



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

September 26, 2005

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2005-11

Mr. Kenneth Batson  
Treasurer  
Friends of Duke Cunningham  
P.O. Box 697  
San Marcos, CA 92079

Dear Mr. Batson:

We are responding to your advisory opinion request on behalf of Friends of Duke Cunningham, Representative Randall “Duke” Cunningham’s principal campaign committee (the “Committee”), concerning the application of the Federal Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations to the use of campaign funds to pay legal fees and expenses incurred by Representative Cunningham in connection with a grand jury investigation. The Commission concludes that the Committee may use campaign funds to pay for the legal fees and expenses incurred in connection with the grand jury investigation and legal proceedings that may arise from this investigation because the investigation concerns allegations that are related to Representative Cunningham’s campaign activities or his duties as a Federal officeholder and the legal fees and expenses would not exist irrespective of Representative Cunningham’s campaign or duties as a Federal officeholder. The Committee may also use campaign funds to pay for the legal fees and expenses incurred in responding to the press regarding the grand jury investigation and legal proceedings that may arise from this investigation.

***Background***

The facts of this request are presented in your letter received on August 3, 2005, and the attachments thereto, as supplemented on August 10, 2005, and on Representative Cunningham’s official website.<sup>1</sup>

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<sup>1</sup> <http://cunningham.house.gov/>

Representative Cunningham is the U.S. Representative from the 50th Congressional District of California and is a member of the Permanent Select Committee on Intelligence and the House Appropriations Defense Subcommittee.

Your request states that the United States Attorney for the Southern District of California recently convened a grand jury “purporting to investigate matters related to Representative Cunningham’s conduct in office and campaign fundraising.” The grand jury subpoenaed testimony from Representative Cunningham’s Congressional staff, as well as records from the files of his Congressional office. The grand jury also subpoenaed records pertaining to contributions to Representative Cunningham’s campaign accounts and the Committee’s fundraising activities. Although the details of the grand jury’s investigation are not public at this time, the media reports you submitted indicate that the investigation appears to be based on two principal allegations: (1) in November 2003, Mitchell Wade, founder and president of MZM, Inc. (“MZM”), a Federal defense contractor, purchased a house owned by Representative Cunningham allegedly at a price above market value, allegedly in order to support MZM’s efforts to secure defense contracts with the U.S. Department of Defense; and (2) Mr. Wade allegedly allowed Representative Cunningham to live rent-free on Mr. Wade’s yacht for 13 months.

### ***Questions Presented***

- 1. May the Committee use campaign funds to pay legal fees and expenses incurred by Representative Cunningham in connection with the grand jury investigation and legal proceedings that may arise from this investigation?*
- 2. May the Committee use campaign funds to pay legal fees and expenses incurred by Representative Cunningham in responding to the press regarding the grand jury investigation and legal proceedings that may arise from this investigation?*

### ***Legal Analysis and Conclusions***

*Question 1. May the Committee use campaign funds to pay legal fees and expenses incurred by Representative Cunningham in connection with the grand jury investigation and legal proceedings that may arise from this investigation?*

Yes, the Committee may use campaign funds to pay for the legal fees and expenses incurred in connection with the grand jury investigation and legal proceedings that may arise from this investigation because the investigation concerns allegations that are related to Representative Cunningham’s campaign activities or his duties as a Federal officeholder, or both, and the legal fees and expenses would not exist irrespective of Representative Cunningham’s campaign or duties as a Federal officeholder.

The Act identifies six categories of permissible uses of contributions accepted by a Federal candidate. They are: (1) otherwise authorized expenditures in connection with the candidate’s campaign for Federal office; (2) ordinary and necessary expenses

incurred in connection with the duties of the individual as a holder of Federal office; (3) contributions to organizations described in 26 U.S.C. 170(c); (4) transfers, without limitation, to national, State or local political party committees; (5) donations to State and local candidates subject to the provisions of State law; and (6) any other lawful purpose not prohibited by 2 U.S.C. 439a(b). *See* 2 U.S.C. 439a(a); *see also* 11 CFR 113.2(a) through (c).

Contributions accepted by a candidate may not, however, be converted to “personal use” by any person. 2 U.S.C. 439a(b)(1); 11 CFR 113.2. Commission regulations define “personal use” as “any use of funds in a campaign account of a present or former candidate to fulfill a commitment, obligation or expense of any person that would exist irrespective of the candidate’s campaign or duties as a Federal officeholder.” 11 CFR 113.1(g); *see also* 2 U.S.C. 439a(b)(2).

