

1 CAROL C. LAM
United States Attorney
2 SANJAY B. BHANDARI
Assistant U.S. Attorney
3 California State Bar No. 181920
JASON A. FORGE
4 Assistant U.S. Attorney
California State Bar No. 181542
5 PHILLIP L. B. HALPERN
Assistant U.S. Attorney
6 California State Bar No. 133370
7 Federal Office Building
880 Front Street, Room 6293
8 San Diego, California 92101-8893
Telephone: (619) 557-7042/7463/5165

9 Attorneys for Plaintiff
10 UNITED STATES OF AMERICA

11 UNITED STATES DISTRICT COURT
12 SOUTHERN DISTRICT OF CALIFORNIA

13 UNITED STATES OF AMERICA,) No. 05cr2137-LAB
14 Plaintiff,)
15 v.) **GOVERNMENT'S SENTENCING**
16) **MEMORANDUM**
17 RANDALL HAROLD CUNNINGHAM) Hearing Date: March 3, 2006
aka Randy "Duke" Cunningham) Time: 1:00 p.m.
18 Defendant.) Place: Courtroom 9
19) Judge: Hon. Larry Alan Burns

20 I.

21 INTRODUCTION

22 Having admitted unparalleled corruption, defendant Randall H. Cunningham now comes
23 before the Court to be sentenced for his stunning betrayal of the public trust. Cunningham used his
24 status as a war hero to get into Congress, and then he used his Congressional office to get rich. In
25 doing so, Cunningham reneged on his obligation to execute his office with conscientious, loyal,
26 faithful, disinterested, and unbiased service. The length, breadth, and depth of Cunningham's crimes
27 against the people of the United States are unprecedented for a sitting Member of Congress. So, too,
28 should be his sentence. For the reasons detailed below, the United States requests that this Court
impose the statutory maximum sentence of 120 months in custody.

FILED

06 FEB 17 PM 4: 23

CLERK, U.S. DISTRICT COURT,
SOUTHERN DISTRICT OF CALIFORNIA

BY: DEPUTY

1 In this "bribe menu," the left column
 2 represented the millions in government contracts
 3 that could be "ordered" from Cunningham. The
 4 right column was the amount of the bribes that the
 5 Congressman was demanding in exchange for the
 6 contracts. For example, Cunningham's menu
 7 offered \$16 million to Coconspirator No. 2 in
 8 government contracts in exchange for the
 9 contractor giving up his title to a boat ("BT") for
 10 which Coconspirator No. 2 had initially paid
 11 \$140,000 ("140"). The next four rows indicate
 12 that an additional million dollars in funding was
 13 "for sale" in exchange for every additional
 14 \$50,000 that Coconspirator No. 2 was willing to
 15 pay Cunningham. Once Coconspirator No. 2 had
 16 paid Cunningham \$340,000 in bribes, the rates
 17 dropped; and, as the final five rows reflect,
 18 Cunningham would charge only \$25,000 for each additional million dollars that was awarded in
 19 additional government contracts.

20 Cunningham's malversation is unprecedented in the long history of Congress. It is a
 21 numbing betrayal, on an epic scale, correctly termed "outrageous" by the President of the United
 22 States. But not only did Cunningham betray the public trust; he also tampered with witnesses to
 23 interfere with the administration of justice. Thus, Cunningham's conduct not only corroded
 24 confidence in our system of governance; it attacked our very system of justice. Deterrence alone
 25 commands that the highest possible sentence be imposed.



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RANDY "DUKE" CUNNINGHAM
 U.S. HOUSE OF REPRESENTATIVES
 WASHINGTON, D.C. 20515
 (202) 225-5452
 (760) 737-8438
 WWW.HOUSE.GOV/CUNNINGHAM

1 II.

2 STATEMENT OF FACTS¹

3 The bribes Cunningham demanded and received ran the gamut from the routine (expensive
4 meals, hotels, and travel) to the peculiar (buck knives, lasershot simulator system), the audacious
5 (demands that a defense contractor pay defendant's cross-country moving expenses and additional
6 cash bribes so the defendant could comfortably pay capital gains tax on a prior bribe conveyed
7 through a housing transaction), the self-indulgent (luxury vehicles, yachts, homes, an antique Louis
8 Philippe commode, Persian rugs) and the truly astonishing (\$500,000, divided into two checks from
9 one defense contractor, and a \$525,000 wire transfer from a second defense contractor).
10 Cunningham has admitted the receipt of at least \$2.4 million in bribes since 2000, principally from
11 two defense contractors. These are detailed in the plea agreement, and will not be exhaustively
12 catalogued here. For the Court's convenience, however, the major part of this bribe activity is
13 summarized below in section II.A., with additional illustrative facts not contained in the plea
14 agreement.² A discussion of relevant facts concerning the recommended upward adjustment for
15 obstruction of justice follows in section II.B. All other facts are discussed in the context of the
16 discussion of guideline calculations and sentencing recommendations that follows in section III.

17 A. Bribe Activity

18 1. Meals, Hotels, and Travel

19 Both defense contractors routinely and lavishly entertained Cunningham at his favorite
20 restaurants (such as the Capital Grille in Washington, D.C.) in the capital, and elsewhere. These

21
22 ¹ As this sentencing proceeding involves matters common to ongoing investigations
23 of other persons not yet charged, the United States cannot publicly provide all relevant facts and
24 circumstances. However, based on the parties' detailed plea agreement, the United States
25 submits that: (1) any remaining factual disputes will likely be quite limited; (2) all significant and
26 relevant facts are adequately addressed through the pleadings; and (3) any additional facts the
27 Court determines are necessary could be supplied under seal, if required. In the event that
28 Cunningham contests one or more of the facts described herein, the United States will
supplement the record with the appropriate evidence.

² The parties have agreed that Cunningham should be sentenced on the basis of the
bribes he received, rather than any waste or harm his corrupt diversions of public funds caused.
The United States, therefore, has avoided detailing waste and harm in this filing, but reserves its
right to rebut claims by the defendant about such matters.

1 meals were frequently “big ticket” occasions, costing thousands of dollars. It was typical for
2 Cunningham’s tab (always picked up by the defense contractors) to run into the hundreds of dollars.

3 Cunningham would also be flown on private jets by these co-conspirators to various locales
4 around the country. These private jets would cost thousands of dollars to charter. Meals on such
5 private jets would be catered, and would include expensive bottles of wine, lobster, and other
6 extravagances. Accommodations were invariably exclusive, top-of-the-line hotels or resorts,
7 including the Greenbriar Resort in White Sulfer Springs, West Virginia, The Coeur d’Alene Resort
8 in Coeur d’Alene, Idaho, the Royal Hawaiian in Oahu, Hawaii, and the Mandarin Oriental in
9 Washington D.C.

10 As but one example of these extravagances, on March 8-9, 2004, a defense contractor flew
11 Cunningham by private jet to Miami, so that Cunningham could go yacht-shopping. Cunningham
12 stayed in Delano Hotel, Room 603, for \$1,254.50. Cunningham’s personal tab for meals at the Hotel
13 was \$848.27.³ The cost of the charter flight was \$12,975.23.

14 Cunningham grew to expect luxury. His co-conspirators eagerly plied him with it.

15 2. Asset Transactions

16 Defendant Cunningham favored disguising his receipt of bribes by the use of asset
17 transactions. Among other stratagems, Cunningham would pretend to sell an asset to a co-
18 conspirator and pocket the payments for a sale that never truly occurred; pretend to buy an asset at
19 fair value (when in fact it was priced below market); or pretend to sell it at fair value (when in fact
20 it was priced above market).

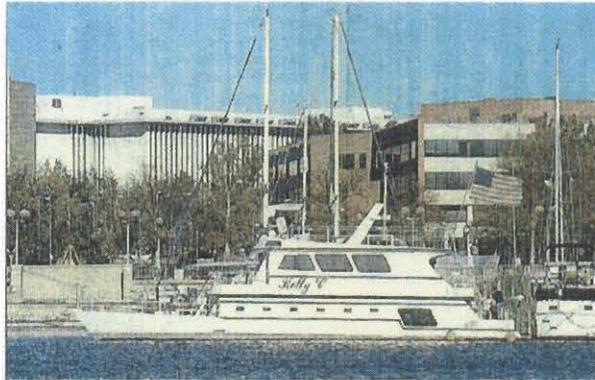
21 a. Kelly C Transactions

22 On May 1, 2000, a co-conspirator caused the issuance of \$100,000 (broken into two checks,
23 one for \$70,000 and one for \$30,000 check, both written on the same day),⁴ and thereafter began

24
25 ³ The contractor’s total expenses, including his own room and other expenses, were
over \$16,000.

26 ⁴ Defendant endorsed the \$30,000 check and deposited it (on May 11, 2000)
27 directly into his joint bank account at the Union Bank of California. The proceeds from the
28 \$70,000 check were also eventually transferred (by depositing check no. 8471) into Defendant’s
account at the Navy Federal Credit Union.

