

The original documents are located in Box 29, folder “Nixon - Papers Court Cases - Apton v. Wilson and Kuhn v. Wilson” of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

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THE WHITE HOUSE

WASHINGTON

March 22, 1975

MEMORANDUM FOR: JAY FRENCH

FROM: BARRY ROTH *BR*

The decision that Phil Buchen was referring to was in the consolidated cases of Apton, et al. v. Wilson, et al. and Kuhn, et al. v. Wilson, et al. These cases in the United States District Court for the District of Columbia are civil actions stemming from the May Day demonstrations. Phil Buchen was served with a subpoena duces tecum for various tapes and documents of the Nixon Administration which Justice sought to quash, primarily on the basis of a lack of relevancy and burdensome nature. Justice was joined by attorneys for former President Nixon who raised the presumptive privilege referred to by the Supreme Court in U. S. v. Nixon.

Judge Pratt, ruling orally from the bench, held that the materials in question were neither relevant to the main portions of the plaintiffs' case, nor had the plaintiffs met the heavy burden required of them to overcome the presumption of privilege. More importantly, Judge Pratt took issue with Judge Richey's ruling (now stayed) in Nixon v. Sampson, et al., in holding that a former President can maintain this privilege after leaving office. Finally, Judge Pratt held that the discovery requested was overly burdensome for the government. While plaintiffs have indicated a desire to have Judge Pratt certify this question for interlocutory appeal, Justice feels that he is not likely to grant such a request. As the question of privilege is not the sole grounds for Judge Pratt's decision, there is no controlling question of law that would justify such an appeal.

The government and Nixon today filed a proposed order that would implement Judge Pratt's oral ruling. It is expected that Judge Pratt will issue an order encompassing whatever written



opinion he intends to make no earlier than next Tuesday.

The significance of this decision is, of course, that this is the first time it has been held that a former President can claim executive privilege after leaving office.

cc: Rod Hills
Bill Casselman



THE WHITE HOUSE
WASHINGTON

March 25, 1975

Phil:

I believe that the attached transcript will be of interest to you.

Barry



1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF COLUMBIA

3 ROGER S. KUHN,)
4 Plaintiff,)
5 v.) Civil Action No. 956-71
6 JERRY V. WILSON, et al,)
7 Defendants.)
8 and)
9 WILLIAM H. APTON,)
10 Plaintiff,) Civil Action No. 798-72
11 v.)
12 JERRY V. WILSON, et al,)
13 Defendants.)

13 Washington, D.C.

14 Thursday, March 20, 1975

15 The above-entitled matter came on for motion to
16 quash in open court before THE HONORABLE JOHN H. PRATT,
17 United States District Judge, commencing at 9:30 a.m.

18 APPEARANCES:

- 19 ELLIOTT C. LICHTMAN, ESQ., appearing on behalf of
20 the plaintiffs.
21 DENNIS G. LINDER, ESQ., appearing on behalf of the
22 federal defendants.
23 RAYMOND G. LARROCA, ESQ., appearing on behalf of
24 Richard M. Nixon.

25 RICHARD L. MATTSON
Official Court Reporter
Room 6800, U. S. Court House
Washington, D.C. 20001



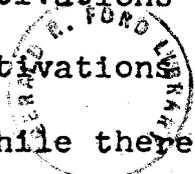
1 * * * * *
2 (Whereupon, after hearing oral argument, the
3 Court rendered the following oral opinion:)

4 THE COURT: Well, we are going to grant the motions
5 to quash the subpoena, and we would do so on the following
6 grounds:

7 First, we would hold, despite what Judge Richey
8 has held in his consolidated civil cases, the presidential
9 privilege of confidentiality, which is a part of executive
10 privilege, continues after the incumbent has left office,
11 and can properly be asserted, and has been asserted in this
12 case.

13 Second, that the presidential privilege of
14 confidentiality which was recognized in U.S. v. Nixon is
15 qualified and does not operate where there is a demonstrated
16 showing of a particularized need in a criminal case. We
17 don't have a situation such as that here.

18 Third, entirely aside and a part from the question
19 of the existence of such a privilege, and who may assert
20 it, particularly a past president, it seems to me that
21 very definitely the information that is requested in these
22 subpoenas does not go to the heart of the plaintiffs' case;
23 that it is of peripheral relevance at best. The motivations
24 that are challenged in this particular case are motivations
25 of certain defendants who have been deposed, and while there



1 might be some justification for release of this information
2 if Mr. Nixon himself was a defendant, he is not even a
3 defendant in these cases.

4 And, furthermore, the defendant has made a
5 demonstration that to obtain this information of very
6 dubious relevance would impose on the Government a very
7 oppressive and burdensome task.

8 I would distinguish Carey v. Hume, where Brit
9 Hume was the sole repository of certain information.

10 And even applying a balancing test of Branzburg
11 v. Hayes, or of Carey v. Hume, it seems to me the plaintiffs,
12 who have a very heavy burden in this case, haven't reached
13 that burden.

14 For all of the foregoing reasons, as I indicated
15 before, I will grant the motion to quash and suggest,
16 Mr. Linder, that you and Mr. Larroca get together on a
17 formal order and you can send a copy to Mr. Lichtman.

18 * * * * *

19 C E R T I F I C A T E

20 I, RICHARD L. MATTSON, Official Court Reporter,
21 do hereby certify that the foregoing transcript is a
22 complete and accurate transcript of the proceedings
23 contained therein.



24 *Richard L. Mattson*
25



THE WHITE HOUSE

WASHINGTON

cy for you.

