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*from* THE U.S. DISTRICT COURT *for the* WESTERN DISTRICT OF TENNESSEE



(LEFT TO RIGHT)  
REV. JAMES  
LAWSON, ANDREW  
YOUNG, LUCIUS  
BURCH, CHARLES  
NEWMAN AND W.J.  
MICHAEL CODY  
ENTER THE FEDERAL  
COURTHOUSE IN  
MEMPHIS, APRIL  
4, 1968. PHOTO  
COURTESY W.J.  
MICHAEL CODY.

## Remembering Dr. King's last legal battle

BY SARAH SMITH

DURING THE FIRST WEEK OF APRIL OF THIS YEAR, THE CITY OF MEMPHIS, TENN., COMMEMORATED THE LIFE AND LEGACY OF DR. MARTIN LUTHER KING, JR., ON THE 50TH ANNIVERSARY OF THE SANITATION WORKERS' STRIKE AND KING'S ASSASSINATION. As part of the commemoration, the judiciary of the U.S. District Court for the Western District of Tennessee remembered a parallel court battle — a fight for the right to march downtown in the face of a federal injunction.<sup>1</sup>

This article recalls the court hearing from two perspectives, based on a 2018 interview with attorney W.J. Michael Cody, conducted by the author of this article, and a preserved oral history from Judge Bailey Brown of the U.S. District Court for the Western District of Tennessee and U.S. Sixth Circuit Court

of Appeals, conducted by Judge Gilbert Merritt in 1994 and Rita F. Wallace in 1997 and made available by the Sixth Circuit Court of Appeals Library.<sup>2</sup> The story is further evidence of the critical role the federal courts played in negotiating the legal challenges of the Civil Rights Era.

### THE RIGHT TO MARCH

King came to Memphis in spring 1968 to support and help lead a large march through downtown Memphis to promote living pay and safer working conditions for city sanitation workers. Just a few months prior, on Feb. 1, 1968, two sanitation workers — Echol Cole and Robert Walker — were brutally killed on the job when a garbage truck malfunctioned and crushed them. No compensation or benefits were available to their families. A labor dispute erupted ten days later, when 1,300 black men from the city's

Public Works Department walked off the job and began to strike for better treatment.<sup>3</sup> Every day for weeks, workers continued to strike, carrying signs with a powerful message: "I Am a Man."

A large march in support of the striking workers was held on March 28, 1968, organized by local leader Rev. James Lawson. The march turned violent after a small number of (mostly young) people stripped the sticks from the signs they were carrying and began to smash storefronts. Property damage and violence ensued. King and Lawson fled the march to safety.<sup>4</sup> Mayor Henry Loeb declared martial law and called in 4,000 National Guard troops.

King was determined to see the workers' cause through, and he sought to return to Memphis to lead a second march to promote economic equality and social justice — in line with the goals of his Poor People's Campaign.<sup>5</sup> ▶

At the time, Cody was a young associate at the law firm of Burch Porter & Johnson, president of the West Tennessee Chapter of the American Civil Liberties Union, and a member of the ACLU's national board. Judge Brown, a former named partner at the same firm where Cody worked, was the chief judge of the U.S. District Court for the Western District of Tennessee.

The city of Memphis sued to enjoin King and his colleagues at the Southern Christian Leadership Conference from leading the second march through downtown Memphis. Cody, working under trial lawyer Lucius Burch, participated in that injunction hearing and ruling — King's last court battle. Because the judge assigned to the case was out of town, Judge Brown handled and issued the temporary restraining order on the morning of April 3, 1968.

That same day, Dr. King delivered his powerful "I've Been to the Mountaintop" speech, reflecting on his own mortality:

Like anybody, I would like to live a long life — longevity has its place. But I'm not concerned about that now. I just want to do God's will. And He's allowed me to go up to the mountain. And I've looked over, and I've seen the Promised Land. I may not get there with you. But I want you to know tonight that we, as a people, will get to the Promised Land. And so I'm happy tonight; I'm not worried about anything; I'm not fearing any man. Mine eyes have seen the glory of the coming of the Lord.<sup>6</sup>

A hearing to dissolve the restraining order was held on April 4, 1968. Dr. King was assassinated that evening on his hotel balcony in Memphis.

