

The Burger Court Opinion Writing Database

Ohio v. Kentucky

444 U.S. 335 (1980)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



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

From: The Chief Justice

1st DRAFT

Circulated: DEC 26 19

SUPREME COURT OF THE UNITED STATES

Recirculated: _____

No. 27, Orig.

State of Ohio, Plaintiff,
v.
Commonwealth of Kentucky.

On Bill of Complaint.

[January —, 1980]

ORDER.

The exceptions of the Commonwealth of Kentucky to the Report of the Special Master are overruled. The Report is hereby adopted and the cause is remanded to the Special Master so that with the cooperation of the parties he may prepare and submit to the Court an appropriate form of decree giving effect to the recommendations of the Special Master.

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

CHAMBERS OF
THE CHIEF JUSTICE

January 3, 1980

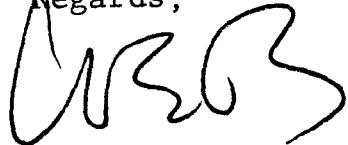
PERSONAL

Re: 27 Original - Ohio v. Kentucky

Dear Harry:

If you get your votes on your "concurring" opinion, plainly it should be converted into a Court opinion. It is a "toss up" whether any opinion is needed but now that your time is invested, that becomes moot.

Regards,



Mr. Justice Blackmun

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

CHAMBERS OF
THE CHIEF JUSTICE

January 17, 1980

Re: No. 27 Original - Ohio v. Kentucky

Dear Harry:

I can join your opinion initially circulated
as a concurrence.

I suggest it be signed.

Regards,

WB B

Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

December 27, 1979

RE: No. 27 Orig. Ohio v. Kentucky

Dear Chief:

I agree.

Sincerely,



The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE W. J. BRENNAN, JR.

January 15, 1980

RE: No. 27 Orig. Ohio v. Kentucky

Dear Harry:

I agree. I think it should be a signed opinion.

Sincerely,



Mr. Justice Blackmun

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

January 3, 1980

Re: No. 27 Original, Ohio v. Kentucky

Dear Harry,

It seems to me that your concurring opinion, circulated today, is not only correct but very clearly stated. Since there is now a dissenting opinion in this case, should not what you have written be an opinion of the Court? Your present draft would require a bit of restructuring, but not much.

Sincerely yours,

P.S.
1/

Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

January 15, 1980

Re: No. 27 Original - Ohio v. Kentucky

Dear Harry:

I agree with your proposed per curiam, but
see no reason whatever why it should not be a
signed opinion.

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

December 27, 1979

Re: No. 27 Original - Ohio v. Kentucky

Dear Chief,

Like Harry, I would much prefer that the majority publish an opinion supporting its judgment.

Also, because I doubt that I would have come out as the Conference voted were the issue here for the first time, I am looking again at prior authority in light of Lewis' dissent.

Sincerely yours,



The Chief Justice

Copies to the Conference

cmc

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 16, 1980

Re: 27 Orig. - Ohio v. Kentucky

Dear Lewis,

I have gone back to this case several times since voting in Conference for the Special Master's report, primarily on the basis of Indiana v. Kentucky. I am now quite convinced that you have the better view. To the extent that the intent of the original grantor, Virginia, is significant in this case, it is unreasonable to think that Virginia intended anything but a border that would follow the movements, if any, of the north bank of the river. Otherwise, if there was sufficient change in a section of the river, Virginia would no longer front on the river along that section. Had Virginia simply made the river the boundary, rather than the north bank, there is no doubt the Court would hold that the boundary would follow the deepest channel of the river, in which event neither state would be deprived of either a riverfront or access to the deepest navigable channel because of river movement.

Please join me in your dissent.

Sincerely yours,



Mr. Justice Powell

Copies to the Conference

cmc

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 17, 1980

Re: No. 27 Original - Ohio v. Kentucky

Dear Harry:

Please join me.

Sincerely,



T. M.

Mr. Justice Blackmun

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 26, 1979

Re: No. 27 Original - Ohio v. Kentucky

Dear Chief:

It is my understanding that your office will circulate a proposed "bare-bones" order overruling the Kentucky exceptions. After reading the dissent, I remain firm in my vote to overrule.

I write this note only to state that I, for one, as I stated at conference, would prefer to have a supporting opinion. I thus did not join, as Lewis describes it in his note of December 18, any disposition "by order and without opinion." My notes indicate, however, that a majority (not including me) voted to handle the case that way. I may or may not join in any such summary disposition.

