The Burger Court Opinion Writing Database

Hampton v. Mow Sun Wong

426 U.S. 88 (1976)

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

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

CHAMBERS OF
THE CHIEF JUSTICE

May 15, 1976

Re: 73-1596 - Hampton v. Mow Sun Wong et al.

Dear Bill:

Please show me as joining your dissent.

Regards,

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 22, 1976

RE: No. 73-1596 Hampton v. Mow Sun Wong

Dear John:

I am happy to join your opinion in the above. However, I do accept your invitation and would appreciate your adding the following at the foot of your opinion:

> "MR. JUSTICE BRENNAN, concurring. I join the Court's opinion with the understanding that there are reserved the equal protection questions that would be raised by Congressional or Presidential enactment of a bar on employment of aliens by the Federal Government."

Sincerely,

Bill

Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

April 14, 1976

Re: No. 73-1596, Hampton v. Mow Sun Wong

Dear John,

My inordinate delay in definitively responding to your proposed opinion in this case has been occasioned by difficulties I have had with the approach that you have adopted. While I agree with much of the analysis and with the conclusion that the Civil Service Commission regulation at issue is invalid because it is not "justified by reasons which are properly the concern of that agency" (p. 28), I am troubled by your procedural due process discussion on pp. 13-16.

As I understand it, your opinion ultimately rests upon a determination that the protection of the national interests relating to immigration and naturalization is entrusted to the Congress and the President by the Constitution and is not the concern of the Civil Service Commission unless made part of the Commission's responsibilities by an express delegation of that authority. Part III of the opinion demonstrates that there has not been such a delegation to the Commission of authority to consider immigration and naturalization interests in promulgating regulations governing eligibility for employment in the federal civil service. In view of these aspects of the opinion, it is not clear to me why you have chosen to cast this discussion in terms of a denial of procedural due process. I am also uncertain as to the source of and the scope of the general constitutional requirement of "orderly procedure" discussed on p. 14, and of the impact of that requirement in other cases. My uncertainty regarding the contours of the general due process rules set forth in the opinion causes me to be concerned about how other courts will interpret and apply them.

I also believe that the procedural due process discussion clouds the underlying delegation question. At several points, the due process discussion seems to focus on the necessity for "a legitimate basis for presuming that the rule was actually intended to serve [an overriding national interest]." (p. 14). The opinion emphasizes the importance of "a statement of reasons identifying the relevant national interest," especially where "the agency which promulgates the rule" does not have "direct responsibility for fostering or protecting that interest." Ibid. The implication of the articulation of reasons discussion is that if the Civil Service Commission had expressly relied on national interests related to immigration and naturalization in adopting the challenged regulation, the regulation would have been valid. Yet surely the opinion does not leave the Commission free to reenact the regulation accompanied by a statement that it is deliberately acting to promote immigration and naturalization interests, because those interests are not "properly the concern of that agency." (p. 28).

It would thus appear that the requirement that "the decision to adopt and enforce the rule be made by an office having the responsibility for fostering the interest at stake" (p. 14) is what ultimately underlies your conclusion that the CSC regulation is invalid. In my view this adds up to a conclusion that neither Congress nor the President has delegated the authority to adopt the rule to the CSC, and that its administrative convenience rationale is insufficient to support the regulation. I therefore see no reason to go through the additional steps of finding a constitutionally protected liberty interest in eligibility for employment in a major sector of the economy and of delineating procedural due process requirements governing rulemaking in order to deal with this case, and I would prefer to avoid these additional steps.

Sincerely yours,

P.S.

Mr. Justice Stevens

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

April 30, 1976

Re: No. 73-1596, Hampton v. Mow Sun Wong

Dear John,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice Stevens

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 22, 1976

Re: No. 73-1596 - Hampton v. Mow Sun Wong

Dear Bill:

Please join me in your dissenting opinion in this case. I assume some changes will be necessary because of John's recent modifications.

Sincerely,

Mr. Justice Rehnquist

Copies to Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 28, 1976

Re: No. 73-1596, Robert E. Hampton v. Mow Sun Wong

Dear John:

Brennan has agreed to let me join his short concurrence at the end of your opinion.