## TO THE FEDERAL COURTS

On the morning of April 3, 1968, Mike

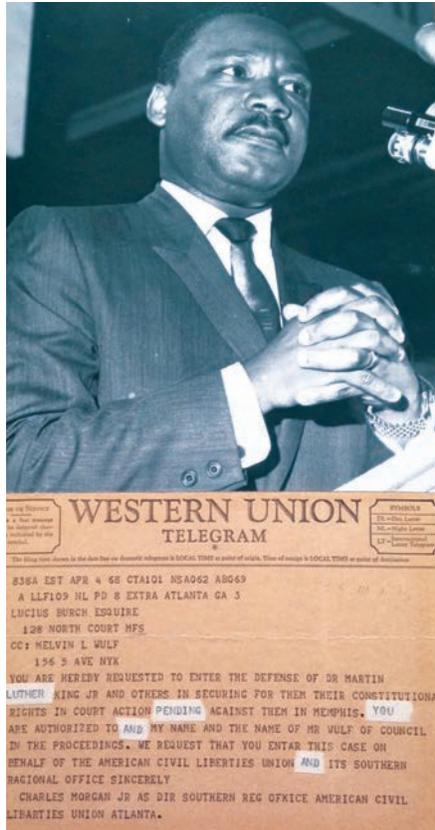


PHOTO COURTESY W.J. MICHAEL CODY

*If the march continued in direct violation of a federal injunction, civil rights protections enforced by the federal courts might be diluted.*

Cody received a telephone call from a colleague at the ACLU in New York City. The ACLU sought to have Cody represent King to have the temporary restraining order lifted, despite King's "threatening in the media that he was going to conduct the march anyway."

"The federal injunction was the only reason we were intervening. The city wanted it to be in federal court," said Cody. "They didn't name Jim Lawson or anyone local [in order] to guarantee that it would stay in federal court."

Cody went upstairs to Burch, a seasoned and revered litigator, to see how to proceed:

At that point, Burch wanted me to get a telegram or something to get us formally engaged and not be volunteering to do this. The telegram ended up coming about the time we ended up going to court the next morning.

The other thing was that Burch wanted to meet with Dr. King. We went over to the Lorraine Motel.

Burch went to the Lorraine motel with Cody and fellow young attorneys David Caywood and Charles Newman. Memphis attorneys Louis Lucas and Walter Bailey were also involved in the matter from the Ratner, Sugarmon firm.

Burch and Cody knew why the city wanted to pursue the injunction in federal court. If the march continued in direct violation of a federal injunction, civil rights protections enforced by the federal courts might be diluted. Their strategy was clear: Burch and his associates would seek to have the injunction lifted and, in exchange, they would agree to restrictions on the march. They also needed to respond to another of the city's concerns — "that, among other [safety concerns], they had threats against King's life and couldn't even guarantee his safety."

Two themes emerged in the hearing: (1) The city would be safer having nonviolent leaders leading and supervising the march; and (2) city leaders were amenable to certain restrictions to guarantee safety. There was plenty of familiarity among the lawyers, Cody recalls. Judge Bailey was the Brown of Burch, Porter, Johnson, and Brown, prior to taking the bench. The attorney for the city, James Manire, had also worked as an attorney at Burch, Porter, and Johnson. The collegial nature of

their relationships helped to make the later compromise possible.

Burch called three witnesses to discuss how the march could be conducted safely, relying on King's leadership and nonviolent principles: Andrew Young (later Ambassador to the United Nations), Lawson, and John Spence of the U.S. Commission on Civil Rights. Burch was able to get city witnesses to admit that, if the march were going to happen, they would "rather have the march occur when it is under the leadership of people who have an established conviction for nonviolence and a strong self-interest in maintaining nonviolence."<sup>7</sup>

Lawson testified: "[I]t is Dr. King's desire, as it is mine, that Memphis and people everywhere learn to put into application the high ideals that most of us confess concerning neighborliness, love, justice, understanding, and not just, you know, on Monday, but every day of the week."<sup>8</sup>

A compromise was reached to allow the march to proceed with safety conditions; the order lifting the injunction would be entered the following day.