Sincerely,

H. A. B.

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 27, 1975

Re: No. 27 Original - Ohio v. Kentucky

Dear Chief:

In view of Byron's letter of today, I shall undertake, with your permission, a brief concurring opinion supporting the judgment of the Court. This will be along in due course.

Sincerely,

HAB.

The Chief Justice

cc: The Conference

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

From: Mr. Justice Blackmun

JAN 3 1980

Circulated:

Recirculated:

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 27, Orig.

State of Ohio, Plaintiff,
 v.
 Commonwealth of Kentucky. } On Bill of Complaint.

[January —, 1980]

MR. JUSTICE BLACKMUN, concurring.

I join the Court's *per curiam* order overruling the objections filed by the Commonwealth of Kentucky to the Report of the Special Master. I write briefly only to respond to comments in the dissenting opinion.

Much of the history concerning Virginia's cession to the United States of lands "northwest of the river Ohio" was reviewed and set forth in the Court's opinion concerning an earlier phase of this litigation, 410 U. S. 641, 645-648 (1973), when Ohio sought to amend its 1966 complaint to assert, as a first and basic proposition, that the boundary between it and Kentucky was the middle of the Ohio River. *Id.*, at 643. Leave so to amend was denied. The case, accordingly, was left in the posture that the boundary between the two States was the river's northwesterly low-water mark. The litigation then centers on where that northwesterly low-water mark is—is it the mark of 1792 when Kentucky was admitted to the Union, 1 Stat. 189, or is it a more northerly mark due to the damming of the river and the rise of its waters?

It should be clear that the Ohio River between Kentucky and Ohio, or, indeed, between Kentucky and Indiana, is not the usual river boundary, such as the Missouri River is between Iowa and Nebraska, see, *e. g.*, *Nebraska v. Iowa*, 143 U. S. 359, (1892), or as the Mississippi River is between Arkansas and Mississippi. See *Mississippi v. Arkansas*, 415 U. S. 289 (1974), and 415 U. S. 302 (1974). See also *Iowa v. Illinois*, 147 U. S. 1 (1893); *Missouri v. Nebraska*, 196

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 15, 1980

MEMORANDUM TO THE CONFERENCE

Re: No. 27 Original - Ohio v. Kentucky

Pursuant to the suggestion made at the conference of January 11, I have formulated a proposed per curiam along the general lines of the concurrence circulated January 3.

I suppose we ought to vote over again. I am assuming, of course, that Lewis' dissent, already joined by Bill Rehnquist, will continue in the form he circulated December 18, or in something similar thereto.

HAB
/

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

From: Mr. Justice Blackmun

Circulated: JAN 15 1980

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 27, Orig.

State of Ohio, Plaintiff,
v.
Commonwealth of Kentucky. } On Bill of Complaint.

[January —, 1980]

PER CURIAM.

The State of Ohio, in 1966, instituted this action, under the Court's original jurisdiction, against the Commonwealth of Kentucky. By its bill of complaint as initially filed, Ohio asked that the Court declare and establish that the boundary line between the two States is "the low water mark on the northerly side of the Ohio River in the year 1792." Leave to file the bill of complaint was granted. 384 U. S. 982 (1966). In due course, Kentucky filed its answer and a Special Master was appointed. 385 U. S. 803 (1966). In its answer, Kentucky alleged that the boundary line is the current low-water mark on the northerly side of the Ohio River.

Ohio later moved for leave to file an amended complaint that would assert, primarily, that the boundary between Ohio and Kentucky is the middle of the Ohio River, and, only alternatively, is the 1792 low-water mark on the northerly shore. That motion was referred to the Special Master. 404 U. S. 933 (1971). The Special Master held a hearing and in due course filed his report recommending that Ohio's petition for leave to amend be denied. 406 U. S. 915 (1972). Upon the filing of Ohio's exceptions and Kentucky's reply, the matter was set for hearing. 409 U. S. 974 (1972). After argument, the Special Master's recommendation was adopted, Ohio's motion for leave to amend was denied, and the case was remanded. 410 U. S. 641 (1973).

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

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 27, Orig.

State of Ohio. Plaintiff,
 v.
 Commonwealth of Kentucky. } On Bill of Complaint.