1 making regular payments for the mortgage on Cunningham’s yacht the “Kelly C” (pictured below).



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10 Between September 2000 and April 2001, this co-conspirator paid \$11,116.50 for Cunningham’s
11 yacht mortgage. Despite this “purported sale,” the yacht remained with Cunningham throughout this
12 entire time period.

13 Subsequently, Cunningham purported to sell the yacht to a different co-conspirator. Once
14 again, Cunningham received significant sums of money purportedly related to the sale of the yacht.
15 Once again, there was no contract and no transfer of title. Significantly, just before this investigation
16 began in May 2005, Cunningham informed the Coast Guard that he wanted title for the Kelly C to
17 be reissued in his name. He also began making preparations to bring the vessel back to his yacht
18 club in Washington, D.C.

19 b. Suburban

20 In 2003, Cunningham purchased a 1999 Suburban from Coconspirator No. 2, for \$10,000.
21 When a senior member of defendant’s Congressional staff found out about this, he was deeply
22 troubled by the sales price and the seller. When this staffer raised the matter with the Congressman,
23 Cunningham furiously slammed his hand on his desk, twice, and yelled at the staffer to “Stay the
24 f--- out of my personal business.” In an attempt to right, and conceal, this obviously corrupt
25 transaction, Cunningham’s staffers altered the California DMV Vehicle Title Registration
26 Application to reflect an \$18,000 sales price, rather than the actual \$10,000 price, and asked

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28

1 Cunningham to make up the difference.⁵ Cunningham did not.

2 c. Arlington Condominium

3 In late-2001, the Cunninghams purchased a condominium located at 1211 Eads Street South,
4 Unit 2002, Arlington, Virginia for \$350,000. The Cunninghams ostensibly financed the purchase
5 with a \$200,000 down payment and a \$150,000 loan from Coconspirator No. 4's company. The
6 purchase, however, disguised the fact that Coconspirator No. 4's company supplied the \$200,000
7 down payment.⁶

8 d. Del Mar Home

9 In late May or early June 2003, Cunningham approached a local realtor, who mistakenly
10 believed Cunningham to be her friend, at a fund-raising event at Torrey Pines Golf Course.
11 Cunningham stated that he wanted the realtor to show him some property in San Diego. Shortly
12 thereafter, Cunningham called the realtor and explained that he and his partner were interested in
13 buying a condominium in San Diego.

14 Cunningham initially expressed interest in a new project going up in a beach area. The
15 realtor later determined this to be the Seahaus project in La Jolla, and that the units in this project
16 were priced from under \$400,000 to over \$1 million. Cunningham told the realtor that he and his
17 partner would be interested in purchasing a unit in the million-dollar range with an ocean view.
18 When the realtor conveyed that Seahaus was two to three years away from completion, though,
19 Cunningham said that he wanted something sooner. As a result, the realtor began looking at other
20 condominium listings in La Jolla, downtown San Diego, and on Coronado Island in order to find a
21 suitable property. In late June and early July 2003, the realtor showed Cunningham a variety of
22 condominiums priced around \$1 to \$1.2 million.

23 Towards the end of July or the beginning of August, Cunningham mentioned to the realtor
24 that because he had a million dollars to spend, perhaps he would simply sell his home at 13832

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26 ⁵ It is obvious from the Motor Vehicle Title Registration Application itself that the
27 entry for the sales price was changed from \$10,000 to read \$18,000.

28 ⁶ A review of Cunningham's bank statements reveal that he clearly did not provide
the \$200,000 down payment to Coconspirator No. 4's company.

1 Mercado Drive in Del Mar for \$1.5 million and use the million dollars netted from that sale to
2 purchase a bigger house for himself. Cunningham said that his partner (whom he had identified as
3 Coconspirator No. 2) could simply have an office in Cunningham's bigger home. The next day, the
4 realtor asked Cunningham if she could handle the listing for his Del Mar home. Cunningham replied
5 that he already had a buyer for it. Thereafter, the realtor and Cunningham began looking at a number
6 of homes that Cunningham picked out of a magazine featuring "Dream Homes" in the San Diego
7 area. Cunningham's plan turned out to be to use the profits from the sale of his Del Mar home
8 (pictured below left) to purchase a Spanish style mansion located at 7094 Via Del Charro in Rancho
9 Santa Fe, California (pictured below right).



14 On or about October 28, 2003, Cunningham instructed the realtor to submit an offer on the 7094 Via
15 Del Charro house. Eventually, the Cunninghams and the sellers agreed on a purchase price of
16 \$2,550,000.

17 In early November 2003, Cunningham directed the realtor to draft a purchase agreement for
18 the sale of his Del Mar home to Coconspirator No. 2. Cunningham (not the realtor, as Cunningham
19 later claimed publicly) set the purchase price at \$1.5 million. On November 5, 2003, the realtor—who
20 did not charge for all of her assistance with this transaction—faxed the agreement from San Diego
21 to D.C. Cunningham signed the agreement and faxed it on to Coconspirator No. 2, who also signed.

22
23 Almost immediately thereafter, Cunningham told Coconspirator No. 2 that he needed an
24 additional \$175,000. Cunningham then had the realtor draft another purchase agreement, this one
25 for \$1.675 million. On November 7, 2003, the realtor faxed the revised purchase agreement from
26 San Diego to D.C., which Cunningham and Coconspirator No. 2 signed again.

27 Once the transaction closed, Cunningham rolled the net proceeds of \$1.4 million (after
28 discharge of mortgage obligations, etc.) from the Del Mar home sale into the purchase of his Rancho

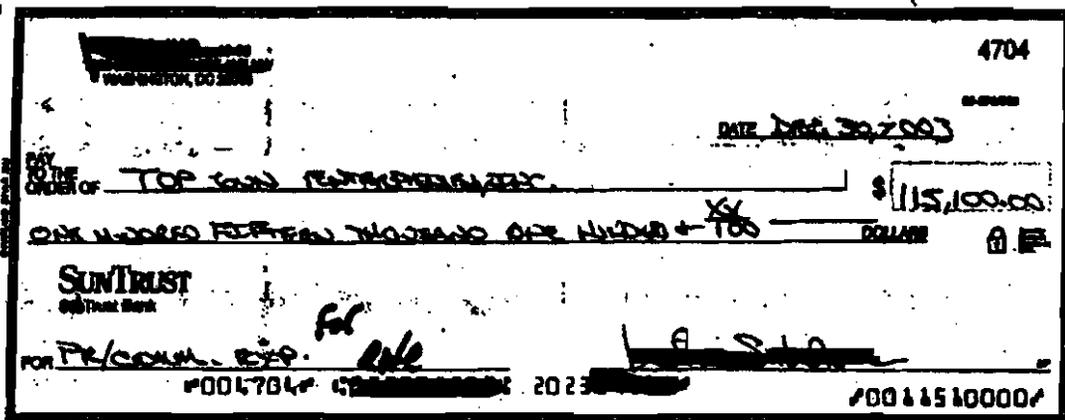
1 Santa Fe mansion. Cunningham financed the remaining \$1,095,000 of the purchase price with a first
2 mortgage of \$595,000 and a second mortgage of \$500,000—both issued by Coconspirator No. 4's
3 mortgage company.

4 Coconspirator No. 2, who had bought Cunningham's Del Mar home, immediately enlisted
5 the realtor, who had never visited the home or estimated its value, to resell it. Upon entering the
6 home for the first time, the realtor immediately realized that Coconspirator No. 2 had overpaid for
7 the home. Nevertheless, Coconspirator No. 2 initially placed the home for sale at just above his
8 purchase price. Even in one of the hottest real estate markets in recent San Diego history, the home
9 languished for months, finally selling on October 13, 2004, for \$975,000 – \$700,000 less than
10 Coconspirator No. 2 had paid Cunningham.

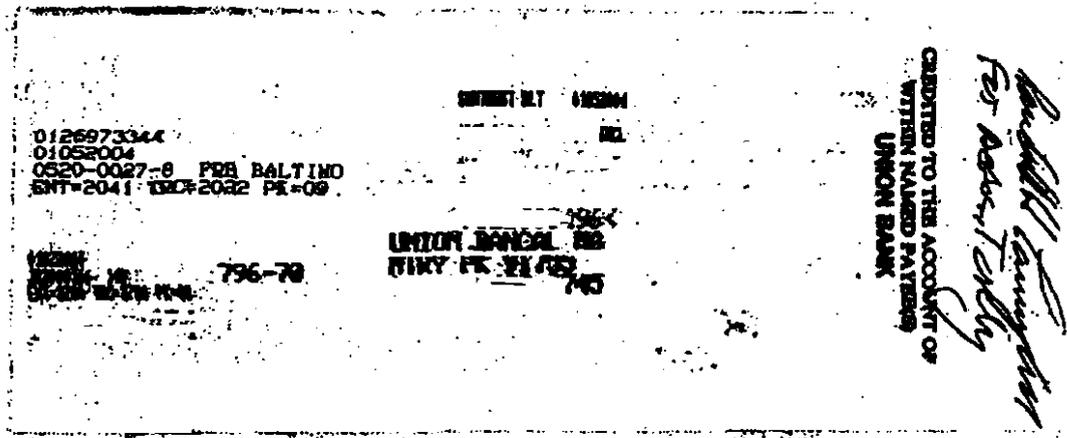
11 But Cunningham was not done feathering his nest.

