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16  
17 **UNITED STATES DISTRICT COURT**  
18 **SOUTHERN DISTRICT OF CALIFORNIA**

19 UNITED STATES OF AMERICA,  
20  
21 Plaintiff,  
22  
23 v.  
24  
25 RANDALL HAROLD  
26 CUNNINGHAM,  
27  
28 Defendant.

Case No. 05-CR-2137 (LAB)

**DEFENDANT CUNNINGHAM'S  
SENTENCING MEMORANDUM**

Hearing Date: March 3, 2006  
Time: 1:00 p.m.  
Place: Courtroom 9  
Judge: Hon. Larry Alan Burns

1     **I. INTRODUCTION**

2             The Defendant, Randall Harold Cunningham, recognizes that he violated an  
3 important public trust and must be harshly punished. He does not ask this Court to look  
4 the other way. He does not request home confinement or supervised release. Mr.  
5 Cunningham agrees with the United States that his misconduct warrants a prison term --  
6 indeed, a lengthy prison term. On this point, there is no dispute.

7             But the parties disagree about what constitutes a *harsh* sentence and *lengthy* prison  
8 term. Thus, the central question for this Court is how much is enough? The United States  
9 requests -- and the Pre-Sentence Report recommends -- that Mr. Cunningham be  
10 sentenced to the statutory maximum of ten (10) years imprisonment. The United States  
11 understandably seeks to vindicate society's desire for a stiff sanction of public corruption.  
12 Accordingly, it assigns no value in its sentencing recommendation to the exceptional and  
13 life-long contribution that Mr. Cunningham has made to this country in times of war and  
14 peace. The Pre-Sentence Report acknowledges those substantial contributions -- indeed,  
15 historic contributions -- but then gives them no weight in its sentencing recommendation.  
16 Instead, it mechanically applies the Federal Sentencing Guidelines Manual to this case  
17 and, in so doing, declines to credit Mr. Cunningham's unique offender characteristics such  
18 as military service, civic contributions, charitable works, advanced age and medical  
19 condition.

20             Prior to the United States Supreme Court's decision in *Booker v. United States*, 543  
21 U.S. 220 (2005), such an approach to sentencing would have been authorized. But *Booker*  
22 recently held that the Sentencing Guidelines are no longer mandatory and instructed  
23 sentencing courts to tailor criminal punishment to the requirements of 18 U.S.C. §  
24 3553(a). To be sure, sentencing courts must still consider the Guidelines after *Booker*, but  
25 those *advisory* Guidelines are just one of seven (7) statutory factors that are pertinent to  
26 the Court's sentencing judgment. And, 18 U.S.C. § 3553(a)(1) specifically requires the  
27 Court to consider Mr. Cunningham's history and characteristics when imposing sentence.  
28 The Pre-Sentence Report demonstrates that -- notwithstanding his deplorable crimes ---

1 Mr. Cunningham has compiled a life-long record of national service that is rarely  
2 witnessed in a single man. More than forty (40) letters appended to this Memorandum  
3 from friends, acquaintances, former colleagues and constituents conclusively establish  
4 that he has given selflessly to others his entire life.

5 None of Mr. Cunningham's many accomplishments in the military, in his  
6 community or in the halls of Congress justify his misdeeds. There is – and can be – no  
7 justification for his breach of the public trust. In his statement of resignation from the  
8 United States House of Representatives and his letter to the Court, Mr. Cunningham offers  
9 no excuses and continues to accept full responsibility for his criminal conduct. But, Mr.  
10 Cunningham's history of service to others is relevant to his sentence because a just  
11 punishment must account for his entire life -- not simply his transgressions at its twilight.

12 Such a command is not borne just of common sense but also the express language  
13 of 18 U.S.C. § 3553(a), which cautions the Court to impose a sentence “sufficient, but not  
14 greater than necessary” to comply with the goals of punishment set forth in the statute.  
15 Therefore, the Court should not – and cannot – impose the statutory maximum sentence of  
16 ten (10) years if it concludes that a lesser sentence would be sufficient to satisfy the goals  
17 of punishment in the statute. Mr. Cunningham submits that a sentence of ten (10) years  
18 far exceeds the “necessary” punishment in this case.

19 Mr. Cunningham is now sixty-four (64) years old and, as the medical evidence  
20 referenced in this Memorandum indicates, he is of poor health. Accompanying this  
21 Memorandum is a letter and affidavit from Mr. Cunningham's treating physician at  
22 Bethesda Naval Hospital, which indicates that, given his two prior bouts with prostate  
23 cancer, Mr. Cunningham's estimated life expectancy is no more than seven (7) years.  
24 Under any sentencing scenario before the Court, Mr. Cunningham will be seventy (70)  
25 years old or more *if he survives his prison term*. Thus, the statutory maximum sentence  
26 requested by the United States would likely be a death sentence. Given Mr.  
27 Cunningham's many years of exceptional service to this nation and to his community in  
28 San Diego, it cannot be credibly asserted that a sentence with such potentially dire

1 consequences is “necessary” to achieve the goals of punishment in the statute. This is  
2 particularly true because his own misconduct has already left him penniless, homeless,  
3 estranged from those he loves, and disgraced in the eyes of his countrymen.