[January —, 1980]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

The State of Ohio, in 1966, instituted this action, under the Court's original jurisdiction, against the Commonwealth of Kentucky. By its bill of complaint as initially filed, Ohio asked that the Court declare and establish that the boundary line between the two States is "the low water mark on the northerly side of the Ohio River in the year 1792." Leave to file the bill of complaint was granted. 384 U. S. 982 (1966). In due course, Kentucky filed its answer and a Special Master was appointed. 385 U. S. 803 (1966). In its answer, Kentucky alleged that the boundary line is the current low-water mark on the northerly side of the Ohio River.

Ohio later moved for leave to file an amended complaint that would assert, primarily, that the boundary between Ohio and Kentucky is the middle of the Ohio River, and, only alternatively, is the 1792 low-water mark on the northerly shore. That motion was referred to the Special Master. 404 U. S. 933 (1971). The Special Master held a hearing and in due course filed his report recommending that Ohio's petition for leave to amend be denied. 406 U. S. 915 (1972). Upon the filing of Ohio's exceptions and Kentucky's reply, the matter was set for hearing. 409 U. S. 974 (1972). After argument, the Special Master's recommendation was adopted, Ohio's motion for leave to amend was denied, and the case was remanded. 410 U. S. 641 (1973).

Supreme Court of the United States

Washington, D. C. 20543

filed

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 21, 1980

MEMORANDUM TO THE CONFERENCE

Re: Holds for No. 27 Original - Ohio v. Kentucky

No. 81 Original, Kentucky v. Indiana et al., is the only hold for No. 27 Original.

You will recall that, in a sense, the held case is a companion to the decided one. Although in No. 81 Kentucky is the plaintiff, whereas in No. 27 Kentucky was the defendant, the location of the northerly line of Kentucky is the issue in both. The only difference is that the held case concerns the Indiana-Kentucky segment of the river. The Kentucky-Indiana case has some overtones that were not present in the Ohio-Kentucky litigation, but I suspect that they will evaporate.

Perhaps we could decide No. 81 peremptorily on the authority of No. 27. I do not know that the Court has ever taken such summary action in an original case. I would be inclined, however, and so recommend, that we merely order the Special Master's report filed, and that we allow the usual time for the filing of exceptions. This follows routine and neither party should complain. I do not know whether, in view of the decision in No. 27, Kentucky will now file exceptions to the Master's report. If none is filed, I suppose we can bring the case to a close without further ado. If exceptions are filed, we can then determine whether to set the matter on for hearing or to decide it on the authority of No. 27.

We should also bear in mind that the Master's earlier interim report recommending the denial of intervention by Public Service Company of Indiana, Inc., has not been fully processed. That report was ordered filed on October 1, 1979. Inasmuch as the parties have now waived the right to file exceptions, perhaps the Master's recommendation should be formally adopted and the motion for leave to intervene denied.

HAB.

December 17, 1979

27 Orig. Ohio v. Kentucky

Dear Bill:

As you are the only other Justice who failed to "see the light" in the above case, I enclose herewith a draft of my proposed dissent.

I would welcome your comments before I circulate it.

Since no opinion for the Court is to be written, and its judgment is to be evidenced only by an order, I suppose it is appropriate for me to circulate my dissent without awaiting the order itself.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 18, 1979

27 Orig. Ohio v. Kentucky

MEMORANDUM TO THE CONFERENCE:

As the vote (7 to 2) was to dispose of this case by order and without opinion, accepting the Special Master's conclusion, I am circulating herewith my dissent.

L. F. P.

L.F.P., Jr.

ss

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

From: Mr. Justice Powell

12-17-79

Circulated: DEC 18 1979

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

 No. 27, Orig.

State of Ohio, Plaintiff, _____
 Commonwealth of Kentucky. _____ } On Bill of Complaint.

[January —, 1980]

MR. JUSTICE POWELL, dissenting.

The Court today accepts the Special Master's conclusion that the present boundary between Ohio and Kentucky is the low-water mark of the northern shore of the Ohio River in 1792, when Kentucky was admitted to the Union. This result frustrates the terms of the Virginia Cession of 1784 that first established the Ohio-Kentucky border, ignores Chief Justice Marshall's construction of that grant in *Handly's Lessee v. Anthony*, 18 U. S. (5 Wheat.) 374 (1820), is contrary to common-law rules of riparian boundaries, and creates a largely unidentifiable border. Accordingly, I dissent.