12 i Capital Gains Taxes

13 A few weeks after Coconspirator No. 2 had purchased Cunningham's Del Mar home,
14 Cunningham asked him for more money. Cunningham explained that he needed additional funds
15 to help pay the required capital gains tax on the publicly reported sale of his Del Mar home.⁷
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28 ⁷ According to Cunningham's tax preparer, Cunningham called him to inquire about the tax consequences of the sale of his Del Mar home. The tax preparer explained that Cunningham's first \$500,000 of gain would be exempt from taxes, but that any additional gain



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Accordingly, Cunningham instructed Coconspirator No. 2 to write him a check for \$115,100 and send it to his San Diego congressional office. To conceal the transaction, Cunningham asked that the check (no. 4704) be made payable to Cunningham's military memorabilia business, Top Gun Enterprises, Inc. Coconspirator No. 2 indicated falsely in the notation section of the check that it was for Public Relations and Communication expenses. Cunningham endorsed the check and, on December 31, 2003, deposited it into his personal account at the Union Bank of California.

ii Elimination of the \$500,000 Second Mortgage

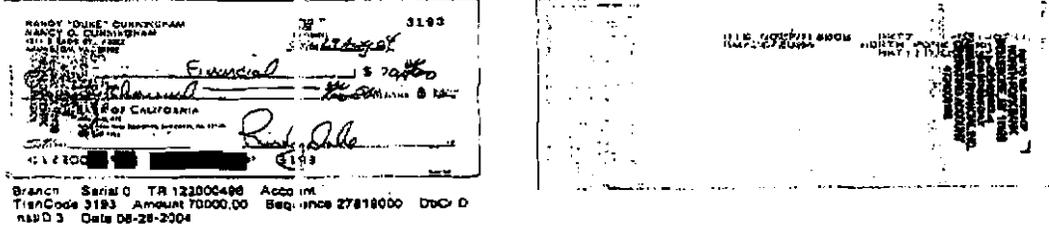
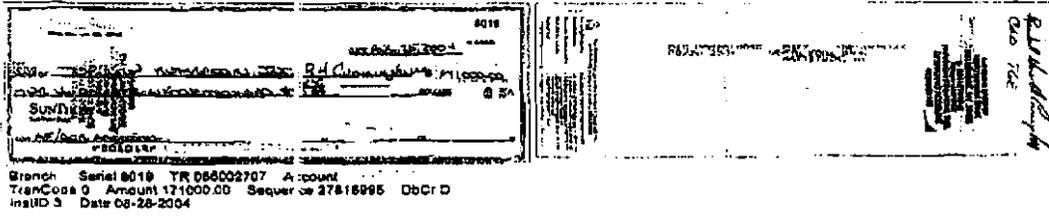
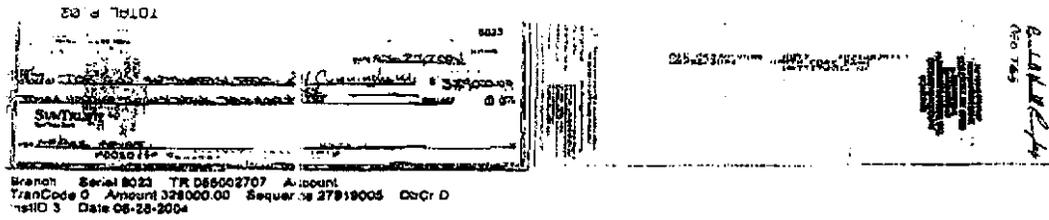
Cunningham then put into effect a plan to eliminate the \$1,095,000 in mortgages that he had obtained from Coconspirator no. 4. First, Cunningham demanded that Co-conspirator No. 1 give him \$525,000. Coconspirator No.1 agreed, but on condition that he receive an additional \$6,000,000 in government funds. Shortly after receiving this money (through a DoD subcontract), Coconspirator No. 1 wired the \$525,000 (thinly disguised as an "investment") to Coconspirator No. 3's financial services company. Cunningham never made another payment on his second mortgage.

iii Elimination of the \$595,000 First Mortgage

But Cunningham was still not done. In August 2004, Cunningham demanded that Coconspirator No. 2 pay him \$500,000, to eliminate the remaining mortgage burdens for his Rancho Santa Fe mansion. In return, Cunningham promised to support a specific defense appropriations request. Coconspirator No. 2 agreed. To disguise this bribe, Coconspirator No. 2 divided the

_____ would be taxed.

1 \$500,000 into two unequal checks (one for \$329,000 and one for \$171,000), both made out to Top
2 Gun Enterprises. Although both checks were made out at the same time, Coconspirator No. 2 sought
3 to further disguise the illegal activity by utilizing different dates and non-consecutive check numbers.
4 He added false notations on both checks that suggested a legitimate purpose.



18 These checks were not deposited into Top Gun Enterprises bank account, but instead they
19 were deposited into the account of Coconspirator No. 3's financial services company, along with a
20 \$70,000 personal check from Cunningham, bringing to \$1,095,000 (\$525k + \$500k + \$70k) the total
21 payments made to Coconspirator No. 3's financial services company.⁸ Thus, by the end of 2004, the
22 Cunninghams were living in their Rancho Santa Fe mansion free of any monthly payments.

26 ⁸ Rather than paying off Cunningham's first mortgage with these funds,
27 Coconspirator No. 3 simply assumed the payments. This mortgage was no longer held by
28 Coconspirator No. 4's company, but had been sold almost immediately to Washington Mutual Bank. From November 2004 through June 2005, Coconspirator No. 3's company made the \$3,529.65 monthly payments on Cunningham's first mortgage.

1 3. Miscellaneous Bribes

2 a. Antiques and Furniture

3 In approximately November 2001, Cunningham had Coconspirator No. 2 take him antique
4 shopping. Cunningham picked out a number of antiques costing approximately \$12,000. When it
5 came time to prepare the bill and pay for the antiques, Cunningham wandered to a different area of
6 the store. After Coconspirator No. 4 paid the bill, Cunningham returned to the counter to provide
7 delivery instructions to his new condominium at 1211 South Eads Street #2002, Arlington, Virginia.
8 In the car on the way back from this shopping trip, Cunningham expressed his appreciation for
9 Coconspirator No. 2's willingness to bribe him, and told Coconspirator No. 2 that Cunningham
10 would make him "somebody." Coconspirator No. 2's business records show that following this
11 "green light" from the Congressman, his company's government contracts went from less than a
12 million dollars per year to tens of millions per year.

13 In turn, Coconspirator No. 2 continued to feed Cunningham's appetite for expensive antique
14 furniture. Records from one antique store alone document the purchase of approximately \$190,000
15 worth of antiques between November 10, 2001 and November 16, 2003. Although not all of these
16 items went to Cunningham, the receipts indicate that at least the following items did: (1) two night
17 stands; (2) a leaded glass cabinet; (3) four armoires; (4) two buffets; (5) a marble top washstand; (6)
18 a marble top server; (7) chair; and (8) a stained glass cabinet. Testimony and records from this
19 dealer and others reveal that Cunningham stuffed these and many other items into his Arlington,
20 Virginia condominium – many more items than that condominium could reasonably hold.
21 Cunningham did this not because he needed those items for the condominium, but because he was
22 preparing to feather his nest in San Diego.

23 b. Check for \$50,000

24 In December 2001, Cunningham received a \$50,000 check laundered through Coconspirator
25 No. 4's mortgage company. This, of course, was the same condominium for which Coconspirator
26 No. 4's company had supplied the \$200,000 downpayment. The actual source of these funds was
27 Coconspirator No. 2, who had written a \$50,000 check (backdated to October 31, 2001) to
28 Coconspirator No. 4's company.