4 To be expected, the United States will ask the Court in this case to reflexively  
5 apply the Sentencing Guidelines. That is, of course, the easy path. But, that path does not  
6 produce a just outcome. The Court is sentencing a man who broke the law for the first  
7 time in his life at fifty-nine (59) years old, and for the better part of his life, was an  
8 exemplary figure in society. Justice requires a lengthy sentence in this case but not  
9 retribution that is blind to the good qualities of the man standing before the Court. As  
10 such, the Court should follow the wise counsel of a fellow district court judge who sought  
11 to make sense of the sentencing process in the wake of the Supreme Court’s decision in  
12 *Booker*: “Sentencing will be harder now than it was a few months ago. District courts  
13 cannot just add up figures and pick a number within a narrow range. Rather, they must  
14 consider all of the applicable factors, listen carefully to defense and government counsel,  
15 and sentence the person before them as an individual. *Booker* is not an invitation to do  
16 business as usual.” *United States v. Ranum*, 353 F. Supp.2d 984, 987 (E.D. Wis. 2005).

17 Because a sentence well below the statutory maximum of ten (10) years is  
18 “sufficient” to satisfy the goals of sentencing in 18 U.S.C. § 3553(a), Mr. Cunningham  
19 respectfully asks the Court to reject the recommendation in the Pre-Sentence Report and  
20 impose a punishment tailored to account for not only his transgressions but also his life-  
21 long service to this nation.

22 **II. THE PLEA AGREEMENT, THE OFFENSE CONDUCT AND MR.**  
23 **CUNNINGHAM’S RESIGNATION FROM THE U.S. HOUSE OF**  
24 **REPRESENTATIVES**

25 After lengthy discussions between defense counsel and the Office of the United  
26 States Attorney,<sup>1</sup> Mr. Cunningham and the United States entered into a Plea Agreement

26 <sup>1</sup> Long before the Plea Agreement was finalized, Mr. Cunningham instructed defense  
27 counsel to notify the Office of the United States Attorney of his desire to plead guilty and  
28 he personally commenced providing assistance to the government’s ongoing investigation  
in advance of November 23, 2005. Mr. Cunningham is submitting a separate filing under

1 on November 23, 2005. Plea Agreement, *United States v. Randall Harold Cunningham*,  
2 Criminal No. 05-CR-2137 (LAB) (Nov. 23, 2005) (hereinafter "Plea Agreement"). In the  
3 Plea Agreement, Mr. Cunningham agreed to waive Indictment by the grand jury and enter  
4 a plea of guilty to a two-count Information charging conspiracy pursuant to 18 U.S.C. §  
5 371 and tax evasion pursuant to 18 U.S.C. § 7201. *Id.* at 2. Mr. Cunningham also agreed  
6 to forfeit to the United States all equity that he held in his home, over \$1.8 million in  
7 currency and over fifty (50) separate items of furniture, rugs and other household  
8 furnishings. *Id.* at 18-20. Finally, Mr. Cunningham agreed to cooperate with the Internal  
9 Revenue Service to file corrected income tax returns for the years 2000 through 2004 and  
10 to pay all outstanding tax liability owed to the United States, including any penalties and  
11 interest. *Id.* at 28-29. This Court accepted the Plea Agreement on November 28, 2005,  
12 finding that Mr. Cunningham had freely and voluntarily waived his constitutional right to  
13 a trial by jury.

14 Mr. Cunningham stipulates to the Factual Basis set forth in the Plea Agreement and  
15 admits to participating in a criminal conspiracy, the object of which was to influence the  
16 congressional appropriations and government contracting process for the benefit of the  
17 coconspirators. *Id.* at 3-5. Mr. Cunningham also admits to receiving or transacting \$2.4  
18 million in payments and benefits in furtherance of the conspiracy. While Mr.  
19 Cunningham concedes that he used his public office to influence the congressional  
20 appropriations and government contracting process, the Plea Agreement makes clear that  
21 he did so only, in part, because of the benefits and payments bestowed by the  
22 coconspirators. *Id.* at 6. Mr. Cunningham believed that the appropriations that he  
23 supported were valuable to the national security of the United States. (Hersey Decl. Ex. 3,  
24 Duke Cunningham Letter.) He believes in the value of those programs to this day. (*Id.*)  
25 Indeed, when he was in Congress, Mr. Cunningham instructed his staff to vet the

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26 seal that details the history of those plea discussions and his efforts to provide substantial  
27 assistance to the government's ongoing investigation. *See* Supplemental Submission re:  
28 Acceptance of Responsibility and Assistance to the Government's Investigation (Under  
Seal).

1 programs with officials at the Department of Defense ("DOD"). *Id.* Mr. Cunningham and  
2 his staff even received written statements from DOD officials attesting to the merits of the  
3 programs. (*Id.*) They also consulted with DOD officials regarding their views about  
4 appropriate funding levels. (*Id.*)

5 Mr. Cunningham nevertheless admits that he sought to profit personally from his  
6 endorsement of those programs. In short, Mr. Cunningham's motives were not pure. He  
7 did not act only out of the national interest as he was obligated to do by virtue of his oath  
8 of office.

9 After entering his guilty plea on November 28, 2005, Mr. Cunningham  
10 immediately announced his resignation from the United States Congress and publicly  
11 apologized to his constituents, his colleagues, his friends and his family. He expressed his  
12 heart-felt remorse in a statement to the press that was widely reported in San Diego  
13 County and the entire country. Mr. Cunningham's public statement is set forth below in  
14 its entirety:

15 I am resigning from the House of Representatives because I've compromised the  
16 trust of my constituents.

17 When I announced several months ago that I would not seek re-election, I publicly  
18 declared my innocence because I was not strong enough to face the truth. So, I  
19 misled my family, staff, friends, colleagues, the public -- even myself. For all of  
20 this, I am deeply sorry.

21 The truth is -- I broke the law, concealed my conduct, and disgraced my high  
22 office. I know that I will forfeit my freedom, my reputation, my worldly  
23 possessions, and most importantly, the trust of my friends and family.

