

[REDACTED]

[REDACTED] The term 'vindictive prosecution' is ordinarily used to describe a prosecution which is vindictive in the normal sense of the word, resulting from specific animus or ill will (as the prosecution of all Democrats who violate the election laws, or all gamblers who do not make timely payoffs to the 'bagman'); or a prosecution which charges a more serious violation ('upping the ante') in retaliation for the exercise of a legal or constitutional right in connection with the original charge.").

Not even in the heat of a legal battle is it routine to raise the issues in this motion. Given all the unusual actions in and the political use of this case, however, this motion and request for this level of scrutiny are justified.

STATEMENT OF FACTS

In April 2008, the House Judiciary Committee issued its report concerning President Bush's U.S. Attorneys scandal. U.S. House of Representatives, Judiciary Committee, Allegations of Selective Prosecution in Our Federal Criminal Justice System (2008). The report, based on an extensive investigation and testimony from bi-partisan

witnesses (including Republican Attorney General Dick Thornburgh), found that the Bush Administration put a premium on political prosecutions and that U.S. Attorneys were replaced because they failed to bring partisan political charges and that U.S. Attorneys were retained because they did bring such charges. Id. at 1-2. A Department of Justice Office of the Inspector General Report actually found that the criteria used to decide whether to retain U.S. Attorneys was whether those persons were "loyal Bushies." DOJ Office of the Inspector General Special Report, An Investigation into the Removal of 9 U.S. Attorneys in 2006 17 (2008) [hereinafter "OIG Report"]. Empirical evidence, cited in the House Report, makes clear that these sorts of political investigations and prosecutions were pervasive. Between 2001 and 2007, U.S. Attorneys working for President Bush brought 77% of public corruption cases against Democratic officeholders compared to just 17% brought against Republicans. During the same period, 80% of federal investigations targeting local officials were brought against Democrats. According to one scholar, the odds of such partisan disparity occurring randomly were less than 1 in 10,000, and ran counter to the Department's practices in preceding Republican and Democratic administrations. See Gersham, The Most Dangerous Power of the Prosecutor, 29 Pace L. Rev. 1, 26 & n.129 (2008).

Former U.S. Attorney Holding did nothing to refute the conclusions reached in the Congressional and OIG Reports. During his tenure as an Assistant U.S. Attorney and then as U.S. Attorney for the Eastern District, Mr. Holding directed high-profile investigations

into more than half a dozen Democratic politicians and officeholders, and these cases already have been cited as part of his campaign for Congress. In 2008, the same year the Bush Department of Justice initiated the current investigation of Senator Edwards, Mr. Holding led a separate investigation into Michael Easley, the former Democratic Governor of North Carolina. On the eve of state and federal elections in the fall of 2010, Mr. Holding also authorized the issuance of subpoenas against the campaign of the current Democratic Governor Beverly Perdue.

No doubt aided by the fallout of the investigation of Governor Perdue's campaign, the Republicans won control of the North Carolina General Assembly in 2010 for the first time in one hundred years. Control of the Assembly brought with it the right to redraw North Carolina's congressional boundaries following the 2010 census. During the redistricting process the Republicans dramatically redrew North Carolina's 13th Congressional District, tilting it heavily Republican. Just one month after the Indictment of Mr. Edwards in this case, Mr. Holding announced his intent to run, as a Republican in that newly redrawn 13th Congressional District, and announcement articles highlighted the political cases he had brought. And they Keep on Coming . . . George Holding Declares for 13th District, Carolina Politics Online (July 13, 2011) ("Former U.S. Attorney George E.B. Holding, who made his reputation pursuing high-profile Democrats in public corruption cases, said [July 13th] he plans to run for Congress next year.") (emphasis added).

Mr. Edwards, who had been a Democratic Party front-runner for the White House in 2008, was perhaps the biggest political prize. By the time Mr. Holding took this assignment, he already had crossed political paths with Mr. Edwards. Mr. Holding began his legal career as a law clerk for the Honorable Terrence Boyle, a federal District Court Judge in the Eastern District. When Judge Boyle was nominated to the Fourth Circuit Court of Appeals in 2001, then-Senator Edwards blocked his nomination. Mr. Holding also worked for a time as an aide to Senator Jesse Helms, a vocal political opponent of Senator Edwards and his policies. And Mr. Holding contributed money to the campaign of Senator Lauch Faircloth, the Republican incumbent defeated by Mr. Edwards in 1998. Indeed, between 1997 and 2004, Mr. Holding contributed \$12,000 to Republican candidates for North Carolina's two Senate seats and political action committees that supported those candidates.¹

¹ In addition to contributing to Mr. Edwards' opponent in 1998, Senator Faircloth, Mr. Holding donated money to the senatorial campaigns of Republicans Jesse Helms and Elizabeth Dole, candidates who Mr. Edwards publicly opposed. During the hotly contested race for the Senate seat vacated by Mr. Edwards in 2004, Mr. Holding contributed \$3,000 to the Republican candidate, Richard Burr. Senator Edwards supported the Democrat who opposed Mr. Burr. During the same election cycle Mr. Holding contributed over \$5,000 to two Republican political action committees, the Leadership Circle PAC and the American Spirit PAC. Those organizations in turn contributed \$24,000 to Senator Burr's campaign and \$4,000 to President Bush's campaign for reelection. See Federal Election Commission, "Transaction Query by Individual Contributor," available at <http://www.fec.gov/finance/disclosure/norindsea.shtml>.