The Act and Commission regulations list a number of expense categories that would constitute *per se* personal use, such as household food items or supplies, clothing, tuition payments, home mortgage, rent, and utility payments. *See* 2 U.S.C. 439a(b)(2); 11 CFR 113.1(g)(1)(i). This list does not include legal fees and expenses. The Commission considers on a case-by-case basis whether specific, unlisted uses constitute “personal use.” *See* 11 CFR 113.1(g)(1)(ii). Further, Commission regulations specifically provide a non-exhaustive list of uses, including “legal expenses,” that are subject to a case-by-case examination. 11 CFR 113.1(g)(1)(ii). Accordingly, the Commission analyzes the payment of legal fees and expenses on a case-by-case basis under 11 CFR 113.1(g)(1)(ii)(A).

The Commission has previously concluded that any legal fees and expenses incurred in legal proceedings involving allegations concerning the candidate’s campaign activities or duties as a Federal officeholder would not exist irrespective of the candidate’s campaign or duties as a Federal officeholder and therefore may be paid for with campaign funds. *See* Advisory Opinions 2003-17, 1998-1, 1997-12, 1996-24, and 1995-23.

Here, you represent that Representative Cunningham will incur legal fees and expenses associated with a grand jury investigation involving allegations relating to Representative Cunningham’s campaign activities or duties as a Federal officeholder, or both. According to the media reports you submitted, the grand jury investigation appears to focus on allegations that Representative Cunningham obtained benefits (*i.e.*, the sale of his house at an above-market price and a rent-free stay on a yacht) from Mr. Wade because of his status as a U.S. Representative and his position on the Permanent Select Committee on Intelligence and the House Appropriations Defense Subcommittee. Thus, based on the representations made in your request and the submitted news articles, the Commission concludes that the legal fees and expenses associated with the grand jury investigation would not exist irrespective of Representative Cunningham’s campaign or duties as Federal officeholder. Accordingly, the Committee may use campaign funds to pay for legal fees and expenses incurred in connection with the grand jury investigation and legal proceedings that may arise from this investigation.

Because the details of the grand jury investigation are not public at this time, however, it is possible that portions of the investigation could involve allegations not related to Representative Cunningham's campaign activities or his duties as a Federal officeholder. The use of campaign funds to pay for Representative Cunningham's representation in legal proceedings regarding any allegations that are not related to his campaign activity or duties as a Federal officeholder would constitute an impermissible personal use. See Advisory Opinion 2003-17; see also Advisory Opinion 1993-15 (determining that counts within an indictment could be severed, depending upon whether the counts were related to campaign activity).

*Question 2. May the Committee use campaign funds to pay legal fees and expenses incurred by Representative Cunningham in responding to the press regarding the grand jury investigation and legal proceedings that may arise from this investigation?*

Yes, the Committee may use campaign funds to pay for the legal fees and expenses incurred in responding to the press regarding the grand jury investigation and legal proceedings that may arise from this investigation.

In the past, the Commission has determined that legal fees and expenses incurred to respond to the press regarding allegations that concern the candidate's campaign activities or duties as a Federal officeholder would not exist irrespective of the candidate's campaign or duties as a Federal officeholder and therefore may be paid for with campaign funds. *See* Advisory Opinions 1998-1, 1997-12. Accordingly, Representative Cunningham may use campaign funds to pay for the legal fees and expenses incurred in responding to the press regarding the grand jury investigation and legal proceedings that may arise from this investigation.

The Commission notes that in the event that the grand jury investigation involves allegations that are *not* related to Representative Cunningham's campaign activities or his duties as a Federal officeholder, the Committee may also be permitted to use campaign funds to pay for certain legal fees and expenses incurred in responding to press inquiries and stories involving the grand jury and legal proceedings arising from it. *See* Advisory Opinions 1998-1 and 1997-12. In these Advisory Opinions, the Commission concluded that for allegations that do not concern campaign or officeholder activity, campaign funds may be used to pay for 100% of any legal fees and expenses related to dealing with the press such as preparing a press release, appearing at a press conference, or meeting or talking with reporters. Campaign funds may also be used to pay for 50% of any other legal fees and expenses incurred in researching and preparing substantive responses to the press regarding allegations that do not concern campaign or officeholder activity.

In accordance with 11 CFR 102.9(b) and 104.11(b), the Committee must maintain appropriate documentation of any disbursements made to pay legal fees and expenses incurred in connection with the grand jury investigation and legal proceedings that may arise from this investigation, including legal fees and expenses incurred in responding to the press. *See* Advisory Opinion 2003-17. In addition, the Committee must report all funds disbursed for such legal fees expenses as operating expenditures, with the purpose

noted. 11 CFR 104.3(b)(2) and (b)(4)(i); Advisory Opinions 2003-17, 1998-1, 1997-12, and 1996-24.

The Commission expresses no opinion regarding the application of state law and Federal tax or other law, or the rules of the House of Representatives to the proposed activities, because those questions are not within the Commission's jurisdiction.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity.

Sincerely,

(signed)

Scott E. Thomas  
Chairman

Enclosures (Advisory Opinions 2003-17, 1998-1, 1997-12, 1996-24, 1995-23, and 1993-15)