Sincerely,

T. M.

Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 4, 1976

Re: No. 73-1596 - Hampton v. Mow Sun Wong

Dear Bill:

Please join me in your dissenting opinion in this case.

Sincerely,

Harry

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 17, 1976

No. 73-1596 Hampton v. Mow Sun Wong

Dear John:

I should have written you earlier to say that I expect to join your fine opinion in the above case, but thought I would await circulation of Mathews v. Diaz.

Although the two cases involve quite different issues, they have been viewed as bearing some relationship to each other.

Sincerely,

Lewis

Mr. Justice Stevens

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 29, 1976

No. 73-1596 Hampton v. Wong

Dear John:

Please join me.

Sincerely,

Lewis

Mr. Justice Stevens

lfp/ss

cc: The Conference

April 23, 1976

No. 73-1596 Hampton v. Mow Sun Wong

Dear Bill:

I would appreciate your allowing me to join in your concurring sentence in the above case.

Sincerely,

Mr. Justice Brennan

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 24, 1976

Re: No. 73-1596 - Hampton v. Mow Sun Wong

Dear John:

In due course I will circulate a dissent in this case.

Sincerely,

WHR

Mr. Justice Stevens

Copies to the Conference

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

From: Mr. Justice Reh

Circulated: [illegible]

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73–1596

Robert E. Hampton, Chairman of the United States Civil Service Commission, et al., Petitioners, *v.* Mow Sun Wong et al.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[April —, 1976]

MR. JUSTICE REHNQUIST, dissenting.

The Court's opinion enunciates a novel conception of the procedural due process guaranteed by the Fifth Amendment, and from this concept proceeds to evolve a doctrine of delegation of legislative authority which seems to me to be quite contrary to the doctrine established by a long and not hitherto questioned line of our decisions. Neither of the Court's innovations is completely without appeal in this particular case, but even if we were to treat the matter as an original question I think such appeal is outweighed by the potential mischief which the doctrine bids fair to make in other areas of the law.

At the outset it is important to recognize that the power of the federal courts is severely limited in the areas of immigration and regulation of aliens. As we reiterated recently in *Kleindienst* v. *Mandel*, 408 U. S. 753, 766 (1972),

> "The power of Congress to exclude aliens altogether, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial inter-

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73–1596

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[April —, 1976]

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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: Mr. Justice Stevens

Circulated: 3/5/76

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-1596

Robert E. Hampton, Chairman of the United States Civil Service Commission, et al., Petitioners, v. Mow Sun Wong et al. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[~~February~~ March —, 1976]

MR. JUSTICE STEVENS delivered the opinion of the Court.

Five aliens, lawfully and permanently residing in the United States, brought this litigation to challenge the validity of a policy, adopted and enforced by the civil Service Commission and certain other federal agencies, which excludes all persons except American citizens and natives of Samoa from employment in most positions subject to their respective jurisdictions.[1] Because the

[1] The Civil Service Commission's regulations, 5 CFR § 338.101, provide in pertinent part

"(a) A person may be admitted to competitive examination only if he is a citizen of or owes permanent allegiance to the United States.

"(b) A person may be given appointment only if he is a citizen of or owes permanent allegiance to the United States. However, a noncitizen may be given (1) a limited executive assignment under section 305.509 of this chapter in the absence of qualified citizens or (2) an appointment in rare cases under section 316.601 of this chapter, unless the appointment is prohibited by statute."

Apparently the only persons other than citizens who owe *permanent* allegiance to the United States are noncitizen "nationals." See 8 U. S. C. §§ 1101 (a)(21), (22), 1408. The Solicitor General has

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 16, 1976

Re: No. 73-1596 - Hampton v. Mow Sun Wong et al.