Despite this history of political conflict between Mr. Holding and Mr. Edwards, Mr. Holding was given the investigation, moved it from subject to subject, and steered its direction. At no time did he recuse himself nor did the Bush Administration suggest he step aside to avoid any appearance of impropriety. This actual or appearance of a conflict is now highlighted by Mr. Holding's announcement to run for office.

Mr. Holding's involvement in the Edwards investigation also was unusual not only because he had been a staunch supporter of Mr. Edwards's political foes but, as indicated above, because Mr. Holding was the U.S. Attorney for the Eastern, not the Middle District of North Carolina. According to the Preliminary Inquiry Memo sent to Mr. Holding, the targets of the initial investigation were Mr. Edwards, Ms. Hunter (doing business as Midline Groove Productions), Andrew Young and Fred Baron. None of those targets resided or conducted business in the Eastern District. Both Senator Edwards and Andrew Young resided in Chapel Hill, in the Middle District. Senator Edwards' campaign headquarters was in Chapel Hill, and all campaign finance reports were filed by staff members in Washington, D.C. Ms. Hunter was living in California at the time of the preliminary inquiry and her company, Midline Groove, operated out of New Jersey. Fred Baron was a resident of Texas. Aside from Mr. Holding's involvement, nothing

about the inquiry indicated that venue was appropriate in the Eastern District as opposed to the Middle District, Washington, D.C., New Jersey, California or Texas.²

It certainly appears the Bush Justice Department was looking for a way to get this case to Mr. Holding and not the U.S. Attorney with jurisdiction over the matter in the Middle District of North Carolina, Anna Mills Wagoner. In the midst of selecting U.S. Attorneys to fire for political reasons, she had been placed on the Bush Administrations' initial list of U.S. Attorneys selected for firing. OIG Report at 19 & 26; see id. at 26 n.4 (indicating she was viewed as "weak"). Instead of Ms. Wagoner, Mr. Holding who was from a different District, but had an established track record of prosecuting Democrats, got the assignment.³

The manner in which the case started and then was drastically expanded tells the story. After Mr. Edwards ended his presidential campaign and publicly acknowledged

² Mr. Edwards has filed a separate motion to dismiss certain counts in the Indictment for lack of venue. (MTD No. 5.) The lack of venue in the Eastern District also necessitated a last-minute change of venue to the Middle District, which created significant irregularities in the grand jury process that are addressed in MTD No. 3.

³ Mr. Holding was "held-over" as the U.S. Attorney for the Eastern District of North Carolina following the 2008 election of President Obama because the President's nominee for that office, Thomas Walker, made campaign contributions to several Democratic candidates, including the Kerry-Edwards ticket in 2004. Ironically, the Department of Justice reportedly determined that such contributions created a conflict of interest for Mr. Walker. The Department has not explained why Mr. Holding's contributions to Mr. Edwards' opponent in the 1998 Senate race did not create the same conflict of interest.

his extra-marital affair, on August 11, 2008, Craig Donsanto, in the Public Integrity Section of the Department of Justice, authorized a narrow, preliminary inquiry into the alleged receipt of actual campaign monies by Rielle Hunter. Mr. Donsanto's recommendation came on the heels of inaccurate media reports claiming that Ms. Hunter had received payments from campaign funds associated with Mr. Edwards. (MTD No. 1 Ex. B (Preliminary Inquiry Memo).) Mr. Donsanto's recommendation was forwarded to Mr. Holding, U.S. Attorney for the Eastern District of North Carolina, even though Mr. Edwards, Ms. Hunter and all meaningful subjects of the investigation were located in the Middle District. As set forth in the Preliminary Inquiry Memo, the initial purpose of Mr. Holding's investigation was to determine whether Mr. Edwards unlawfully converted campaign funds for non-political purposes to support Ms. Hunter. The specific crime to be investigated was violation of 2 U.S.C. § 439, which prohibits the conversion to personal use of money contributed to a federal candidate or his campaign. The concern was that certain moving expenses of Ms. Hunter and the Youngs had been paid by Mr. Baron and that, according to Edwards campaign finance reports, Mr. Baron had received significant reimbursements from the Edwards campaign. The memo stated that "[i]f some of the payments to BARON from EDWARDS campaign were reimbursements for relocation expenses BARON provided for the benefit of HUNTER and the YOUNGS, provisions of Title 2, U.S.C., Section 439, may have been violated."