In 1784 the Commonwealth of Virginia ceded to the United States all of its territory "to the northwest of the river Ohio." 1 Laws of the United States 472, 474 (1784). As this Court recently observed, the border question "depends chiefly on the land law of Virginia, and on the cession made by that State to the United States." *Ohio v. Kentucky*, 410 U. S. 641, 645 (1973), quoting *Handly's Lessee v. Anthony*, 18 U. S. (5 Wheat.), at 376. The 1784 Cession was construed definitively in *Handly's Lessee*, a case involving a dispute over land that was connected to Indiana when the Ohio River was low, but which was separated from Indiana when the water was high. Chief Justice Marshall, writing for the Court, pointed out that Virginia originally held the land that became both Indiana and Kentucky. Under the terms of the Virginia Cession, he

1/15/80,

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

From: Mr. Justice Powell
Circulated: JAN 15 1980

Recirculated: _____

No. 27, Orig., Ohio v. Kentucky

MR. JUSTICE POWELL, dissenting:

The Court today holds that the present boundary between Ohio and Kentucky is the low-water mark of the northern shore of the Ohio River as it was when Kentucky was admitted to the Union in 1792. This curious result frustrates the terms of the Virginia Cession of 1784 that first established the Ohio-Kentucky border, ignores Chief Justice Marshall's construction of that grant in Handly's Lessee v. Anthony, 18 U.S. (5 Wheat.) 374 (1820), is contrary to common law rules of riparian boundaries, and creates a largely unidentifiable border. Accordingly, I dissent.

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Black
 Mr. Justice Harlan
 Mr. Justice Douglas
 Mr. Justice Brandeis
 Mr. Justice Sutherland
 Mr. Justice Harlan

Stylistic Changes Throughout.

1-17-80

3rd DRAFT

JAN 17 1980

SUPREME COURT OF THE UNITED STATES

No. 27, Orig.

State of Ohio, Plaintiff,
 v.
 Commonwealth of Kentucky.

On Bill of Complaint,

[January —, 1980]

MR. JUSTICE POWELL, with whom MR. JUSTICE WHITE and
 MR. JUSTICE REHNQUIST join, dissenting.

The Court today holds that the present boundary between Ohio and Kentucky is the low-water mark of the northern shore of the Ohio River when Kentucky was admitted to the Union in 1792. This curious result frustrates the terms of the Virginia Cession of 1784 that first established the Ohio-Kentucky border. ignores Chief Justice Marshall's construction of that grant in *Handly's Lessee v. Anthony*, 18 U. S. (5 Wheat.) 374 (1820), is contrary to common-law rules of riparian boundaries, and creates a largely unidentifiable border. Accordingly, I dissent.

I

In 1784 the Commonwealth of Virginia ceded to the United States all of its territory "to the northwest of the river Ohio." 1 Laws of the United States 472, 474 (1784). As this Court recently observed, the border question "depends chiefly on the land law of Virginia, and on the cession made by that State to the United States." *Ohio v. Kentucky*, 410 U. S. 641, 645 (1973), quoting *Handly's Lessee v. Anthony*, 18 U. S. (5 Wheat.), at 376. The 1784 Cession was construed definitively in *Handly's Lessee*, a case involving a dispute over land that was connected to Indiana when the Ohio River was low, but which was separated from Indiana when the water was high. The Court held that since the 1784 Cession required that the river remain within Kentucky, the proper border was the

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

✓

December 18, 1979

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

Dear Lewis:

I think your draft dissent is excellent, have no changes to suggest, and will join it as soon as you circulate it.

Sincerely,

John

Mr. Justice Powell

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 18, 1979

Re: No. 27 Orig. Ohio v. Kentucky

Dear Lewis:

Please join me in your dissenting opinion in this case.

Sincerely,



Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 16, 1980

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

Dear Lewis:

Please join me.

Sincerely, *WR*

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 3, 1980

Re: 27 Orig. - State of Ohio v. Commonwealth
of Kentucky

Dear Harry:

If you would like company, I would be pleased
to have you add my name to your opinion.

Respectfully,



Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 15, 1980

Re: 27 Orig. - Ohio v. Kentucky

Dear Harry:

Please join me. Since the case was argued orally and there is to be a signed dissent, should it not be a signed opinion?

Respectfully,



Mr. Justice Blackmun

Copies to the Conference