Dear Potter:

Thank you for your thoughtful letter. Subject to further reflection, I have these two thoughts:

> First, the criticism in the first paragraph on page 2 of your letter is valid. The paragraph on page 14 of the draft opinion did imply that the regulation would have been valid if the Commission had expressly relied on national interest relating to immigration. However, I did not intend that implication and therefore will revise that paragraph to eliminate it.
>
> Second, it did not seem to me that the regulation was invalid simply because the authority to promulgate that kind of regulation had not been delegated to the Commission. If, for example, the Commission had determined that aliens as a class were so unfamiliar with the English language that they are generally less competent civil service employees than citizens, I would suppose the regulation would be valid. I believe the only reason I cannot simply adopt it as valid is because it has such a significant impact on a liberty interest that it is important to be sure it was adopted for an appropriate reason by an appropriate decision-maker. Since this is the kind of concern that the due process clause addresses, I think that clause provides the proper predicate for the analysis.

Putting the same thought in somewhat different form, I doubt whether the result could be adequately supported

without either the due process rationale, or an equal protection analysis that I find unacceptable in this case.

Respectfully,

Mr. Justice Stewart

Copies to the Conference

P.S. After dictating the above, I have read Justice Rehnquist's well-reasoned dissent. I think my draft opinion would not provide an adequate response to his argument without the due process predicate.

I might add that the liberty interest at stake is eligibility for employment, rather than simply the interest in federal employment to which he refers on page 3 of his draft.

Finally, I recognize the validity of your concern about the potential contours of this interpretation of the due process clause. My only response is that I think we should take the cases one at a time, and I am firmly persuaded in my own mind that this is an appropriate disposition of this problem.

JPS

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 22, 1976

MEMORANDUM TO THE CONFERENCE

Re: No. 73-1596 - Hampton v. Mow Sun Wong et al.

In further reference to Potter's letter of April 14 and Bill's dissenting opinion, I have these four comments:

(1) The enclosed recirculation omits some of the "orderly procedure" language that troubled Potter and, I believe, makes explicit that my proposed holding rests on a narrower ground than the equal protection rationale of the Court of Appeals.

(2) There is, I believe, a clear distinction between the discharge of a non-tenured employee for reasons which have no impact on her ability to obtain other employment, see Cafeteria Workers v. McElroy, 367 U.S. 886, 895-896, and a rule which makes an employee, or a group of employees, ineligible for a broad category of positions. The former is not a deprivation of liberty whereas the latter is. I believe this distinction is plainly described in Potter's opinion in Roth, 408 U.S. at 573-574, as well as in Cafeteria Workers. I have therefore modified footnote 23 on page 13 to refer to Roth and the cases which it cites.

(3) At pages 3-4 of his dissent, Bill states that Truax was distinguished in Cafeteria Workers on the ground that the deprivation was caused by a state rather than the federal government. Of course, even if accurate, that distinction would not affect the point that the interest at stake is entitled to constitutional protection. Moreover, I think Bill's reading of Cafeteria Workers (367 U.S.

at 895-896) is, at best, incomplete because the opinion emphasizes the "quite different" nature of the private interest at stake in the two cases. I do not believe, however, that this particular point needs any further elaboration in my opinion.

(4) At page 2 of his dissent, Bill refers to a "holding" that the regulation would have been valid if expressly mandated by Congress. He correctly describes my own view, but because I know that view is not shared by Bill Brennan and perhaps others, I tried to write the opinion to avoid any such holding. Actually the portion of my opinion which Bill quotes merely states that if the rule were expressly mandated by Congress, "we might presume that any interest which might rationally be served by the rule did in fact give rise to the adoption." There are two reasons why I think this statement does not amount to a holding. a) What we might presume is not necessarily what we would in fact presume if the issue were squarely presented; b) presuming a rational basis is not the same as presuming validity because the Court might regard the classification as sufficiently invidious to require a stronger justification. In all events, if anyone wants to write separately disclaiming any such holding, I surely would not object.

I continue to welcome your suggestions and comments.

Respectfully,

Opinions & Revisions pp. 13-14

STYLISTIC CHANGES THROUGHOUT.
~~SEE PAGES~~

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: Mr. Justice Stevens

Circulated: 4/22/76

Recirculated: _____

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-1596

Robert E. Hampton, Chairman of the United States Civil Service Commission, et al., Petitioners, v. Mow Sun Wong et al. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[April —, 1976]

MR. JUSTICE STEVENS delivered the opinion of the Court.