24 Some time ago, I asked my lawyers to inform the U.S. Attorney Carol Lam that I  
25 would like to plead guilty and begin serving a prison term. Today is the  
26 culmination of that process. I will continue to cooperate with the government's  
27 ongoing investigation to the best of my ability.

28 In my life, I have known great joy and great sorrow. And now I know great shame.  
I learned in Viet Nam that the true measure of a man is how he responds to  
adversity. I cannot undo what I have done. But I can atone. I am now almost 65  
years old and, as I enter the twilight of my life, I intend to use the remaining time  
that God grants me to make amends.

The first step in that journey is to admit fault and apologize. The next step is to  
face the consequences of my actions like a man. Today, I have taken the first step  
and, with God's grace, I will soon take the second.

1 Mr. Cunningham officially resigned from the U.S. House of Representatives on December  
2 1, 2005, after submitting his letter of resignation to the Speaker of the House and the  
3 Governor of the State of California.

4 **III. THE IMPACT OF THE CRIMINAL CONDUCT ON MR. CUNNINGHAM**  
5 **AND HIS FAMILY**

6 As the Court might expect, since the entry of his plea, Mr. Cunningham has been  
7 ostracized by virtually all who once lauded him. Dignitaries no less prominent than the  
8 President of the United States have publicly declared that Mr. Cunningham should be  
9 harshly punished. Most of Mr. Cunningham's former colleagues have not only distanced  
10 themselves from him but some have even convened press conferences to criticize him. It  
11 has become sport for the media to dissect his personal life. Stories have even been  
12 published regarding the intimate details of his marriage more than thirty years ago.

13 As a result, Mr. Cunningham has not borne the shame of his crimes alone. Unlike  
14 most criminal defendants who break the law in anonymity, Mr. Cunningham's family has  
15 been forced to publicly bear the stigma of his misconduct as well. This reality has taken  
16 an enormous physical and psychological toll on Mr. Cunningham, who knows that his  
17 wife and children are bombarded regularly with reminders of his wrongdoing. They must  
18 confront daily the tragic consequences of his actions. In her letter to the Court, Mrs.  
19 Cunningham indicates, "[i]t would be impossible for me to adequately describe the pain  
20 and suffering that our daughters are presently enduring and the legacy that they will now  
21 have to live with." (Hersey Decl. Ex. 5, Nancy Cunningham Letter.) Mr. Cunningham's  
22 youngest daughter states in her letter to the Court that she fears that her father will miss all  
23 of the coming milestones of her life: "While I know that my dad will not be there to see  
24 me graduate this fall, and may not see me graduate from medical school, these things  
25 mean little to me when I think that he may not be there at my wedding or to see my own  
26 children grow up some day." (Hersey Decl. Ex. 2, Carrie Cunningham Letter.) His oldest  
27 daughter laments that, because of his misconduct, she may never be able to build the  
28

1 relationship with her father that had been so difficult to sustain during his public career.  
2 She explains in her letter to the Court that “[t]his is my last chance to have the relationship  
3 with my father that I always thought I could wait to build when he retired. I made a  
4 mistake to think that I could wait.” (Hersey Decl. Ex. 1, April Cunningham Letter.)

5 Mr. Cunningham’s younger brother now hears ridicule of his boyhood idol. In his  
6 letter to the Court, Rob Cunningham, explains that “[n]ow we all share his pain, shame,  
7 and ridicule every day in the papers, on television, and through personal conversations.”  
8 (Hersey Decl. Ex. 6, Robert Cunningham Letter.)

9 Mr. Cunningham carries with him everyday the knowledge that his misconduct has  
10 inflicted enormous pain and hardship on those he loves most:

11 I know that I have forfeited my good name, my house, my job, the income that  
12 supports my family, all of my worldly possessions and, most of all, the trust of my  
13 wife and children. I confess that it has been difficult for me to come to terms with  
14 what I have done. It has been hard to endure the daily public ridicule, the angry  
words of former friends and colleagues, and, worst of all, the disappointment in the  
face of my 91-year-old mother.

15 (Hersey Decl. Ex. 3, Randall “Duke” Cunningham Letter) This burden represents a  
16 punishment that he will bear for the remainder of his life regardless of the sentence that  
17 this Court chooses to impose in this case.

18 Since entering his guilty plea, Mr. Cunningham has led a solitary and simple life.  
19 His wife no longer lives with him. The couple is estranged as a result of Mr.  
20 Cunningham’s misconduct. They no longer reside in the large home in Rancho Santa Fe  
21 that Mr. Cunningham purchased for his planned retirement with his wife. The  
22 Cunninghams sold the Rancho Santa Fe property in early December 2005, and Mr.  
23 Cunningham forfeited all of his property interest in the net proceeds of the sale -  
24 approximately \$900,000 - to the United States pursuant to the Plea Agreement. Mr.  
25 Cunningham presently lives in a bunk house located on the ranch of a long-time friend  
26 and performs manual labor to pay for his room and board. *See* Pre-Sentence Report of  
27 Randall Harold Cunningham, United States Probation Office, at 23 (Feb. 14, 2006)  
28 (hereinafter “PSR”).



1 In the wake of his plea, Mr. Cunningham is now essentially a pauper, having  
2 agreed to forfeit what little currency he still possesses and facing substantial debts for his  
3 legal fees. (*Id.* at 30-35.)<sup>2</sup> While Mr. Cunningham is entitled by law to pension payments  
4 for his military and congressional service, *see id.* at 33, those funds will be used to satisfy  
5 his significant tax liability to the United States as required by the Plea Agreement.<sup>3</sup>

6 As he awaits sentencing, Mr. Cunningham spends his time reflecting upon his  
7 wrongful conduct and individually making amends to those close friends and family who  
8 he personally wronged in the last six months.