Original sent
to Casselway





UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

March 27, 1975

Address Reply to the
Division Indicated
and Refer to Initials and Number

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145-12-1552
145-12-1721

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(202) 739-3487

Philip W. Buchen, Esquire
Counsel to the President
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D. C. 20500

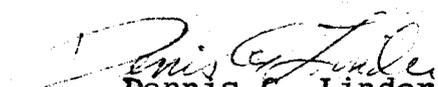
Re: Roger Kuhn, et al. v. Wilson, et al.,
(USDC D.C.) Civil Action No. 956-71
William Apton, et al. v. Wilson, et al.
(USDC D.C.) Civil Action No. 798-72

Dear Mr. Buchen:

As we informed you last week, Judge Pratt on March 20, 1975 orally granted the Motions to Quash filed in response to the subpoena served upon you by plaintiffs in these actions.

Enclosed for your information is a copy of the formal Orders entered by the District Court on March 26, 1975, granting the Motions to Quash and denying the plaintiffs' motion to certify the privilege issue to the United States Court of Appeals for the District of Columbia Circuit pursuant to 28 U.S.C. § 1292(b).

Yours very truly,


Dennis G. Linder
Attorney

Office of Special Litigation Counsel
Civil Division

Enclosure



UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF COLUMBIA

WILLIAM H. APTON, et al.,)

Plaintiffs,)

v.)

JERRY V. WILSON, et al.,)

Defendants.)

CIVIL ACTION NO.

798-72

FILED

MAR 26 1975

JAMES F. DAVEY, CLERK

CIVIL ACTION NO.

956-71

ROGER S. KUHN, et al.,)

Plaintiffs,)

v.)

JERRY V. WILSON, et al.,)

Defendants.)

ORDER

This matter is before the Court on the Motion to Quash or, in the Alternative, For a Protective Order filed by Philip W. Buchen, Counsel to President Gerald R. Ford, and the Motion to Quash and Formal Claim of Presidential Privilege filed by former President Richard M. Nixon, in response to the plaintiffs' subpoena duces tecum served upon Philip W. Buchen on February 11, 1975. The Court, having heard oral argument on March 20, 1975, and having considered the Motions, Opposition, and Points and Authorities of the parties, and being fully advised in the premises, finds as follows:

1. The Presidential Privilege of Confidentiality, which is a part of the executive privilege, continues after



a President has left office, can be properly asserted by such a former President, and has been so asserted by former President Nixon in this action.

2. The Presidential Privilege of Confidentiality recognized in United States v. Nixon, ___ U.S. ___, 93 Sup. Ct. 3090 (1974) is a qualified privilege which may be overcome by a demonstrated showing of a particularized need in a criminal case. This situation does not exist in the instant case, which is civil in nature.

Entirely separate and apart from the grounds set forth in (1) and (2) above,

PMB
3. [^] the information requested by the plaintiffs' subpoena duces tecum does not go to the heart of the plaintiffs' case, and is of peripheral relevance at best. The motivations challenged in these actions are motivations of the federal defendants, who have been deposed by plaintiffs. Furthermore Philip W. Buchen, Counsel to President Gerald R. Ford, has demonstrated that to obtain this information of very dubious relevance would impose on the Government a very oppressive and burdensome task.

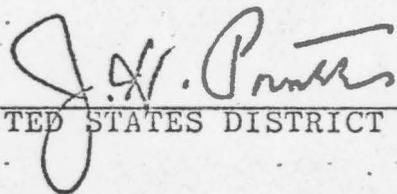
The Court distinguishes Carey v. Hume, 492 F.2d 631 (CAD 1974), where Britt Hume, a party to the action, was the sole repository of certain information. Further, even applying a balancing test as in Branzburg v. Hayes, 408 U.S. 665, 710 (1972) or of Carey v. Hume, supra, it appears to the Court that plaintiffs, who have a very heavy burden in this case, have not carried that burden.

Therefore, for the above-stated reasons, it is this 26th day of March, 1975, hereby

ORDERED, that the Motion of Richard M. Nixon to Quash Subpoena Duces Tecum be and the same is hereby granted, and it is further

ORDERED, that the Motion to Quash or in the Alternative for a Protective Order of Philip W. Buchen be and the same is hereby granted, and it is further

ORDERED, that the subpoena duces tecum dated February 11, 1975, for the testimony of Philip W. Buchen and for the production of tapes, recordings, transcripts, and documents relating to certain conversations of former President Richard M. Nixon during his tenure in office be and the same is hereby quashed.


UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM H. APTON et al.,
Plaintiffs,
v.
JERRY V. WILSON et al.,
Defendants.

Civil Action No. 798-72

FILED

MAR 26 1975

JAMES F. DAVEY, CLERK

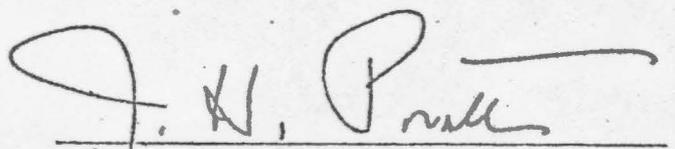
ROGER S. KUHN et al.,
Plaintiffs,
v.
JERRY V. WILSON et al.,
Defendants.

Civil Action No. 956-71

ORDER

Upon consideration of the motion of plaintiffs to certify to the United States Court of Appeals for the District of Columbia Circuit the privilege issue raised in the matter of the subpoena of the tape recordings of certain Presidential conversations, which matter was ruled upon in this Court's Order of March 26, 1975, and noting that the Court's order in granting the motion to quash was also based on the independent ground that the information sought was of dubious relevance at best and would impose a very oppressive and burdensome task on the Government, it is by the Court this 26th day of March, 1975,

ORDERED, that said motion be and is hereby denied for the reason that an appeal will not "materially advance the ultimate termination of the litigation . . ." 28 U.S.C. §1292(b).


John H. Pratt
United States District Judge