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c. Moving Expenses

When Cunningham eventually sold the Arlington, Virginia condominium (in August 2004), it was literally stuffed with furniture, including the many antiques and rugs given to Cunningham as bribes. Cunningham shipped all of these items (some of which are pictured below) to his Rancho Santa Fe mansion. Among other things, the shipping manifest that Cunningham signed included: (1) two Bejar Rugs valued at \$40,000 a piece; (2) a corner lead glass armoire valued at \$5,200; (3) a large lead glass armoire valued at \$4,500; (4) a small lead glass armoire valued at \$2,700; (5) a china hutch circa 1890 valued at \$24,000; (6) two candelabras valued at \$1,400; (7)



two smoking tables valued at \$2,000; (8) a French lamp shade valued at \$3,500; (9) three smoking tables valued at \$2,000; (10) cobalt blue lamps valued at \$300 a piece; (11) a cut glass floor piece valued at \$1,200; (12) a Tiffany statue valued at \$2,000; (13) an Erte statue valued at \$12,000; (14) four crystal lamps valued at \$2,800; (15) a cut glass lamp valued at \$2,400; (16) an eagle ceramic valued at \$500; (17) three cut glass doors valued at \$5,000; (18) glass armoire valued at \$5,400; (19) a French bedroom armoire valued at \$5,200; (20) three marble top French dressers valued at \$12,600; (21) a marble top mirrored vanity valued at \$2,200; (22) an antique mirror valued at \$1,200; (23) a living room armoire valued at \$5,200; (24) a marble top / marble fold shelf valued at \$4,200; (25) a hall tree valued at \$3,700; (26) small bedroom armoire valued at \$2,700; (27) an armoire valued at \$3,200; (28) an antique secretary valued at \$4,200; (29) two German antique bars

1 valued at \$6,400; and (30) two silver candle sticks valued at \$5,600.⁹

2 Cunningham demanded that Coconspirator No. 2 pay to ship not only all of the expensive
3 items he had purchased for Cunningham, but also all of Cunningham's other furnishings. In March
4 2004, Coconspirator No. 2 paid \$11,393.56 to a moving company to ship Cunningham's furnishings
5 to San Diego. The invoice indicates that the moving company built and packed four crates, along
6 with 20 china barrels, 3 book cartons, 22 medium containers, 11 Utility/Golf containers, 14 medium
7 mirror containers, 11 wardrobe containers, 3 mattresses, and 1 gun carton.¹⁰ Cunningham signed the
8 packing slip as an employee of the defense contracting firm.

9 d. Rugs

10 Cunningham obtained a number of expensive Persian and Indian rugs from a Maryland rug
11 dealer. In May 2005, Cunningham and Coconspirator No. 2 visited this store so that Cunningham
12 could select rugs for his Rancho Santa Fe mansion. After Cunningham selected five rugs,
13 Coconspirator No. 2 negotiated and paid for them. Cunningham then instructed the rug dealer to
14 ship the rugs to his Congressional Office in Escondido, California. The rugs were delivered to the
15 Escondido office on May 16, 2005.

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26 ⁹ Dozens of these items have been identified as having been purchased by
27 Coconspirator No. 2. Defendant has provided these items to the Government, which is holding
28 them for auction.

¹⁰ The value listed for the 30-plus antiques was approximately \$214,900.

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e. Rolls Royce

In approximately April 2002, Cunningham demanded \$10,000 from Coconspirator No. 2 to purchase a used Rolls Royce. Coconspirator No. 2 gave Cunningham the money. When the car arrived at the Port of Baltimore, the contractor dropped off Cunningham to pick up the vehicle. Cunningham then demanded, and the contractor paid, thousands of dollars to restore the car.



Cunningham registered the Rolls Royce in his (Cunningham's) name and kept it in the Congressional parking garage.

Some time later, Cunningham "sold" this vehicle to Coconspirator No. 2, for still more money. Coconspirator No. 2 eventually obtained possession of the Rolls (after paying the additional money), but never received title to the vehicle from Cunningham.

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f. The Duke-Stir

In the summer of 2002, through an intermediary, Cunningham approached the seller of a 42-foot Carver yacht then named the “Buoy Toy” (pictured at right) and eventually negotiated a price. On August 30, 2002, the day of the proposed sale, Cunningham and Coconspirator No. 2 showed up to conclude the sale. Cunningham introduced Coconspirator No. 2 as his “business partner.” Although the seller of the boat remained in contact with Cunningham (occupying a boat slip in the same yacht club as Cunningham), this August 30, 2002 meeting was the first and last time the seller saw or heard of Cunningham’s “business partner.”



Shortly after its purchase, Cunningham moved the yacht into his personal slip at the Capital Yacht Club. Cunningham later caused the name of the boat to be changed to “Duke-Stir,” a not-so-subtle play on Cunningham’s nickname, “Duke.” In explaining the change from the name “Buoy Toy,” Cunningham commented that, “I bought the boat, not the lifestyle.” From late 2002 through May 2005, Cunningham often resided on the Duke-Stir while he was in Washington. By May 2005, Cunningham had placed the Duke-Stir up for sale, and was talking openly about using the proceeds to purchase another yacht. This plan was undone when Cunningham’s corruption came to light in June 2005.¹¹

f. Kelly C Moving Expenses

In the Fall of 2002, Cunningham demanded that Coconspirator No. 2 pay \$16,867.13 for a new engine and other repairs to his 65-foot houseboat, the “Kelly C,” which he was preparing to

¹¹ The PSR incorrectly states that the Government views \$140,000 as a conservative valuation for the bribe represented by the Duke-Stir. PSR at 12:20-27. In fact, the Government views this valuation as aggressive, though supportable given numerous actions Cunningham took reflecting his apparent view that the boat was his to use and dispose of as he wished. But given that the scheme was undone before the Duke-Stir’s fate was decided by the conspirators, it is possible that a lower valuation, reflecting the use value of the boat over several years, is more appropriate. The PSR correctly notes that the Government views the valuation of this and other bribes as debatable, and not necessary to decide, given the joint position of the Government and the defense that the +16 recommended by the plea agreement, and the \$2.5 million bribe valuation cap to which it corresponds, are both fair and appropriate.

1 move to New York to be renovated by Coconspirator No. 4 (as described above). Cunningham also
2 demanded money to pay a crew to deliver the boat. On September 25, 2002, Coconspirator No. 2
3 paid a crew member \$600 for this purpose. Coconspirator No. 2 also paid Cunningham's mechanic
4 \$2,000 for his role in transporting the yacht.

5 g. Laser Shot Shooting Simulators

6 On July 28, 2003, Coconspirator No. 2 purchased three Laser Shot Shooting Simulators for
7 \$13,800. This device is used primarily by federal and state agencies to train officers on
8 marksmanship, shot placement and critical decision making skills. Among other things, the device
9 comes with recorded video scenarios that assists the shooter in evaluating the situation and making
10 appropriate shooting decisions. Coconspirator No. 2 and Cunningham split up these simulators, one
11 of which was installed in his Cunningham's Congressional Office on Capital Hill.

12 B. Obstruction of Justice and Other Concealment

13 Cunningham's efforts to conceal his criminal conduct included the abuse of his public office
14 (issuing official press releases containing false information), the creation of false documents, and
15 contacts with witnesses that were intended to influence their recollection and testimony. Both under
16 the Sentencing Guidelines under USSG 3C1.1, and under general sentencing precepts under 18
17 U.S.C. § 3553, these actions counsel in favor of additional punishment beyond that required to
18 address the underlying criminal conduct.

19 A. False Public Statements

20 i. Del Mar House Transaction

21 On June 12, 2005, the San Diego Union-Tribune newspaper reported that in November 2003,
22 Cunningham had sold his Del Mar, California home to an entity controlled by Conspirator No. 2.
23 The newspaper reported that the sales price was \$1,675,000, and that Coconspirator No. 2 had taken
24 a loss of \$700,000 on the resale of the home less eight months later. In an interview with the
25 newspaper (June 12) and in an official press release from his Congressional Office (June 13),
26 Cunningham denied any impropriety in the transaction, denied any special friendship with
27 Coconspirator No. 2, and denied having exerted any influence to ever favor Coconspirator No. 2's
28 company. Cunningham described himself as beyond even the appearance of impropriety in his

1 dealings with contractors: "If a contractor buys me lunch and we meet a second time, I buy the
2 lunch." Marcus Stern, *Lawmaker's home sale questioned*, S.D. U-T, June 12, 2005, at A1.
3 Cunningham denied that the sales price had been inflated in order to conceal a bribe payment,
4 claiming that the sale price was well founded and based upon objective information:

5 [Coconspirator No. 2] was interested in purchasing our home. He
6 received comparables from an independent source establishing the
7 value of the home. He made an offer based on that evaluation. Nancy
and I accepted that offer. I have no reason to believe the value of the
house was inflated then, and I have no reason to think so today.

8 William Bennett, *Cunningham defends real estate deal*, N.C. Times, June 13, 2005, at A1. As the
9 story continued to swirl in the press, on June 23, 2005, Cunningham made an even more definitive
10 statement, again using his public office to issue an official press release. This time, among other
11 false claims, Cunningham stated: "[A local relator] in Del Mar, California set the asking price for
12 our home." See Personal Statement from Congressman Cunningham, dated June 23, 2005, a
13 redacted version of which is attached as Exhibit A.