#### 9 **IV. MR. CUNNINGHAM'S HISTORY AND BACKGROUND**

10 The PSR recites a generally accurate account of Mr. Cunningham's background  
11 and history. While there are minor inaccuracies to be noted in that personal history  
12 information, for purposes of Rule 32, those points do not appear to be material to the  
13 Court's sentencing judgment.<sup>4</sup> To supplement the background investigation recited in the

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14 <sup>2</sup> The PSR finds that Mr. Cunningham has a net worth of between approximately  
15 \$363,000 and \$446,000. (PSR at 31.) However, these net worth calculations do not  
16 include the anticipated forfeiture of over \$1.8 million in United States currency as  
17 required by the Plea Agreement. (Plea Agreement at 18.) Nor does it include the  
18 outstanding tax liability that Mr. Cunningham will bear by virtue of his commitment in  
19 the Plea Agreement to file amended tax returns for the relevant years of the conspiracy.  
(*Id.* at 28-29.) Thus, after sentencing and entry of the forfeiture judgment by the Court,  
Mr. Cunningham's net worth will be substantially negative.

20 <sup>3</sup> The PSR concludes that Mr. Cunningham has the future earnings potential to pay a fine.  
21 (PSR at 35, 46.) It does not indicate the basis of that conclusion. Mr. Cunningham  
22 disputes this judgment. Under any sentencing scenario before the Court, Mr. Cunningham  
23 will be in excess of 70 years old if he survives incarceration. His reputation has been  
24 destroyed and, thus, his future earnings potential upon release from custody is virtually  
25 nil. Therefore, Mr. Cunningham's only source of income when he is released from prison  
will be various government pensions. Because those pensions will provide the sole source  
of funds to satisfy his substantial tax liability to the United States, he does not possess the  
future earning potential to pay a fine in this case, as the PSR ultimately concludes in its  
recommendation to the Court. (*Id.* at 46.)

26 <sup>4</sup> For instance, Mr. Cunningham recalled that his son's arrest for selling marijuana  
27 occurred in 1986, while the PSR reports the date of that conviction as 1998. (PSR at 22.)  
28 Likewise, the PSR notes that Mr. Cunningham gave three or four speeches per week prior  
to entering Congress and that he earned between \$50,000 and \$100,000 per speech. (*Id.* at  
28.) While Mr. Cunningham was paid substantial sums on the lecture circuit through the

1 PSR, Mr. Cunningham submits the following social history information pursuant to 18  
2 U.S.C. §3661, which states that “[n]o limitation shall be placed on the information  
3 concerning the background, character and conduct of a person convicted of an offense  
4 which a court of the United States may receive and consider for the purpose of imposing  
5 an appropriate sentence.”

6 Mr. Cunningham was the first of two children born to Randall Cunningham, Sr.,  
7 and Lela Bell Reed Cunningham. Randall, Sr., was born in 1917 in Shawnee, Oklahoma.  
8 Lela, who was born in 1914, was originally from Alabama, but moved to Oklahoma with  
9 her family when she was a child. Mr. Cunningham’s younger brother, Robert  
10 Cunningham, relates that their parents met at a roller skating rink in Shawnee.

11 In the late 1930s, Lela’s family relocated from Oklahoma to California, settling in  
12 the Central Valley in a small town near Fresno. According to the accounts that Mr.  
13 Cunningham heard growing up: “They were farmers and were having a tough time  
14 making a living, so they decided to pack up and head west.” Not long after Lela’s family  
15 arrived, Mr. Cunningham’s father hitchhiked from Oklahoma to California to be near her.  
16 His father soon found a job driving a truck for 76 Union, delivering gasoline to service  
17 stations in the Los Angeles area. Mr. Cunningham was born there at Queen of Angels  
18 Hospital one day after the raid on Pearl Harbor. His mother, who is now 91 years old and  
19 lives in Texas, recalls in her attached handwritten letter:

20  
21 My husband, Randall Cunningham, and I, Lela B. Reed, were married in Sawtell,  
22 Ca, in 1940 by Pastor E.A. Earns of the Baptist Church. We had two sons, Randall  
23 and Robert. Randall was born on December 8, 1941, and Robert on May 20, 1948.  
Parents never had more loving obedient sons. They attended church and Sunday  
School with us. They both worked with the boy scouts.

24 (Hersey Decl. Ex. 4, Lela Cunningham Letter.)

25 Mr. Cunningham has only the faintest memories of living in Los Angeles. His  
26 prominent Washington Speaker’s Bureau prior to his election to Congress, the frequency  
27 and contract amounts of those speeches cannot be determined with accuracy more than 16  
28 years later. However, Mr. Cunningham does not believe that either of these factual  
assertions in the PSR are material to the ultimate sentencing judgment before the Court.

1 father apparently acquired enough savings from his truck driving job to purchase a gas  
2 station of his own in Fresno, and the family moved there when Mr. Cunningham was  
3 somewhere between three (3) and five (5) years old. He attended Mayfair Elementary  
4 School in Fresno, and recalls spending free time on the weekends and summers helping  
5 with chores at his father's service station.

6 When Mr. Cunningham was in the sixth grade, the family moved to Northeast  
7 Missouri to the small town of Shelbina (population 2113) where they opened a five-and-  
8 dime store called Cunningham's Variety Store. Mr. Cunningham worked part-time in the  
9 store, but preferred working outside for the local farmers, baling hay. He characterizes his  
10 parents as kind, religious people who shared an extraordinarily harmonious relationship.  
11 He never recalls them fighting. He remembers that his mother "made Easter baskets all  
12 day at the store, but she was always home to cook us supper. She was the type of mother  
13 who made biscuits from scratch." He further recalls that his parents never missed any of  
14 his academic or athletic events, and "would always have five dollars if I needed it--even  
15 though I realize now it must have been pretty hard for them to come up with it."

