

Citizens for Responsibility and Ethics in Washington

August 11, 2005

Lawrence H. Norton
Office of the General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

BY FAX: 202-219-3923

RE: AOR 2005-11

Dear Mr. Norton:

*Comment on
AOR 2005-11*

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FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

Pursuant to 11 C.F.R. §112.3(a), Citizens for Responsibility and Ethics in Washington ("CREW") has the following comments regarding the Friends of Duke Cunningham Treasurer's request for an advisory opinion as to whether Representative Randy "Duke" Cunningham can use the funds from his principal campaign committee to pay legal fees and expenses.

The request for an advisory opinion contends that the United States Attorney for the Southern District of California recently convened a grand jury purporting to investigate matters related to Rep. Cunningham's conduct. The request states that the grand jury has subpoenaed testimony from Rep. Cunningham's congressional staff as well as records from the files of his congressional office. Rep. Cunningham's San Diego home and the boat on which he resided in Washington were also searched by federal agents. Several news reports regarding the criminal investigation are attached to the request.

These reports indicate that the U.S. Attorney is investigating Rep. Cunningham's sale of his house to defense contractor Mitchell Wade. Without putting the house on the open market, Rep. Cunningham sold the property to Wade, who then took a \$700,000 loss on the property when he resold it soon thereafter. At the same time, Wade's company, MZM, Inc. began to reel in tens of millions of dollars in defense and intelligence related contracts.

Other press reports attached to the request indicate that a subcommittee on which Rep. Cunningham sits authorized a \$100,000 federal grant to a foundation controlled by Wade and that Rep. Cunningham lived on a boat owned by Wade, but failed to pay rent.

CREW is aware the Commission has previously concluded that legal expenses in defense of allegations relating directly to a candidate's campaign activities or status as a federal officeholder may be paid for with campaign funds. Advisory Opinions 2003-17, 1998-1, 1997-12, 1996-24 and 1995-23. FEC regulations require, however, that the Commission consider requests to allow campaign funds to be used for legal expenses on a case-by-case basis. 11 C.F.R. §113.1(g)(1)(ii)(A).

Because Rep. Cunningham has not yet been indicted, it is unknown whether any of the eventual criminal charges filed against him will stem from campaign activity or his status as a



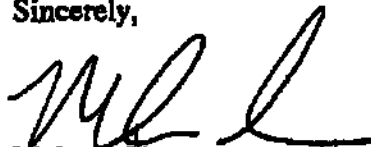
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federal officeholder. It seems likely, however, that at least some of the potential charges will not involve such activity.

The most serious charge Rep. Cunningham appears likely to face is bribery: Mitchell Wade paid Rep. Cunningham approximately \$700,000 more for his house than the house was worth and, in return, Rep. Cunningham helped steer defense contracts to Wade's firm. Because this \$700,000 was paid directly to Cunningham and not to any campaign committee associated with him, the allegation would not relate to campaign activities. As a result, Rep. Cunningham should not be permitted to use campaign funds to defray legal costs stemming from such a charge.

At the very least, CREW requests that the Commission defer making a decision as to whether Rep. Cunningham is entitled to use campaign funds to defray his legal costs until the U.S. Attorney issues an indictment. This would allow the Commission to make a more informed decision as to whether Rep. Cunningham's illegal actions stem from campaign activities or his status as a federal officeholder. Those who contributed to a campaign committee with the expectation that their contributions would be used to fund a political campaign deserve this consideration before their money is to fund a criminal defense team.

Sincerely,



Melanie Sloan
Executive Director
Citizens for Responsibility and
Ethics in Washington