14 In fact, as detailed above, contractors bought Cunningham's breakfast, lunch, and dinner,
15 over and over, to the tune of tens of thousands of dollars. In fact, neither Coconspirator No. 2 nor
16 the realtor determined the price of Cunningham's home. Cunningham himself did. Twice.¹² In fact,
17 as Cunningham has now admitted, he "broke the law, concealed [his] conduct, and disgraced [his]
18 high office." See PSR at 41:40 (quoting post-plea statement by former Congressman Cunningham).

19 ii Duke-Stir Transaction

20 On June 16, 2005, newspapers (including the San Diego Union and the North County Times)
21 reported that Cunningham lived aboard a boat named the "Duke-Stir" while in Washington D.C.,
22 and that title to that boat was held by Coconspirator No. 2. Seven days later, in a June 23, 2005
23 public statement, Cunningham attempted to explain this additional disclosure. Cunningham claimed
24 to be a temporary paying tenant on Coconspirator No. 2's boat, asserting "that [he] only began living

25
26 ¹² In fact, during the search of Cunningham's Rancho Santa Fe home federal agents
27 uncovered several notations in which Cunningham appears to have been calculating the money
28 that may have been necessary to purchase the Rancho Santa Fe home. For example, one of the
notations arrives at 2.5 (the approximate purchase price of the Rancho Santa Fe home) by adding
1.5 (House), .5 (Coconspirator No. 1), and .5 (Loan). Another arrives at 2.8 by adding 2.3
(Coconspirator No. 2) and .5 (Coconspirator No. 1).

1 on [Coconspirator No. 2's] boat in roughly April 2004," and further stating as follows:

2 [Coconspirator No. 2] and I agreed that, in return for me staying on the boat, I would
3 pay the monthly dock fees and maintenance costs associated with keeping
4 [Coconspirator No. 2's] boat at the marina. There was nothing improper about my
5 arrangement with [Coconspirator No. 2] because I paid these monthly fees and costs
6 in lieu of rent. Based on the records that I have been able to locate to date, I have
7 paid well over \$8,000 for the dock fees and well over \$5,000 for service and
8 maintenance.

9 See Exhibit A. Cunningham added that his attorneys would make the payment records available
10 when collected.

11 In fact, Cunningham lived on the Duke-Stir on and off from when it was purchased in late
12 2002 to 2005, and was the only person to ever do so. In fact, Coconspirator No. 2 repaid
13 Cunningham for the docking fees at the Capital Yacht Club.¹³ In fact, Coconspirator No. 2 also paid
14 for service and maintenance of the Duke-Stir.

15 As one example of these payments: In mid-2004, Coconspirator No. 2 took a cash-filled
16 envelope to a fund-raiser that was being thrown at The Caucus Room restaurant in downtown
17 Washington, D.C., where he gave it to a third party with instructions that it was for Cunningham.
18 Cunningham informed one of his staffers, who ultimately delivered the envelope to him, that it
19 contained Coconspirator No. 2's half of \$13,000 in repairs to the Duke-Stir.

20 According to the same staffer, towards the end of 2004, he confronted Cunningham
21 regarding: (1) the Congressman's receipt of the cash from Coconspirator No. 2; (2) Coconspirator
22 No. 2's purchase of the Del Mar house; and (3) Cunningham's use of Coconspirator No. 2's boat.
23 The staffer told Cunningham that these transactions eventually were going to become public.
24 Accordingly, he requested that the Congressman either resign or announce that he would not seek
25 re-election. Although Cunningham initially entertained this proposal, he eventually decided he
26 would neither resign nor retire at the expiration of his term, prompting the staffer to resign himself.

27 ¹³ On November 1, 2002, Conspirator No. 2 issued a \$7,500 check (no. 4781) to
28 Duke Cunningham from his Navy Federal Credit Union account. The memo line of the check
indicates that it was for "Yacht Club Fees."

1 2. False Documents and Witness Tampering

2 a. Fabrication of Evidence - The Local Realtor

3 When Cunningham first learned of Coconspirator No. 2's \$975,000 sale price for
4 Cunningham's former Del Mar home, Cunningham told the realtor that the disparity between that
5 price and his earlier price of \$1.675 million could be damaging to him. Cunningham pressured the
6 realtor to prepare a justification for the lower selling price. The realtor was uncomfortable with
7 Cunningham's request, but agreed because she felt as if she had no choice. She therefore drafted a
8 letter to Cunningham in which she attempted to justify the lower price by, among other things,
9 suggesting that in 2004 trends had changed and the market had become more of a buyer's market.
10 After completing the letter, the realtor faxed it to Cunningham's Washington office. the realtor
11 acknowledges that she followed Cunningham's instructions in writing the in a manner designed to
12 help out Cunningham, rather than in a way that candidly or accurately reflected the San Diego real
13 estate market during the relevant periods. Although 2004 was somewhat less of a stellar year for
14 home appreciation than 2003, the overall San Diego housing market continued to appreciate at a
15 double-digit rate, fairly priced homes continued to receive multiple offers, and in no sense could the
16 market in San Diego generally, or Del Mar in particular, be fairly called a "buyer's market."

17 b. Fabrication of Evidence - Coconspirator No. 2

18 Having successfully pressured the
19 realtor into furnishing the above-described
20 letter, Cunningham turned to Coconspirator
21 No. 2 for the next step in his "cover-up" plan.
22 Cunningham drafted a letter to Coconspirator
23 No. 2 professing surprise and concern over
24 the low price generated by the sale of the Del
25 Mar property. This letter, which was really
26 nothing more than a crude attempt to get their
27 stories straight, asserted that Cunningham
28 would pay Coconspirator No. 2 the difference

I WAS BOTH SURPRISED AND CONCERNED WHEN I FOUND OUT THAT YOU SOLD THE HOUSE AT A MUCH LOWER PRICE THAN YOU PAID FOR IT. TWO CONCERNS: FIRST THE ORIGINAL INTENT WAS TO ESTABLISH A PLACE NEAR MCAS MIRAMAR FOR TEMPORARY RESIDENCE AND A PLACE TO CONDUCT BUSINESS. I KNOW THAT AFTER THE SALE WE MET WITH DOD TO FIND A PLACE AT MIRAMAR, PENDELTON, OR NORTH ISLAND BUT I ASSUMED YOU WOULD KEEP THE HOUSE AS A PLACE TO STAY. I WAS NOT CONCERNED WHEN I LEARNED YOU PLACED IT ON THE MARKET SINCE IT WAS FOR MORE THAN YOU PAID FOR IT. DAY BEFORE YESTERDAY I WAS TOLD THAT THE HOUSE SOLD FOR LESS THAN THE ORIGINAL PRICE. I CHECKED WITH THE BROKER AND SHE SAID THE MARKET AND SALES HAD DECLINED GREATLY SINCE THE TIME OF PURCHASE AND THAT YOU DISTRUSTED HER TO GET RID OF IT ASAP. I HAVE TAKEN PRIDE IN THAT CARS, HOUSES AND PROPERTY SOLD WERE FAIR WITH FULL DISCLOSURE THAT'S WHY I HAD ELIZABETH COMPILE AND SEND YOU ALL HOMES SOLD IN DELMAR INCLUDING TWO NEW ONES ON MY BLOCK WITH LESS FOOTAGE AND NO LIMITED OCEAN VIEW. THEY WERE OFFERED AT 1.5 M. I DO NOT WANT TO LOOSE OUR LONG TIME FRIENDSHIP OVER MONEY AND THE SALE ALSO CREATES A PERCEPTION THAT IS UNJUST BUT COULD LEAD TO POLITICAL ISSUES IN THE FUTURE.

THIS IS WHAT I WOULD LIKE TO DO TO MAINTAIN OUR FRIENDSHIP AND ELIMINATE ANY NEGATIVE PERCEPTION.

1. ESTABLISH THROUGH THE BROKER THE VALUE OF THE HOME IN TODAY'S DECLINING MARKET SINCE YOU LET IT GO IN A FIRE SALE IT WOULD BE FAIR FOR ME TO REPAY TO YOU THE DIFFERENCE OF THAT VALUE AND THE ORIGINAL SALES PRICE. TODAY I CAN CUT A CHECK IN GOOD FAITH FOR \$50,000. THE REMAINING BALANCE WILL BE PAID MONTHLY WITH INTEREST. PLEASE LET ME KNOW WHAT YOU WOULD LIKE TO DO. YOUR SUPPORT OF THIS NATIONS SECURITY AND FRIENDSHIP IS FAR MORE IMPORTANT THAN ANY DOLLAR AMOUNT.