When asked about the most memorable moment of his career, Judge Brown later said it was "the Martin Luther King case — it was really fortuitous, because it should have been [Judge] McRae's case, but he was away. I went to all of that trouble, and I tried to settle the case. But by the end of the day after I started home, I'd heard that he'd been shot and killed."<sup>9</sup>

When a former law clerk of Judge Brown's later reflected on his career, he commented about the hearing: "As frequently occurred in his court, the two sides seemed to be hopelessly at odds at the beginning of the day but had, under Judge Brown's firm but fair guidance, reached agreement by the end of the day."<sup>10</sup> Judge Brown guided the tes-

timony and the lawyers, and he helped them reach a resolution.

So after I got that kind of understanding out in the courtroom, I called them back into my chambers, and I said, "Do I interpret the situation right? The King people are willing to submit to these kind of restrictions, and the city is of the feeling that while they won't agree to it, they will not really oppose my withdrawing the restraining order provided there's limitations set on it?" And they said yes. I said, "Okay. You all go and draw an order and bring it back, have it in here bright and early in the morning, and you can go on with the parade under these conditions."

Judge Brown recalled that evening: Of course, when I was driving home that night, I heard on the radio that King had been killed, been shot and killed. So I mean I had deputy marshals around my house for the next three weeks or a month. I never could figure out who was supposed to be mad at me, who I was supposed to

have made mad by what I had done. But the deputy marshals spent their time watching my little boy out in the sandbox, and that's what it all amounted to.

The march went forward several days later, without King. It was peaceful, and the sanitation workers ultimately reached an understanding with the city of Memphis. Lawson's testimony proved true: "[T]he best defense against urban explosion in the midst of urban injustice is to have creative, vital, nonviolent movements, which include marches, because, then, this helps the angers and the frustrations and the fears of people to find legitimate expression and a means of changing their wrongs."<sup>11</sup>

— SARAH SMITH is a law clerk to Judge Bernice B. Donald, United States Court of Appeals for the Sixth Circuit. She will join the law firm of Burch Porter & Johnson PLLC this year as an associate. She thanks Mike Cody (Partner, Burch, Porter & Johnson, PLLC) and Nick Farris (Satellite Sixth Circuit librarian) for their assistance with this article.

<sup>1</sup> See *Court Recalls MLK's Last Legal Battle* (Apr. 6, 2018), <http://www.uscourts.gov/news/2018/04/06/court-recalls-mlks-last-legal-battle>.

<sup>2</sup> Interview with W.J. Michael Cody (June 2, 2018); Oral History Interview by Judge Gilbert S. Merritt and James A. Higgins, with Senior Circuit Judge Bailey Brown (June 6, 1994) (on file with the Library of the United States Court of Appeals for the Sixth Circuit); Second Oral History Interview by Rita F. Wallace, Court Historian, with Senior Circuit Judge Bailey Brown (Oct. 16, 1997) (on file with the Library of the United States Court of Appeals for the Sixth Circuit).

<sup>3</sup> See *Memphis Sanitation Workers' Strike*, THE MARTIN LUTHER KING, JR. RESEARCH & EDUCATION INSTITUTE, <https://kinginstitute.stanford.edu/encyclopedia/memphis-sanitation-workers-strike>.

<sup>4</sup> See W.J. Michael Cody, *King at the Mountain Top: The Representation of Dr. Martin Luther King, Jr.*,

*Memphis*, April 3-4 1968, 41 U. MEM. L. REV. 699, 700 (2011).

<sup>5</sup> *Memphis Sanitation Workers' Strike*, *supra* note 3.

<sup>6</sup> Dr. Martin Luther King, Jr., "I've Been to the Mountaintop," Address at Bishop Charles Mason Temple (Apr. 3, 1968), <https://kinginstitute.stanford.edu/king-papers/documents/ive-been-mountaintop-address-delivered-bishop-charles-mason-temple>.

<sup>7</sup> *City of Memphis v. Martin Luther King, et al.*, No. C-68-80, 81 (W.D. Tenn. Apr. 3, 1968), <https://www.tnwd.uscourts.gov/pdf/content/CityOfMemphisVKingTranscript.pdf>.

<sup>8</sup> *Id.* at 135 (testimony of Reverend James Lawson).

<sup>9</sup> Oral History Interview, Oct. 16, 1997, *supra* note 2 at 187.

<sup>10</sup> Presentation of the Portrait of the Honorable Bailey Brown, Aug. 5, 1987. On file with the Library of the United States Court of Appeals for the Sixth Circuit.

<sup>11</sup> *City of Memphis*, No. C-68-80, at 146.