16 Rob Cunningham confirms his brother's description of their life in Shelbina as  
17 "safe and secure. Everyone knew Cunningham's Variety Store, and our parents were  
18 attentive and concerned." In his appended letter, he writes:

19  
20 When I was six years old, our parents purchased and managed a small variety store  
21 in Shelbina, Missouri. The business required my parents to put in many after  
22 business hours to make it profitable. Randy was the one who took responsibility to  
23 see that I made it home from school. He prepared our meals, helped me with my  
24 homework, and would ride me back to school the next day on the handlebars of his  
25 bicycle. I can remember being unable to let go of the handlebars on a winter  
26 morning my hands were so cold. He made sure that my teacher "thawed" my  
27 hands that morning.

28 (Hersey Decl. Ex. 6, Robert Cunningham Letter.) Rob Cunningham adds in his  
letter:

As I grew older, I had a keen desire to participate in sports but was discouraged by  
coaches because of my small, slim frame. Knowing my disappointment, Randy  
played ball with me every day after school. We played all kinds of ball—football,

1 basketball, whiffleball, baseball, etc. until I developed the skill and agility to not  
2 only compete with my fellow teammates but to excel in football, basketball, and  
3 track. Those team experiences had an incredible impact in my overall  
development—physically, mentally, socially, and emotionally. I think of him  
every time I play in or watch a game.

4 (Hersey Decl. Ex. 6, Robert Cunningham Letter.) Robert Cunningham states that his  
5 brother was an average student at Shelbina High but an exemplary athlete who lettered in  
6 three sports: football, basketball and track.

7 Education

8 Mr. Cunningham graduated from Shelbina High School in 1959. He enrolled in  
9 Kirksville Teacher's College in Kirksville, Missouri, and after one year there, he was able  
10 to transfer to the University of Missouri at Columbia. While at the University of  
11 Missouri, Mr. Cunningham reports that he matured into a more serious student. His  
12 grades improved to the point that he was able to obtain a graduate assistant position,  
13 which duties included teaching physical education, swimming, and political science. He  
14 graduated with a Bachelor of Science Degree in Education and Physical Education in  
15 1964, and he went on to obtain his Master's of Education Degree the following year.

16 After finishing his graduate studies, Mr. Cunningham was hired to teach physical  
17 education and coach swimming at Hinsdale High School in the Chicago suburb of  
18 Hinsdale, Illinois. He immersed himself in coaching and developed a system to keep  
19 computerized records of each swimmer's performance – a technique that was nearly  
20 unheard of at the high school level in the mid-60s. His efforts paid off, as many of his  
21 swimmers qualified as All-Americans. Later, two (2) members of his swim team from  
22 Hinsdale competed in the 1968 Olympics in Mexico City, where one earned a gold medal  
23 and the other a silver medal.

24 Mr. Cunningham believes that he could have been content as a high school swim  
25 coach for years, but he felt an obligation to serve his country militarily. Hinsdale, Illinois  
26 had a small, local airport where Mr. Cunningham was befriended by a retired colonel,  
27 who encouraged him to pursue his other dream of flying fighter planes. When he learned  
28

1 that his best friend from high school in Shelbina (a young man named Ronnie Cullers) had  
2 just been killed fighting for the Marine Corps in Viet Nam, and that another boyhood  
3 friend, Phil Harrison, was already serving there as a pilot, he decided to enlist himself.

4 Military Career

5 Mr. Cunningham joined the United States Navy in 1967. Over the next two years,  
6 he received specialized pilot training at Pensacola, Florida; Meridian, Mississippi;  
7 Beeville, Texas; and Miramar Naval Air Station in San Diego. He consistently finished at  
8 or near the top of each of his training classes. Ronald Darrell Gray, a retired Naval pilot,  
9 recounts in his appended letter:

10  
11 I was one of nine officers who established the United States Navy Fighter Weapons  
12 School "TOPGUN" in 1969. Lt. Cunningham was one of the school's first  
13 students. Randy was amongst the most dedicated and focused pilots that I had  
14 seen. . . . To be selected as an officer candidate in the United States Navy requires  
15 qualities and capabilities that few possess. To successfully complete officer  
16 training requires commitment and dedication. To be selected amongst those  
17 candidates for flight training is a rare opportunity granted only after rigorous  
18 screening. To complete flight training requires at least 18 months of focused  
19 sacrifice, attention to detail and commitment to excellence. Only the best of those  
20 are selected to fly Fighters. To excel amongst that group is truly an extraordinary  
21 achievement.

22 (Hersey Decl. Ex. 19, Ronald Darrell Gary Letter.)

23 In 1969, Mr. Cunningham was sent to Southeast Asia for his first tour of duty  
24 aboard the aircraft carrier U.S.S. America. Though stationed in the Gulf of Tonkin near  
25 the coast of Viet Nam for eight months, he reports that he and the other pilots saw  
26 relatively little action, limited mainly to bombing enemy targets in South Vietnam and  
27 Laos. During 1970 and 1971, he returned stateside for further training at Miramar. In the  
28 fall of 1971, he sailed back to Viet Nam aboard the aircraft carrier U.S.S. Constellation.

Mr. Cunningham's second combat tour could not have been more different from  
the first. His experience over the next six months established his place in military aviation  
as one of the most decorated fighter pilots in the nation's history. It also, without  
question, impacted and altered the future course of his life in profound ways – some  
readily apparent, others that are still perhaps hard to comprehend.

