

# The Burger Court Opinion Writing Database

*Ohio v. Kentucky*

410 U.S. 641 (1973)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

January 24, 1973

Re: 27 Orig. - Ohio v. Kentucky

Dear Harry:

I had not thought anything more than a decree was necessary in the above. However, I would be happy to have you put your hand to the needed per curiam.

Regards,



Mr. Justice Blackmun

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

February 13, 1973

Dear Chief  
I agree with Potter's  
suggestion in this case  
JL

Re: No. 27 Orig. - Ohio v. Kentucky

MEMORANDUM TO THE CONFERENCE:

I had concluded that a brief per curiam would be useful in this case and had asked Harry to put his hand to it. Inadvertently I did not alert the Conference by sending copies -- all this before Potter had suggested his form of order.

Regards,

WEB

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

March 1, 1973

Re: No. 27 Orig. - Ohio v. Kentucky

Dear Harry:

Please join me.

Regards,

les B

Mr. Justice Blackmun

Copies to the Conference

January 12, 1973

Dear Chief:

When you enter the order in No. 27 -  
Orig. - Ohio v. Kentucky, please note I dissent.

W. O. D.

The Chief Justice

cc: The Clerk  
The Reporter

W.D.

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 27, Orig.

State of Ohio, Plaintiff,

*v.*

State of Kentucky.

On Bill of Complaint.

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: \_\_\_\_\_

Circulated: JAN 25 1973

Recirculated: \_\_\_\_\_

[February —, 1973]

MR. JUSTICE DOUGLAS, dissenting.

The State of Ohio instituted this original action to locate the boundary between it and the Commonwealth of Kentucky on the Ohio River. The initial complaint recognized Kentucky's northern boundary as following "the low water mark on the northerly side of the Ohio River as it existed in the year 1792,"<sup>1</sup> but asserted that subsequent events had altered the location of the low-water mark. Today the Court denies Ohio's request that it be permitted to amend its complaint to plead an alternative boundary theory: that the true boundary between the States is in the middle of the Ohio River.<sup>2</sup>

Basic concepts of pleading preclude determination of factual issues in testing the sufficiency of a claim.<sup>3</sup> The appropriate question for the Court at this stage of the proceedings, therefore, is whether if the facts as stated by Ohio are true, a valid legal issue is tendered. Ohio asserts that Virginia, Kentucky's predecessor in title, never held ownership rights to both banks of the Ohio River and that, accordingly, its current claim to land underlying the northern side of the Ohio River is in-

<sup>1</sup> Complaint, ¶ 6.

<sup>2</sup> Amended complaint, ¶¶ 1-3.

<sup>3</sup> James, Civil Procedure § 4.1, at 127; *Conley v. Gibson*, 355 U. S. 41, 45-46.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR. February 9, 1973

RE: No. 27 Orig. - Ohio v. Kentucky

Dear Chief:

In light of Bill Douglas' dissent, I  
join Potter's suggestion regarding the  
Order disposing of this case.

Sincerely,



The Chief Justice

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

February 26, 1973

RE: No. 27 Orig. Ohio v. Kentucky

Dear Harry:

I agree with your memorandum of  
February 23 in the above.

Sincerely,



Mr. Justice Blackmun

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

January 26, 1973

27 ORIG. - Ohio v. Kentucky

Dear Chief,

In view of the dissenting opinion of Bill Douglas, it seems to me that our Order in this case should include at least this much:

PER CURIAM.

The motion for leave to amend the bill of complaint is denied. Handly's Lessee v. Anthony, 5 Wheat. 374. Compare California v. Washington, 358 U. S. 64.

Sincerely yours,

PS.

The Chief Justice

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

February 23, 1973

17 Orig. - Ohio v. Kentucky

Dear Harry,

I agree with your memorandum in this case.

Sincerely yours,

P.S.

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

February 27, 1973

Re: No. 27, Orig. - Ohio v. Kentucky

Dear Harry:

Please join me.

Sincerely,



Mr. Justice Blackmun

Copies to Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

February 13, 1973

Re: No. 27 Orig. - Ohio v. Kentucky

Dear Chief:

I agree with Potter's suggestion  
in this case.

Sincerely,

  
T.M.

The Chief Justice

cc: Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

February 27, 1973

Re: No. 27 Orig. - Ohio v. Kentucky

Dear Harry:

Please join me.

Sincerely,

  
T.M.

Mr. Justice Blackmun

cc: Conference

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: Blackmun, J.

Circulated: 2/23/73

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 27, Orig.

[February —, 1973]

MR. JUSTICE BLACKMUN, memorandum.

Almost seven years ago, in March 1966, the State of Ohio instituted this original action against the Commonwealth of Kentucky. By its prayer for relief in its proposed bill of complaint, Ohio asked only that the Court declare and establish:

"1. The boundary line between the State of Ohio and the State of Kentucky as being the low water mark on the northerly side of the Ohio River in the year 1792 . . . .

“2. The State of Ohio and the State of Kentucky have equal and concurrent jurisdiction over and on all of the Ohio River from the northerly shore to the southerly shore, except jurisdiction incidental to the sovereignty of the soil under the river and structures permanently attached thereto.”

In its complaint Ohio alleged:

"4. The State of Ohio was established from the land ceded by legislative act of the Commonwealth of Virginia to the United States on the 1st day of March, 1784, which act is known as the Cession of Virginia.

"5. The State of Kentucky was established by the separation of the District of Kentucky from the

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

February 24, 1973

Re: No. 27 Orig. Ohio v. Kentucky

Dear Harry:

Please join me.

Sincerely,



Mr. Justice Blackmun

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

February 26, 1973

Re: No. 27, Orig. - Ohio v. Kentucky

Dear Harry:

Please join me.

Sincerely,

WHR

Mr. Justice Blackmun

Copies to the Conference