

The Burger Court Opinion Writing Database

Hampton v. Mow Sun Wong

426 U.S. 88 (1976)

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

CHAMBERS OF
THE CHIEF JUSTICE

January 28, 1975

PERSONAL

No. 73-1596 - Hampton v. U.S. Civil Service Commission

Dear Lewis:

I have deferred assignment of the Hampton case because we are at an impasse although at least one "negative" vote was expressly tentative. A 4-4 would be institutionally bad and it simply ought not occur.

I agree with you that there ought to be more flexibility expressed in the statute or regulations, but the fact is that in practice hundreds of aliens are in fact employed by the government. But my agreement is on policy, by which I mean if I were in Congress I would try to write more flexibility into law.

I searched the Constitution in vain to find a constitutionally protected right of an alien to be employed by the federal government when he or she declines to become a citizen. To give aliens welfare to keep them from starving is a far cry from saying they have a property or liberty right to government employment.

We have had a "merit" or civil service system for a little short of a century. It was enacted against the background of a constitutional requirement of citizenship for elective office, as we know. Since 1883 countless amendments have been made by Congress to the civil service laws, all with full awareness of regulations barring aliens. If there was ever a case of long legislative acquiescence, this is it. Moreover, during all that history it has been assumed that Congress has the power to allow or not allow aliens to be eligible. I need not quote Holmes on the effect of such a long, consistent acceptance of a congressional power.

Turning to the hard, practical realities, how often do you think (assuming the Hampton case is affirmed) that a federal agency confronted with three certified eligibles, one an alien, will pick the alien over two citizens, assuming neither are among the millions with veterans' preference?

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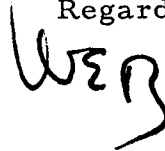
I mention this last because a drastic constitutional holding which is sheer "wheel spinning" is in itself bad.

For 22 years in Washington the one thing that has roused my blood pressure more than anything else was the spectacle of judges operating on vague and visceral reactions that something was "bad" and then embarking on a search to find some provision of the Constitution, or something "rooted in the Constitution" to justify the predetermined result. There has been some of this since 1969 -- less, but still too much.

Congress, not courts, has the responsibility for shaping the ground rules of an "efficient public service." Can there be any doubt that with 7 million unemployed and a reliably estimated 7 million illegal aliens in the country, Congress has the power to conclude that the morale and, hence, the efficiency of the civil service will be impaired by compelling the Executive branch to employ aliens?

Having unburdened myself on the subject, I will say no more except -- try to get a bit of rest and fresh air. I am thinking of asking Congress for funds to establish an "R&R" base for exhausted Justices!

Regards,



Mr. Justice Powell

January 26, 1975

PERSONAL

No. 73-1596 Hampton v. U.S. Civil
Service Commission

Dear Chief:

As I mentioned when you called on Saturday, Jo and I plan to go down to Williamsburg for most of the week of January 27.

I will certainly be back at the Court by February 3, and will be in touch with you during that week. My vote in this case was motivated primarily by the extreme overbreadth of the Civil Service regulation, without any identifiable justification in government self interest. Also, we would not be invalidating a considered enactment by Congress itself. I will nevertheless take a careful second look.

I can be reached, if you need me, through the Williamsburg Inn or Carl Humelsine's office.

I do hope that you and Vera will get away, at least for a few days.

Sincerely,

The Chief Justice

lfp/ss

January 26, 1975

PERSONAL

No. 73-1596 Hampton v. U.S. Civil
Service Commission

Dear Potter:

When we are both back at the Court for the week of February 3, I would like to discuss the above case with you.

My recollection is that, at Conference, you considered the case a close one - as do I. I am troubled to leave a case of this general importance in a 4-4 split posture.

Sincerely,

Mr. Justice Stewart

lfp/ss

February 10, 1975

No. 73-1596 Hampton v. U.S. Civil
Service Commission

Dear Chief:

I have taken another careful look at this case, and am now inclined to suggest a reargument next fall.

It would certainly be undesirable, as you suggest, to have a non-decision (4-4) of a case of this considerable interest and importance. For the reasons stated at Conference, I have trouble satisfying myself that any rational government interest is served by a regulation as sweeping as the one before us. On the other hand, the points you make are quite telling.

In short, I might well benefit from reargument and further reflection. Moreover, one may hope that by next fall we will have a nine-man court.

Sincerely,

The Chief Justice

lfp/ss