2. I WILL REQUEST A COMPLETE ACCOUNTING FROM THE REALTOR.

YOUR FRIEND
RANDY CUNNINGHAM 

1 between the sales price he had paid Cunningham and the true fair market value of Cunningham's Del
2 Mar home. Cunningham did not furnish this letter to Coconspirator No. 2 until just before the first
3 story about this transaction was published. In the letter, Cunningham offered to pay \$50,000 to
4 Coconspirator No. 2 for his help. Although Cunningham flashed Coconspirator No. 2 a \$50,000
5 cashier's check, he never actually paid back any money from the Del Mar home transaction.

6 c. Fabrication of Evidence - Rug Dealer

7 Cunningham's attempts to tamper with
8 evidence were not limited to individuals with whom he
9 had a personal relationship. After the *Union-Tribune*
10 Story broke in June 2005, Cunningham sent a
11 handwritten note and a \$16,500 check to the rug dealer
12 from whom Coconspirator No. 2 had purchased the
13 \$15,200 worth of rugs that were shipped to
14 Cunningham in May 2005 (see above). In the note,
15 reproduced at right, Cunningham concocted a story
16 about having looked in vain for an invoice or address
17 to send payment when the rugs arrived at his
18 Escondido office. He then preposterously suggested
19 that he had previously sent a check for the rugs that
20 had been returned because he had the wrong address.¹⁴

*Mark Not Required w/ # 3122
3123
3122 user came with wrong
address
3125 told hockey to find out
what address & said 3122
it she did before I got ready
A/C Council*

*when hogg arrived i called
my staff and asked to find
invoice they could not
and when we talked they
out could not find the
normal invoice - (00)
I think the # was 16,500
if higher or lower I will
make the change -*

*202 225 6452 W
202 225 4949 Cell
458 2049904
202 484 7775 -*

*Rest of DC call
I see Rarely at 45775*

Randy Bury

26 ¹⁴ Cunningham added that, "I think the # was 16,500. If higher or lower I will make
27 the [unintelligible]," and that he was enclosing a \$16,500 check ("#3123") drawn on one of his
28 personal bank accounts. According to the rug dealer, it was clear that Coconspirator No. 2 had
paid for the rugs; he and Cunningham had no discussions about the price of Cunningham's rugs
nor about any money that was owed for the rugs; and the rugs were shipped with packing labels
that reflected his store's address—the same address the store had used for over a decade.

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d. Witness Tampering - Antique Dealer

The owner of the antique store from which Coconspirator No. 2 had purchased approximately \$190,000 worth of antiques between November 10, 2001 and November 16, 2003 received a phone call from Cunningham on August 1, 2005. Cunningham had attempted to convince both the dealer and an employee to vouch for a false cover story for him. Specifically, Cunningham tried to convince the dealer to say that the dealer had seen Cunningham give Coconspirator No. 2 cash when the pair purchased antiques in the store – an assertion Cunningham has now admitted to be false. The dealer replied that she had never seen Cunningham do any such thing. Despite the dealer’s denials, Cunningham continued to insist that he had given Coconspirator No. 2 approximately \$35,000 in cash while Cunningham and Coconspirator No. 2 were in the store.

e. Witness Tampering - Antique Dealer Employee

Earlier that same day, Cunningham had telephoned an employee of the antique dealer. Cunningham asked whether the store had recently had any “visitors,” which the employee understood to be a reference to the FBI, who had recently “visited” the store. Cunningham’s voice seemed anxious to the employee, and at one point, when there was a click on the line, Cunningham seemed concerned and asked what the noise was. The employee assured Cunningham that the noise was simply the employee switching telephones. Cunningham “reminded” the employee that Cunningham had reimbursed Coconspirator No. 2 in cash for antiques purchased in the store. The employee stated that he had not seen any such thing. When Cunningham persisted, the employee pointed out that he did not handle transactions and so would not have seen what Cunningham was suggesting. He asked Cunningham to speak with the antique dealer herself, which led to the conversation described above.

III.

SENTENCING ANALYSIS

A. USE OF SENTENCING GUIDELINES

The government urges that the Court impose a sentence in accordance with the calculations prescribed by the Sentencing Guidelines. Although United States v. Booker, 543 U.S. 220 (2005) held that the Sentencing Guidelines are no longer mandatory, Justice Breyer’s majority opinion

1 directed that “district courts, while not bound to apply the Guidelines, must consult those Guidelines
2 and take them into account when sentencing.” Id. at 264. Sentences will be subject to review by the
3 Courts of Appeals for “unreasonableness.” Id. at 224.

4 The position of the United States is that, absent highly unusual circumstances, the reasonable
5 sentence for criminal cases should fall within the Sentencing Guidelines range. The Sentencing
6 Guidelines are the product of an expert commission that studied thousands of individual cases, by
7 mandate of Congress and with its frequent input, to create guidelines that would uniformly advance
8 the goals of sentencing, including all factors courts may now independently consider under Booker.
9 United States v. Wilson, 355 F.Supp.2d 1269, 1276, 1280-81 (D. Utah 2005). The inevitable
10 consequence of less deference to the Guidelines will be greater sentencing disparity: the greater the
11 deviance from the Guidelines, the more it will matter which judge or judicial district pronounces
12 sentence. Where the Guidelines recommend heavy weight to one aspect of offense conduct, or less
13 weight to another, those recommendations are the product of much effort by sentencing experts
14 working towards goals of equal justice, fidelity to the will of the people, and advancement of the
15 goals of sentencing. Id. They should not be discarded lightly. The government respectfully
16 recommends that the Court sentence the defendant within the guideline range calculated herein.

17 B. CHAPTER TWO (OFFENSE CONDUCT) GUIDELINE CALCULATIONS

18 Defendant pled guilty to a multi-object conspiracy in violation of 18 U.S.C. § 371, and one
19 count of tax evasion in violation of 26 U.S.C. § 7201. Although the parties understand that the
20 Guidelines are only advisory and just one of the factors that the Court will consider under Title 18,
21 United States Code, Section 3553 (a), the parties have nevertheless jointly agreed that the Court
22 should utilize the November 2004 Guideline Manual and the following Base Offense Levels,
23 Specific Offense Characteristics, and Adjustments set forth in the guidelines:

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27 \\\

28 \\\

1 1. Conspiracy to Commit Bribery and Honest Services Fraud

2 Offense guideline section 2C1.1 governs convictions for bribery and honest services fraud.
3 See Appendix A (Statutory Index). The stipulated Chapter 2 calculations for defendant’s bribery and
4 honest services fraud are as follows:

5 Base Offense Level [2C1.1(a)(1)]	14
6 More than one bribe [2C1.1(b)(1)]	+2
7 Value of payment/benefits received [2C1.1(b)(2)]	+16
8 Elected Public Official [2C.1(b)(3)]	+4
9 TOTAL	<u>36</u>

10 The facts supporting these guideline calculations are set forth above and in defendant Cunningham’s
11 plea agreement. The PSR supports each of these recommendations. PSR at 39-40. Given this
12 unanimity, the Government will not further belabor these calculations.

13 2. Tax Evasion

14 Offense guideline section 2T1.1 governs convictions for tax evasion. See Appendix A
15 (Statutory Index) to Sentencing Guidelines (cross-referencing 26 U.S.C. § 7201 and USSG 2T1.1).
16 The stipulated Chapter 2 calculations for defendant’s tax evasion offense are as follows:

17 Base Offense Level [2T4.1(H) (\$400K > loss < \$1M)]	20
18 Failure to Report > \$10,000 in one year [2T1.1(b)(1)]	+2
19 Sophisticated Means [2T1.1(b)(2)]	+2
20 TOTAL	<u>24</u>

21 The facts supporting these guideline calculations are set forth above and in defendant Cunningham’s
22 plea agreement. Further, the parties agree with the PSR (though for different reasons) that the tax
23 guidelines effectively fall out during grouping analysis, and that the sentence is driven exclusively
24 by the bribery/honest services fraud guidelines. PSR at 38. Given the unanimity of opinion on this
25 issue, the Government will not further belabor the tax calculations.

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1 C. ADJUSTMENTS, GROUPING, AND DEPARTURES

2 1. Summary

3	Highest Group Offense Level [3D1.1(a)]	1 unit
4	Second group (tax) over 9 levels less serious [3D1.4(b)]	+0 units
5	Total Grouped Offense Level	<u>36</u>
6	Aggravating Role [3B1.1]	+3
7	Obstruction of Justice [3C1.1]	+2
8	Acceptance or Responsibility [3E1.1]	-3
9	Substantial Assistance [5K1.1]	<u>-2</u>
10	TOTAL OFFENSE LEVEL	<u>36</u>

11 The above calculations result in a Total Offense Level of 36 and a guideline range of 188 to 235
12 months at Criminal History Category I.

13 The parties and the PSR all agree that -3 for acceptance of responsibility is proper. *See* PSR
14 at 42. Discussion of the upward adjustments and downward departure follows.