Five aliens, lawfully and permanently residing in the United States, brought this litigation to challenge the validity of a policy, adopted and enforced by the civil Service Commission and certain other federal agencies, which excludes all persons except American citizens and natives of Samoa from employment in most positions subject to their respective jurisdictions.[1] Because the

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Apparently the only persons other than citizens who owe *permanent* allegiance to the United States are noncitizen "nationals." See 8 U. S. C. §§ 1101 (a)(21), (22), 1408. The Solicitor General has

Pg. 19, 20, 28

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: Mr. Justice Stevens

Circulated: 4/23/76

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4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-1596

Robert E. Hampton, Chairman of the United States Civil Service Commission, et al., Petitioners, *v.* Mow Sun Wong et al. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[April —, 1976]

MR. JUSTICE STEVENS delivered the opinion of the Court.

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 2, 1976

MEMORANDUM TO THE CONFERENCE

Re: Cases held for 73-1596 - Hampton v. Mow Sun Wong and 73-1046 - Mathews v. Diaz

No. 74-216 - U.S. Civil Service Comm'n. v. Ramos

This appeal is from a decision of a three-judge district court in D.P.R. in two consolidated cases. In one, appellee Gomez sued the Secretary of Agriculture, seeking to enjoin and declare unconstitutional 7 U.S.C. § 1961(b)(1) and FHA Instruction 441.2. Section 1961(b)(1) authorizes the Secretary to grant loans only to citizen farmers within a designated emergency area. FHA Instruction 441.2 requires, inter alia, that partnerships which apply for such loans must have only citizens as partners. Gomez is an alien admitted to permanent residence. He is married to a citizen and he operates a farm jointly with her. The farm is located in a designated emergency area, but Gomez' application for a loan under § 1961(b)(1) was rejected because he is an alien. The possibility of a loan to Gomez' wife was also rejected, because it would result in substantial benefit to him, contrary at least to the purpose of FHA Instruction 441.2. The district court issued an opinion holding § 1961(b)(1) and FHA Instruction 441.2 unconstitutional because they invidiously discriminated against aliens.

However, the district court never entered a judgment in this case, through what both parties take to be clerical error. (In granting a stay, the district court indicated that it thought it had enjoined and declared unconstitutional § 1961 (b)(1) and FHA Instruction 441.2.) Nevertheless, there is no injunction from which an appeal lies under 28 U.S.C. § 1253 and an appeal cannot be taken from the district court's opinion under 28 U.S.C. § 1252 because the notice of appeal was not filed within 30 days of that order. 28 U.S.C. § 2101.

Petitioner's fourth question is somewhat more interesting. The Sixth Circuit held that a provision of the University Charter that the University could sue and be sued in any court in the State or elsewhere amounted to a waiver of sovereign immunity. The Supreme Court of Tennessee has since held that a provision allowing a city to "sue and be sued" was not a waiver of sovereign immunity, remarking that it was not bound by the federal court decision in this case.

It is not necessary to decide the issue of the constitutionality of the statute in this case; it is clear on the facts that the mathematics department did everything it could to grant petitioner de facto tenure. A due process hearing before termination was therefore required by Sindermann. On the sovereign immunity issue, the University Charter is factually distinguishable from the city charter involved in the later Tennessee Supreme Court case. If the Sixth Circuit was wrong in interpreting Tennessee law in the light of this later case, it will correct itself in the future.

I will therefore vote to deny.

Sincerely,

John

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 2, 1976

SUPPLEMENTAL MEMORANDUM TO THE CONFERENCE

Re: Case held for 73-1596 - Hampton v. Mow Sun Wong

No. 75-6300 - Garduno v. California

Petitioner in this case contends that he was denied his right to jury trial in this criminal case because resident aliens were not allowed to serve on the petit jury. It therefore presents the same issue as does Perkins v. Smith, No. 73-1915, in which I will vote to affirm.

Petitioner also claims that he was denied due process because he was required to prove abandonment of the crime as an affirmative defense (by a preponderance of the evidence). Mow Sun Wong has no relevance to this contention. I will vote to deny.

Sincerely,

John