Within days after the presidential election, the Holding-led preliminary investigation began issuing subpoenas. Within a few months, the results refuted the allegations that generated the inquiry:

1. No money from the Edwards campaign was paid to either Ms. Hunter or Midline Groove, and neither Ms. Hunter nor Midline Groove received money from any source that originated with the Edwards campaign.
2. No money from the Edwards campaign was converted by Mr. Edwards to pay his "personal use" expenses.
3. No federal matching funds (*i.e.*, taxpayer money) received by the Edwards campaign were paid to Ms. Hunter or Midline Groove, and neither Ms. Hunter nor Midline Groove received money from any source that originated with federal matching funds.
4. The only money received by Ms. Hunter came from either Ms. Mellon or Mr. Baron.
5. Both Mr. Baron's estate and Rachel Mellon paid hundreds of thousands of dollars in gift taxes for money received by Ms. Hunter and the Youngs.
6. Mr. Young was unable to account for a substantial portion of the money received from Mr. Baron and Ms. Mellon.
7. Mr. Edwards acknowledged his relationship with Ms. Hunter and the fact that he was the father of Ms. Hunter's daughter. Mr. Edwards has provided financial support to his daughter since January 2009.

The narrow preliminary investigation that Mr. Holding was authorized to undertake revealed, in other words, that none of the payments made by the Edwards campaign to Mr. Baron were intended to reimburse him for expenses related to Ms. Hunter, and that there was no evidence that Mr. Edwards had converted campaign funds for personal use. For this reason, none of the crimes mentioned in the Preliminary Inquiry Memo were charged in the Indictment.

If this were a normal case, the investigation would have ended when the allegations that led to the investigation were disproved. That is not what happened here. Rather than closing his investigation, Mr. Holding led an expanded and different course - - pursuing an unprecedented theory of basing a criminal case on a novel interpretation of what constitutes a "campaign contribution." It appears that neither Mr. Holding nor his prosecutors submitted their theory to the Federal Election Commission ("FEC"), the agency with "primary and substantial responsibility for administering and enforcing the [Federal Election Campaign] Act." Buckley v. Valeo, 424 U.S. 1, 109 (1976)⁴.

If the prosecutors had asked the FEC to weigh in on their unprecedented interpretation of the term "contribution," they may well have realized that there was no way Mr. Edwards "knowingly and willfully" violated federal election laws, as a criminal prosecution requires. According to two former Chairmen of the FEC, even if Mr. Edwards directly approached Ms. Mellon and Mr. Baron and asked them to provide financial assistance to Ms. Hunter, "these payments would not be considered to be either campaign contributions or campaign expenditures within the meaning of the campaign

⁴ The constitutional problems with pursuing this unprecedented theory in a criminal case are addressed by Mr. Edwards in a separate motion to dismiss. (MTD No. 1.)

finance laws." (See MTD No. 1 Ex. A (Ltr. from R. Lenhard and S. Thomas).)⁵ The former FEC chairmen further stated that, in their opinion, "the Federal Election Commission, if asked, would conclude that these payments did not constitute a violation of the law, even as a civil matter," and that the facts, even viewed in the light most favorable to the theories advanced in the Indictment, "do not make out a knowing and willful violation of the campaign finance laws warranting criminal prosecution," primarily because no court opinion, agency enforcement action, or FEC advisory opinion had ever considered -- let alone adopted -- this unprecedented interpretation of the term "contribution." (Id.) But it appears that neither Mr. Holding nor any of his associates asked the FEC whether their interpretation of the statute was consistent with the law.

To the contrary, the scope of his investigation of Mr. Edwards expanded. Although the earlier subpoenas requested information relating only to the Edwards campaign from January 1, 2006 to August 2008, Mr. Holding and his office authorized a new round of subpoenas in October 2010 (again on the eve of state and federal elections) requesting information regarding Mr. Edwards' entire thirteen year political career, from January 1, 1997 through October 2010. Among other things, this expanded time period covered Mr. Edwards' successful campaign against Senator Faircloth, the Republican

⁵ DOJ's own election law prosecutor, Craig Donsanto, never raised this theory in the Preliminary Inquiry Memo either -- even though he was aware of payments made by Mr. Baron to support Ms. Hunter.

candidate to whom Mr. Holding donated money in 1998. This expanded time-period exceeded the five-year statute of limitations for election law violations, see 2 U.S.C. § 455, meaning the prosecutors requested information about possible violations they could no longer prosecute. They found none.