1           On his second tour of duty, Mr. Cunningham was paired with William P. "Willy"  
2 Driscoll as his communications and radio control man ("back-seater"). Together, they  
3 flew some 170 combat missions between November 1971 and May 1972 – generally two  
4 per day. He indicates that "nearly every mission over North Vietnam we got shot at . . .  
5 had tracers coming at us."

6           On January 19, 1973, Mr. Cunningham and Mr. Driscoll engaged three MIG-21's  
7 north of Quang Lang airfield, and he shot down the lead aircraft. Mr. Cunningham recalls  
8 coming back to a ship filled with thousands of sailors in celebration, but privately feeling  
9 intense emotion over the fact that he had just killed another pilot. He was surprised at  
10 how upset he became at the simple question he kept hearing from his fellow sailors: "Hey,  
11 Duke, what does it feel like to kill somebody?" He confided his emotions to the ship  
12 chaplain, and was disappointed to find out that the chaplain reported their conversation to  
13 his commanding officer who sent him for a few days of R&R.

14           Three and one-half months later, on May 8, 1972, Mr. Cunningham and Mr.  
15 Driscoll had their second kill when they engaged three MIG-17s and destroyed one plane  
16 while being fired at by three other aircraft. Then, on May 10, 1972, in one of the most  
17 famous air battles of the Viet Nam War, Mr. Cunningham and Mr. Driscoll, while on a  
18 flak suppression mission south of Hanoi, were attacked by twenty-two MIG-17s, MIG-19s  
19 and MIG 21s. During the course of this battle, they shot down three of the 22 MIG's. In  
20 one of the encounters, Mr. Cunningham shot down a MIG-17 from his executive officer's  
21 tail, while being directly attacked by four MIG-17s, four MIG-21s, and two MIG-19s. For  
22 his valor, Mr. Cunningham was later nominated for the nation's highest military honor –  
23 the Congressional Medal of Honor.

24           In a vivid and highly detailed letter to the Court, Mr. Driscoll recounts the air  
25 battles of that morning, the efforts to save their fellow flyers, their brushes with their own  
26 death, and the emotions that they experienced during combat and in the succeeding years.  
27 Mr. Driscoll writes:  
28

1 The enemy pilot stopped shooting but still remained glued behind us in excellent  
2 firing position. As we approached the top of our second rolling vertical loop, the  
3 enemy pilot started shooting again. Duke executed another violent "skid-break"  
4 turn into the MIG to avoid the enemy's bullets. The enemy pilot tracked us  
5 perfectly through this maneuver. Because we were now inverted and flying  
6 straight toward the ground, with the enemy in hot pursuit, Duke pulled up and  
7 rolled hard into the MIG. We were again met by a barrage of bullets from the  
8 enemy's guns. Duke countered with another violent sideways "skid-break"  
9 maneuver. Duke then started up into the pure vertical for the third time. However,  
10 he knew that our airplane didn't have sufficient airspeed to complete this vertical,  
11 rolling loop. If Duke continued with this maneuver, at the top of this loop as our  
12 airplane began to stall, the enemy pilot would tear us to shreds with his guns....

13 As we were climbing through 17,000 feet, several enemy fighters followed us from  
14 well below. We suddenly felt a violent blast of air turbulence followed by what  
15 sounded like someone throwing a handful of b-bs against the side of our airplane.  
16 We had just been hit, with no warning, by a SAM missile.

17 (Hersey Decl. Ex. 45, William P. Driscoll Letter.) Mr. Driscoll then explains how Mr.  
18 Cunningham's skill and courage permitted them to avoid destruction or capture by the  
19 enemy:

20 Our airplane flew normally for the next 30 seconds as Duke continued to climb.  
21 We still were about 40 miles from the coast. Suddenly our airplane, on it's own,  
22 began to skid sideways. As I looked over my left shoulder, I noticed the enemy  
23 fighters were now climbing rapidly toward us. I also noticed a substantial amount  
24 of fire on the left wing and fuselage of our airplane.

25 Although I thought we had already experienced all that combat had to offer, I was  
26 mistaken. All our previous feelings were now intensified by a factor of three....  
27 And here's what we had to consider:

- 28 • Would we make it to the coast to eject?
- 29 • Would we have to eject over enemy territory?
- 30 • Would the airplane blow up with us in it?
- 31 • Were we about to become POW's?
- 32 • Were we about to die?

33 Duke's first challenge though was to continue flying the airplane with whatever  
34 flight controls remained. (We were still about 20 miles from the ocean).... Duke  
35 brilliantly "ruddered" our airplane through 4 sideways vertical loops. Each new  
36 loop was more violent and sideways than the preceding one. We were rolling and  
37 rotating sideways so rapidly that the enemy fighters behind us and in excellent  
38 firing position, couldn't maintain a steady-state track to finish us. They were  
39 however very close behind us.... While in the fourth vertical loop, we started  
40 getting substantial smoke and fire in the cockpit. I actually had to move over to the  
41 far right side of the cockpit to keep the fire off my body. The thought occurred to

1 me that if we stayed in this plane much longer, we would burn to death.  
2 (Hersey Decl. Ex. 45, William P. Driscoll Letter.)

3 They were finally able to eject, and when Mr. Cunningham's parachute opened, a  
4 sharp pain pierced his back. In the water, about three miles from Haiphong Harbor, they  
5 jettisoned their parachutes and swam for their safety rafts. North Vietnamese PT boats  
6 were sent to capture them, but the Navy scrambled attack planes to engage the enemy  
7 boats, and they were rescued by helicopter from the water approximately 20 minutes later.  
8 In the ejection and landing, Mr. Cunningham suffered a severely sprained neck and  
9 chronic back and shoulder problems which plague him to this day. For his  
10 accomplishments and valor in combat during Viet Nam, the Navy awarded Mr.  
11 Cunningham the Purple Heart, two Silver Stars and the Navy Cross.