15 2. Aggravating Role

16 The summary of Cunningham's criminal conduct set forth above makes clear that he directed
17 a lengthy and widespread bribery, money laundering, and tax evasion scheme directed at enriching
18 himself. Cunningham was not only the central object of the conspiracy; he also made the critical
19 decisions. It was Cunningham, not his co-conspirators, who decided which co-conspirator would
20 obtain which defense contract. It was Cunningham who decided what sum of money would be
21 required for his official actions. It was Cunningham who decided how payment of that money would
22 be concealed.

23 It was Cunningham who told Coconspirator No. 2 that Coconspirator No. 2 would pay \$1.5
24 million for Cunningham's Del Mar home. It was Cunningham who decided, two days later, that
25 Coconspirator No. 2 would instead pay \$1.675 million for the same home. It was Cunningham who
26 directed the local realtor to write a misleading letter to explain how Coconspirator No. 2 could suffer
27 a \$700,000 loss while selling the same house into one of the greatest real estate booms in memory.

28 As the Court reviews the facts, in each instance, it is beyond cavil that Cunningham was

1 calling the shots. And it should be clear that in doing so, Cunningham directed the activities of
2 numerous criminally culpable participants, including his four described coconspirators. In addition,
3 Cunningham and his coconspirators used the unknowing services of many others, including:
4 (1) various employees of those coconspirators; (2) Cunningham's own staff members, whom he used
5 to, among other things, improperly influence Executive Branch officials in favor of the corrupt
6 contractors; (3) persons employed by various vendors; and (4) third-party agents such as the local
7 realtor. The meaningful debate is not whether a leadership role is required, but only what level of
8 upward adjustment is required.

9 The PSR recommends a 3-level upward adjustment, reasoning that while "it is clear that
10 Cunningham directed the activities of others to facilitate the commission of the criminal activity,"
11 his conduct was not truly akin to that "of a four-level" organizer. PSR at 41. The government cannot
12 quarrel with this analysis. None of the staff of Cunningham's Congressional Office have been
13 accused of knowingly participating in his criminal scheme. Although there were numerous others
14 directed by Cunningham to do various things in furtherance of his crimes, these persons did not fall
15 within a given hierarchical structure, but instead were disparate individuals pursuing different
16 interests, not accountable to one another or even to Cunningham in many senses. For these reasons,
17 the United States concurs in the Probation Office's recommendation of a 3-level upward adjustment
18 for aggravating role under USSG § 3B1.1.

19 3. Obstruction of Justice

20 Under 3C1.1, if a defendant attempts to obstruct or impede the administration of justice
21 during the course of the Government's investigation of the criminal conduct for which he is
22 convicted, a two-level upward adjustment is mandatory. United States v. Anchetta, 38 F.3d 1114,
23 1117-18 (9th Cir. 1994).

24 In the present case, Cunningham engaged in obstructive conduct both early and often.
25 Beginning with his false comments to the reporter who first broke the story on June 12, 2005,
26 continuing with his false press releases of June 13, 2005 and June 23, 2005, his false notes to the rug
27 dealer and Coconspirator No. 2 in June 2005, and concluding with his witness tampering with the
28 antique dealer and her employee in August 2005, Cunningham consistently demonstrated a

1 willingness to mislead law enforcement and to encourage others to do so as well. Indeed, this is
2 demonstrated as far back as November 2004 when Cunningham pressured the local realtor to help
3 him explain away Coconspirator No. 2's loss from the resale of Cunningham's Del Mar home.
4 Moreover, Cunningham not only tampered with witnesses whom he knew were in contact with the
5 FBI, he directly provided misleading evidence to the United States Attorney's Office, in the form
6 of the misleading documents discussed in section II.B., above.¹⁵

7 Based upon defendant Cunningham's repeated and egregious attempts to both fabricate
8 evidence and influence witnesses, the government agrees with the Probation Office that
9 Cunningham's offense level should be increased two levels for obstruction of justice. PSR at 2.

10 4. Cooperation

11 This Court may depart from the Guidelines, "[u]pon motion of the Government stating that
12 the defendant has provided substantial assistance in the investigation or prosecution of another
13 person. . . ." USSG 5K1.1. The background to Section 5K1.1 indicates that the "nature, extent, and
14 significance of assistance can involve a broad spectrum of conduct that must be evaluated by the
15 court on an individual basis."

16 For the reasons to be set forth in the government's confidential communication to the Court
17 on this subject, the government recommends a two-level downward departure under section 5K1.1.
18 The government may request further sentence reductions under Fed. R.Crim.P. 35 in the future.

19 D. GOVERNMENT'S SENTENCING RECOMMENDATION

20 The Government believes that the Guideline calculations set forth above adequately address
21 all significant equities and considerations. Taking into account other matters such as defendant's
22 age, health condition, and recent conduct, the Government recommends that Defendant be sentenced
23 to the low end of the guideline range corresponding to offense level 36: a sentence of 188 months.
24 As the two counts of conviction allow for the imposition of no more than 120 months collectively,
25 the Government asks that the Court sentence the Defendant to 60 months (5 years) on Count 1 and

26
27 ¹⁵ While the United States recognizes that Cunningham's production of these
28 documents was compelled by the subpoena issued to him, he would not have created, or caused
to be created, these documents unless he intended to use them to mislead others (including law
enforcement) as to the true nature of the Del Mar home transaction.

1 60 months (5 years) on Count 2. Pursuant to the plea agreement, the Government further requests
2 that the Court order that these sentences be served consecutively.

3 E. MONETARY PENALTIES

4 1. Special Assessment

5 A \$200 special assessment is mandatory, \$100 for each of count of conviction.

6 2. Fine

7 The government believes that the defendant's forfeiture of his proceeds of the sale of his
8 Rancho Santa Fe home, the forfeiture of his furniture, and the large outstanding tax penalty render
9 a fine unnecessary and unlikely to be paid.

10 3. Restitution

11 In general, "restitution in a criminal case may only compensate a victim for actual losses
12 caused by the defendant's criminal conduct." United States v. Gamma Tech Indus., Inc., 265 F.3d
13 917, 926 (9th Cir.2001) (citing 18 U.S.C. 3664(a) and United States v. Rodrigues, 229 F.3d 842, 845
14 (9th Cir.2000)); 18 USC 3663A(a)(2). In a conviction for conspiracy to defraud the United States
15 under 18 USC 371, the victim is the United States. United States v. Gee, 432 F.3d 713, 715 (7th Cir.
16 2005). A defendant convicted of bribery may properly be ordered to pay restitution designed to
17 make the victim whole, id., or to disgorge the total amount of bribes received. United States v.
18 Gaytan, 342 F.3d 1010, 1011-12 (9th Cir. 2003). In light of Cunningham's agreement to forfeit the
19 bribes he received, the United States recommends no further restitution order be imposed based upon
20 the bribery and honest services fraud aspects of his conviction.

21 Nevertheless, restitution to the Internal Revenue Service-- i.e., payment of back taxes--may
22 be ordered as a condition of probation or supervised release. 18 U.S.C. §§ 3563(b)(3), 3583(d);
23 United States v. Butler, 297 F.3d 505, 519 (6th Cir. 2002). Although restitution orders for back
24 taxes must be limited to the years of conviction, United States v. Green, 735 F.2d 1203, 1205 (9th
25 Cir. 1984), Cunningham pled guilty to a conspiracy to evade his taxes spanning the years 2000
26 through 2004. Moreover, in the parties' plea agreement, Cunningham agreed to pay any tax liability,
27 including interest and penalties, for the years 2002 through 2004. With penalties and interest,
28 Cunningham owes the IRS \$1,569,869.48. Accordingly, the Government recommends that the Court

1 order as a condition of Cunningham's supervised release that he pay this tax liability to the IRS, in
2 a manner to be overseen and determined by the Court and the Probation Office.¹⁶

3 4. Forfeiture

4 The parties' plea agreement contains a forfeiture section at pages 18-20. Accordingly, the
5 Government requests that the Court order the forfeiture of the items listed on those pages according
6 to the terms of the parties' agreement. The Government will present the Court with a proposed
7 forfeiture order in advance of the sentencing hearing.

8 IV.

9 CONCLUSION

10 For the reasons stated above, the government recommends that the Court sentence Defendant
11 Cunningham to 10 years imprisonment, followed by 3 years of supervised release, and order him to
12 pay his tax outstanding tax obligation (currently calculated as \$1,569,869.48), forfeit \$1,851,508,
13 plus all his interest in the proceeds from the sale of his Rancho Santa Fe residence, and pay a
14 mandatory \$200 special assessment.

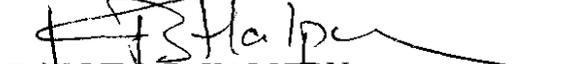
15
16 Dated: February 17, 2006

17 Respectfully submitted,

18 CAROL C. LAM
United States Attorney

19 
20 SANJAY BHANDARI
Assistant United States Attorney

21 
22 JASON A. FORGE
Assistant United States Attorney

23 
24 PHILLIP L.B. HALPERN
Assistant U.S. Attorney

25
26
27 ¹⁶ In ordering restitution, however, this Court should consider "the amount of the
28 loss sustained by any victim as a result of the offense, the financial resources of the defendant,
the financial needs and earning ability of the defendant and the defendant's dependants, and such
other factors as the court deems appropriate." 18 USC 3664(a).