The expanded scope of the investigation being led by Mr. Holding also required a corresponding increase in the vast federal resources spent on the Edwards investigation. At least 50 federal agents conducted more than 125 interviews of anyone (including interns) who had ever worked for Mr. Edwards during his political career. In many cases, federal agents showed up on the doorsteps of potential witnesses unannounced, even though the witness already had been interviewed and was represented by counsel.

The conduct of Mr. Holding's office during grand jury proceedings also raises serious questions about the judgment and good faith of his staff. Prosecutors apparently asked witnesses before the grand jury a broad range of questions that had nothing to do with alleged campaign finance violations by Mr. Edwards. Witnesses report that they were asked whether Mr. Edwards or his law firm had been sued for sexual harassment; whether they were surprised by the size of Mr. Edwards's home; and whether the house had a basketball court. Details about grand jury proceedings were also repeatedly leaked to the news media by "law enforcement officials" and "those close to the investigation" in a rather transparent attempt to convict Mr. Edwards in the court of public opinion before he ever had a chance to fight the allegations against him in court.

From the Fall of 2010 through the date of the Indictment, details of grand jury testimony, the subpoenas that were being issued, and the opinion of prosecutors that they had a “strong” case were repeatedly leaked to the media. For example, on October 8, 2010, WTVD in Raleigh reported that “[a] law enforcement source told the I-Team Wednesday that about 20 new subpoenas have been issued ordering people to testify.” The report further indicated that “prosecutors in Raleigh sent the case to the Department of Justice in Washington for a review. The Justice Department then told prosecutors in Raleigh to interview more people and get more information.” A report by the Associated Press on January 17, 2011, reported information from “someone with access to a subpoena” and a “person involved in the investigation”; a day later, ABC News, citing “multiple sources with knowledge of the investigation” reported that the grand jury would be making its decision “soon.” On February 15, 2011, NBC News reported that “sources close to the investigation” had told them that “[p]rosecutors believe they have a strong case, but have not yet gotten a green light from the Justice Department.” This report came with a video entitled: “Prosecutors Gear up to Charge Edwards in Criminal Case.” On May 25, 2011, NBC News, again citing “sources close to the investigation,” reported that “DOJ Green-Lights Edwards Charges.”

As noted above, the choice of venue also was problematic. Mr. Holding investigated Mr. Edwards for almost three years, from August 11, 2008 until the Indictment was issued on June 3, 2011. For all but a few days of that period, Mr.

Holding led the investigation in his home district, the Eastern District, where a grand jury was convened, hundreds of exhibits were presented and thousands of pages worth of testimony were taken. Yet, Mr. Holding and all the prosecutors he now was leading undoubtedly were aware that none of the targets of his investigation resided in the Eastern District. So, literally, no more than a day or two before Mr. Edwards was indicted, the prosecutors convened a second grand jury in the Middle District. They then hastily presented the second grand jury with merely 40 or so out of hundreds of exhibits (few of which were germane to the charges), as well as a single summary witness who recounted the testimony allegedly offered to the first grand jury in a massive presentation of hearsay. Mr. Edwards addresses these abuses of the grand jury process in a separate motion to dismiss. (MTD No. 3.)

Moreover, Mr. Holding did not direct and the other prosecutors did not present the second grand jury with significant exculpatory evidence that would have cast doubt on their unprecedented theory of election law. Upon information and belief, the grand jury was not informed that at least two former Chairmen of the FEC had stated that the payments in question were not "contributions" within the meaning of the election laws and that Mr. Edwards therefore could not have "knowingly" violated the law because no court or administrative agency had ever described them as such. Upon information and belief, neither Mr. Holding nor his assistants provided the grand jury with the prior statement of Mr. Young in his book The Politician, the government's key witness, who

explained that any funds provided for Ms. Hunter by Ms. Mellon or Mr. Baron "were gifts, entirely proper, and not subject to campaign finance laws." These omissions were in direct contravention of DOJ policy: "It is the policy of the Department of Justice . . . that when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence that directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person." United States Attorneys Manual § 9-11.233 (2008).

The second grand jury indicted Mr. Edwards on June 3, 2011; Mr. Holding left his post as United States Attorney for the Eastern District of North Carolina shortly after the Indictment; and, on July 13, 2011, Mr. Holding announced his intent to run for Congress as a Republican in North Carolina's newly redrawn 13th Congressional District.

QUESTION PRESENTED

1. Does the significant actual or apparent conflict of interest by the U.S. Attorney who led the investigation and signed the Indictment against Mr. Edwards warrant the dismissal of the Indictment for abuse of prosecutorial discretion?

2. Does the significant actual or apparent conflict of interest by the U.S. Attorney who led the investigation and signed the Indictment against Mr. Edwards warrant further discovery to determine whether the Indictment should be dismissed for abuse of prosecutorial discretion?

ARGUMENT