12 Mr. Cunningham's total of five enemy planes shot down was unmatched by any  
13 other Naval pilot during the Viet Nam war, and by only one Air Force pilot. However, the  
14 successes of May 10<sup>th</sup> were marred by the death of the pilot and Executive Officer of their  
15 sister squadron VF-92 Harry Blackburn, and the capture of his back-seater Steve Rudloff  
16 who was held for the next year as a prisoner-of-war North Viet Nam.

17 By every account, Mr. Cunningham's willingness to undergo extreme personal risk  
18 in combat saved the lives of many U.S. pilots who would otherwise have been shot down,  
19 captured or killed on that day. As his wingman, Brian Grant, notes succinctly a letter to  
20 the Court: "I am able to write this letter, and [am] alive today, solely because of the  
21 selfless heroism and skilled airmanship of Mr. Cunningham." (Hersey Decl. Ex. 20, Brian  
22 E. Grant Letter.)

23 Within weeks of the May 10th battle, Mr. Cunningham and Mr. Driscoll were  
24 ordered to return to the United States to undertake a nationwide speaking tour to build  
25 goodwill for the Navy. Mr. Cunningham indicates that he had not expected such an  
26 assignment, but was told by his superior officers "this is the way you can help your  
27 country most."

28 After nine (9) months spent delivering more than 500 speeches to active and retired



1 military personnel as well as civilians in towns and bases throughout the country, he  
2 returned to Miramar where he was assigned as a Top Gun instructor. His next fifteen (15)  
3 years of duty included responsibilities as the Operations Officer for VF-154; serving on  
4 the staff of the Commander of the 7<sup>th</sup> Fleet; and serving as Commanding Officer for VF-  
5 126, an adversary squadron that specialized in realistic air-to-air training for young Navy  
6 fighter and attack crews. Mr. Cunningham was honorably discharged in 1987 after twenty  
7 (20) years of active duty with the rank of O5 Commander.

8 His time in the service left a mark on many young pilots, who still hold great  
9 affection for his leadership and counsel. In his letter to the Court, former Navy pilot,  
10 Richard Redditt, states, "Duke has always been an inspiration to Naval Aviators. He  
11 inspired ME while I was still flying in the Navy in Vietnam. . . . His contributions in this  
12 area cannot be disputed and his deeds were unequalled by any other Navy pilot during the  
13 entire Vietnam conflict." (Hersey Decl. Ex. 35, Richard W. Redditt Letter.) Similarly,  
14 former Navy pilot Charles Nesby, closes his letter to the Court with the proud admonition:  
15 "In closing I want to say that I love Randy 'Duke' Cunningham and would fly with him  
16 again in combat tomorrow. *I would be proud to have my only son serve under his charge*  
17 *today.*" (Hersey Decl. Ex. 34, Charles W. Nesby Letter.) (emphasis in original). Mr.  
18 Nesby relates that, when he served under Mr. Cunningham in the Navy's premier  
19 adversary jet training squadron at Miramar, "[t]hen Commander 'Duke' Cunningham had  
20 the moral courage to break with an embedded racist tradition in 1987 and rank me, a black  
21 fighter pilot/naval officer, as his number one performer thus guaranteeing me a fair  
22 opportunity to compete for squadron command." (*Id.*)

23 About nine (9) years ago, Mr. Cunningham and Mr. Driscoll returned to Vietnam  
24 as part of a congressional delegation to participate in raising the United States flag at the  
25 new embassy being reopened in Saigon. Mr. Driscoll notes in his letter to the Court that  
26 Mr. Cunningham personally visited sites of potential burial locations for MIAs and  
27 "actually helped in the excavation work." (Hersey Decl. Ex. 45, William P. Driscoll  
28 Letter.) Mr. Driscoll adds that Mr. Cunningham "wanted North Vietnam's officials to

1 clearly understand the importance of these excavations for the American people. Several  
2 months later a number of American families quietly received the remains of their loved  
3 ones. (If you look at Duke Cunningham's left wrist today, you'll see that he still wears a  
4 POW bracelet, as he has every day for the past 34 years." (*Id.*)

5 Marriage and Family

6 In 1965, Mr. Cunningham married his first wife, Susan Albrecht, whom he had met  
7 at the University of Missouri. Their adopted son Todd was born July 4, 1969 in Mercy  
8 Hospital in San Diego, while Mr. Cunningham was stationed at Miramar for flight  
9 training. They divorced in 1973. Mr. Cunningham notes that his first wife "started out  
10 married to a high school teacher, and ended up with a military man who was away most of  
11 the time." Custody of Todd was awarded to his mother, though Todd spent holidays and  
12 summers with his father.

13 As a young adult, Todd struggled with a range of personal, legal, and substance  
14 abuse problems, though today he is a successful loan manager who lives in San Diego.  
15 According to Todd, his father's support and assistance during his difficult times was  
16 invaluable. In his letter to the Court, Todd explains that like "many kids growing up I've  
17 had my fair share of ups and downs. My father has always stood by and [sic] giving me  
18 good guidance. He has done the same for my sisters as well. For me personally I've gone  
19 through some very tough and difficult times, and I don't know where I'd be today if it  
20 wasn't for my father." (Hersey Decl. Ex. 7, Todd Cunningham Letter.)