EXHIBIT A

TODAY'S NEWS HEADLINE

California's 50th District Congressman Randy "Duke" Cunningham

FOR IMMEDIATE RELEASE:
June 23, 2005

CONTACT: [REDACTED]
[REDACTED]

Personal Statement from Congressman Cunningham

"In recent weeks, serious questions have been raised about my conduct in office. First and foremost, I want my constituents to know that I have acted honorably and honestly. I recognize, however, that I showed poor judgment in selling my home in Del Mar to a friend who does business with the government. At the time of the sale, I failed to adequately consider how this transaction might be perceived by others who don't know me. However, my work in Congress is and has always been directed at programs and policies that I believe are in the best interest of our nation and my constituents. I have always felt a duty to this country and its people -- a duty that motivated me to volunteer for the Navy, serve in combat in Viet Nam, and run for office. I would never put the interests of a friend or a contractor above the interests of my country. I trust that the facts will bear out this truth over time.

I welcome any and all appropriate investigations. I have faith that any investigation of these allegations will confirm that I have acted honestly. My constituents know me to be the same fighter that has always fought for this nation, whether in uniform or in the halls of Congress. They can be assured that I will continue to defend both my reputation and their interests in Washington.

Because there is now a legal inquiry underway, I do not think it is appropriate for me to publicly address all of the specific questions that may be the subject of that inquiry. However, I do want to explain my relationship with [REDACTED], the sale of my home in Del Mar, and my support for human intelligence programs in the U.S. military. From this point forward, any further questions should be directed to my legal counsel.

[REDACTED] and I have been friends for many years and continue to be friends today. Though I first met [REDACTED] in connection with his work as a defense contractor, Nancy and I came to know [REDACTED] and his wife [REDACTED] personally over the years. My family and I have socialized with the [REDACTED] on numerous occasions. The [REDACTED] have also occasionally asked Nancy and me to support important charitable causes with which they are affiliated and we have willingly done so. This includes the Sure Foundation, which offers financial assistance to refugee children dislocated by war or civil unrest. Nancy and I have been pleased to assist the Sure Foundation's important mission with our time,

charitable contributions and political support. I want my constituents to know that, despite my personal friendship with ██████, I gave his company, ██████, no preferential treatment.

██████ provides highly classified human intelligence support to the U.S. Military. While I am not at liberty to discuss the specifics of ██████'s classified work, I can say that in 2003 ██████ was actively seeking space for its operations close to Miramar Marine Corps Air Station. ██████ shared with me that his company hoped to acquire space where he could locate highly secure communications equipment along with quarters for employees visiting from other cities. I informed ██████ that Nancy and I were contemplating selling our home in the Del Mar Heights neighborhood, which is close to Miramar. After learning about the size and location of our property, ██████ advised me that ██████ would be interested in purchasing our house. I understood that ██████ wanted the property for use as an office and as corporate housing until such time as ██████ could locate more secure facilities for its operations at one of the military installations in the San Diego area. However, my understanding was that ██████ would retain ownership of the property for use as corporate housing even if ██████ was able to locate a more secure facility for their office operations at Miramar.

██████████ a realtor with the Willis Allen Company in Del Mar, set the asking price for our home. ██████ and her husband are friends of mine and as a friend, she was kind enough to research the sale prices of similar homes in my neighborhood. Our home in Del Mar Heights was located in a desirable area west of Interstate 5 between the highway and the ocean. It was a large, two-story home measuring 3,826 square feet with 4 bedrooms, 3.5 baths and a limited ocean view from a loft on the top floor. My understanding is that the asking price recommended by ██████ was very close to the average sale price per square foot of other homes sold in my neighborhood in the six months prior to the sale. Based on the information provided by ██████ about comparable sale prices in my area, I thought the asking price was fair and reasonable. When I gave ██████ the asking price, he requested that I provide him with evidence of comparable sales to substantiate the price. I then asked ██████ to send ██████ the information he requested and my understanding is that she did so. After reviewing the information provided by ██████, ██████ confirmed that he wanted to purchase our home in Del Mar Heights for use by MZM.

I did not list my home in Del Mar Heights for sale or hire a real estate agent to sell the property because ██████ had already indicated an interest in the property and, like most people selling their own home, I hoped to avoid the additional costs associated with selling a house through a broker. Again, I recognize that I showed poor judgment in not listing the house publicly for sale. I should have given more thought to the perception that it might create.

Recent press reports have incorrectly suggested that I secured a government contract for ██████'s company or that I improperly influenced the awarding of contracts to ██████. These reports are simply false. I do not have the authority or ability to award a contract to ██████'s company and no single Member of Congress, no matter how influential,

can dictate to the Armed Services who will be awarded contracts. In fact, my understanding is that the Defense Department awarded ██████ a contract in May 2002, a full year and half before ██████ purchased my home in Del Mar Heights. I advocated funding of a human intelligence program that was supported by the military, and confirmed with the Defense Department that the program had significant value to military effectiveness. Funding for this program was also supported by the full House Appropriations Committee, both Houses of Congress and the President. In short, I categorically reject any suggestion that I secured a contract for ██████'s company or that I supported funding of this important human intelligence program because ██████ purchased my home in Del Mar Heights.

Finally, recent news reports have questioned whether it was appropriate for me to live on a boat owned by ██████ while I was working in Washington. It is important to note that I first came to Congress in 1991, and I only began living on ██████'s boat in roughly April 2004. ██████ and I agreed that, in return for me staying on the boat, I would pay the monthly dock fees and maintenance costs associated with keeping ██████'s boat at the marina. There was nothing improper about my arrangement with ██████ because I paid these monthly fees and costs in lieu of rent. Based on the records that I have been able to locate to date, I have paid well over \$8,000 for the dock fees and well over \$5,000 for service and maintenance. My attorneys are collecting the full payment records now and will make them available when they are all gathered.

I am deeply saddened by this distraction from my regular duties. However, I intend to focus my time and attention on the needs of the people of the 50th district. I ask only that my constituents reserve judgment until any investigation is concluded and I have had the opportunity to defend myself against these false allegations.

This year will mark the 36th year that I have stood in service to this nation – first as a young man volunteering to join the U.S. Navy at a time of war and great unrest, and more recently as a United States Congressman. I have had many proud moments in my career.

I am most proud of the work I do for and with the people of my district.

I continue to lead Congress' work to dramatically increase federal funding for health and medical research – promoting both our national healthcare needs and the economic health of our local bio-technology industry.

I work for economic security in San Diego and our vital national security through funding for important defense and homeland security programs that have created and protected jobs for thousands of my San Diego County constituents. And through road, rail and other transportation funding, I work to help get hard-working San Diegans home to their families as quickly as possible every day so they can continue to enjoy all the life that our beautiful region has to offer.

Perhaps most importantly, I believe the work I am doing with educators and policy makers nationwide to improve education in San Diego and across the country will help lead our children to a better life than their parents enjoy today.

I have always done this job in the interest of my nation and my constituents. And I want the people of California's 50th Congressional district to know that my drive to continue this work on their behalf is as strong today as it was when I first ran for Congress 15 years ago. I have always been humbled by the faith that my district has had in my leadership, and I will continue to work to earn their respect and endorsement."

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UNITED STATES OF AMERICA
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,) Case No. 05cr2137-LAB
)
Plaintiff,)
)
v.)
) CERTIFICATE OF SERVICE
RANDALL HAROLD CUNNINGHAM) BY U.S. MAIL
aka Randy "Duke" Cunningham)
)
Defendant.)
_____)

IT IS HEREBY CERTIFIED THAT:

I, ShaKenya Edison, am a citizen of the United States over the age of eighteen years and a resident of San Diego County, California. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893. I am not a party to the above-entitled action; and subsequent to filing with the Clerk of the Court, I have deposited in the United States mail at San Diego, California, a copy of

GOVERNMENT'S SENTENCING MEMORANDUM addressed to:

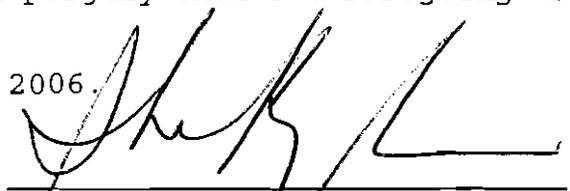
**Mark Holscher
Kristina M. Hersey
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, CA 90071-2899**

**K. Lee Blalack, II
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006**

the last known address, at which place there is delivery service of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 17, 2006.



SHAKENYA EDISON