

No. 106, Original

Supreme Court, U.S.  
FILED

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JOSEPH F. SPANIOL, JR.  
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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1986

STATE OF ILLINOIS, - - - - Plaintiff,

*versus*

COMMONWEALTH OF KENTUCKY, - Defendant.

## DEFENDANT'S BRIEF IN RESPONSE TO PLAINTIFF'S MOTION FOR LEAVE TO FILE COMPLAINT

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STATE OF ILLINOIS,       -       -       -       -       -       *Plaintiff,*

*v.*

COMMONWEALTH OF KENTUCKY,       -       -       *Defendant.*

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**DEFENDANT'S BRIEF IN RESPONSE TO  
PLAINTIFF'S MOTION FOR LEAVE  
TO FILE COMPLAINT**

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The Commonwealth of Kentucky, by its Attorney General, David L. Armstrong, responds herein to the State of Illinois' motion for leave to file complaint.

The Commonwealth does not disagree with the Plaintiff's assertion that Article III, Section 2, Clause 2 of the United States Constitution and 28 U.S.C. § 1251(a) confer jurisdiction on this Court concerning this matter.

This case involves the question of the boundary between Illinois and Kentucky along the Ohio River. Kentucky was created from the District of Kentucky, a portion of Virginia, in 1789 by the Virginia-Kentucky Compact passed by the Virginia legislature. Kentucky was subsequently admitted to the Union in 1792. Kentucky, following its creation, succeeded to all the rights in and claims to the Ohio River that

Virginia had previously held. In *Handly's Lessee v. Anthony*, 18 U. S. 374, 5 L. Ed. 113 (1820) Chief Justice Marshall held that the Ohio River, in its entirety, was within the boundaries of the Commonwealth of Kentucky. He stated:

“When a great river is the boundary between two nations or states, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when, as in this case, one State is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly-created State extends to the river only. The river, however, is its boundary.” 18 U. S. at 379.

Illinois was created in 1818 from part of the territory ceded by Virginia to the United States in 1783 in the Deed of Cession. This Deed of Cession involved all the territory Virginia claimed northwest of the Ohio River. XI Hening's Va. St. at Large, 571.

As is indicated clearly from the history of the two states, the Ohio River in its entirety was to belong to Kentucky and be Kentucky's boundary with Illinois. Consistently from the date of its creation almost 200 years ago to the present, Kentucky has claimed the entire Ohio River as its territory. It has always been Kentucky's contention that the boundary between Illinois and Kentucky is the low-water mark on the northwest side of the Ohio River as it exists from time to time.

Since its creation in 1818, Illinois has acquiesced in Kentucky's claim and the Commonwealth will so

allege in its Answer to Illinois' Complaint, if leave for the filing of the Complaint is granted by the Court. In the course of this lawsuit the Commonwealth will offer proof of Illinois' acquiescence. Additionally, the Commonwealth will distinguish, both factually and legally, this case from *Ohio v. Kentucky*, 444 U. S. 335, 100 S. Ct. 588, 62 L. Ed. 2d 530 (1980).

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Kevin M. Noland, Counsel of Record for defendant and a member in good standing of the Bar of the Supreme Court of the United States, hereby certify that on the \_\_\_\_ day of September, 1986, I served the foregoing brief on the plaintiff by depositing in the U. S. Mail, first class, postage prepaid, a copy addressed to the following counsel for the plaintiff: Attorney General Neil F. Hartigan; Robert V. Shuff, First Assistant Attorney General; Roma J. Stewart, Solicitor General, State of Illinois, and Donna Dagnall and John Brunsman, Assistant Attorneys General, at 500 South Second Street, Springfield, Illinois 62706.

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