21 Randy met Nancy Jones, his second wife, at the Miramar Officer's Club. They  
22 were married on February 16, 1974. Nancy Cunningham has had a long career as an  
23 educator in the Encinitas School District, serving as a teacher, a school principal, and an  
24 administrator. The couple's daughters are both university graduates. April Cunningham,  
25 27, is married and works as a librarian at a community college in Oceanside, California.  
26 Carrie Cunningham, 24, resides in Oakland, California. She is pursuing graduate studies  
27 in public health, and is applying to medical schools. Mr. Cunningham is deeply saddened  
28 by the anxiety and loss of privacy that his wife and daughters have experienced as a

1 consequence of his misconduct.

2 Health

3 At the age of 64, Mr. Cunningham suffers from a combination of serious health  
4 problems. In August of 1998, he underwent surgery (a radical prostatectomy) for prostate  
5 cancer. The operation was not entirely successful because the cancer was not completely  
6 excised or had spread prior to the surgery. In the fall of 2003, he underwent radiation  
7 treatment to the pelvis in an attempt to control the recurrent prostate cancer. In the  
8 aftermath of this surgery, however, recurrent cancer was found behind the bladder. Mr.  
9 Cunningham's treating physician, Dr. Timothy Donahue, MD, Chief of Urology at  
10 National Naval Medical Center in Bethesda Naval Center has provided the Court with a  
11 letter reporting on Mr. Cunningham's recurring battles with prostate cancer and his  
12 potential prognosis.<sup>5</sup> (Declaration of Dr. Timothy Donahue, Attachment.) Given his  
13 medical profile and the nature of the disease, Dr. Donahue has serious concerns about his  
14 long-term prognosis. Dr. Donahue notes in his letter as follows:

15 The fact that [Mr. Cunningham's] PSA level remained elevated despite surgical  
16 resection of the prostate and its quick doubling time (less than 12 months) are both  
17 poor prognostic indicators for his overall survival. Patients with similar pathologic  
18 and clinical features typically have a median survival of between ten to thirteen  
19 years from the time of first treatment. Most commonly, patients in his situation  
20 will experience a period of time without gross evidence of disease recurrence but  
21 then progress to a rapidly progressing and fatal disease in the last few years of life.  
22 . . . He will eventually not respond to the hormonal manipulation and the natural  
23 history of the disease is to become a fatal process. While the timing cannot be  
24 predicted in individual cases, patients with prognostic features similar to Mr.  
25 Cunningham have a median survival of ten to thirteen years from the time of first  
26 treatment. Considering his initial surgery was performed in 1998, one could  
27 estimate his median survival to be another seven years.

28 (Declaration of Doctor Timothy Donahue, Attachment.)

Mr. Cunningham also suffers from a history of thyroid problems, elevated  
cholesterol and glucose levels, a propensity to bronchitis attacks and pneumonia, and he  
will require treatment to remove pre-cancerous polyps that were detected in a  
colonoscopy. Last year, he underwent surgery for skin cancer. He received a knee

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<sup>5</sup> Defendant may also secure the testimony of Joseph D. Schmidt, M.D., an expert in the area of urologic oncology, for purposes of presenting this evidence in court if necessary.

1 replacement in 2001, and continues to suffer chronic back and shoulder pain dating to war  
2 injuries sustained when he ejected from his fighter aircraft in 1972.

3  
4 **V. LETTERS OF SUPPORT**

5 Since the entry of his guilty plea and his public apology on November 28, 2005,  
6 Mr. Cunningham has received many unsolicited letters of support and encouragement  
7 from old friends and even passing acquaintances. Excerpts of those letters have been  
8 included below along with a host of other letters submitted to the Court's attention for the  
9 express purposes of Mr. Cunningham's sentencing. These letters span the years of Mr.  
10 Cunningham's life – some from family, friends, former staff and constituents. As is  
11 evident from a thorough review of these letters, the authors speak to their fond  
12 remembrances of Mr. Cunningham and what he has meant to their lives or communities  
13 over the years. As the Court might expect, a common theme is the shock that they all felt  
14 when they heard of the charges, and greater shock still when Mr. Cunningham admitted  
15 guilt. While many of these letters cover a variety of different subjects, for ease of  
16 reference, the excerpts below are organized according to a few common topics that recur  
17 throughout.

18 Judge Larry Stirling, a friend and former member of the San Diego City Council;  
19 the California State Assembly; the California State Senate; and a former Circuit Court  
20 Judge expresses the reaction many people had when Mr. Cunningham was charged with  
21 wrongdoing, and then pled guilty:

22 I was completely surprised by the allegations against the Congressman and even  
23 more surprised when he pled guilty and admitted that he had violated the law. The  
24 reason I was so surprised is because in all of those years there was absolutely no  
25 hint whatsoever that there was anything amiss in Congressman's [sic]  
26 Cunningham's personal or professional life. At no time did he, or anyone  
27 connected with him indicate that there was any quid pro quo for the Congressman's  
28 friendship, political support, or legislative efforts. In fact, in all the years I knew  
him he never asked for anything from my family or me. Also being involved in  
politics, it is easy to hear about or even know when there is something amiss in the  
conduct or character of various public officials. There was never any hint or rumor  
that Congressman Cunningham did anything but his job as an elected official and  
carried his weight as a politician on behalf of his party.

1 (Hersey Decl. Ex. 37, Larry Stirling Letter.)

2 A. **Mr. Cunningham is Kind Hearted, Generous and Regularly Helped**  
3 **People Less Fortunate than Himself.**

4 One theme common throughout the letters of support Mr. Cunningham has  
5 received is the extraordinary effort he made to help people in need. Mr. Grayson Bass  
6 volunteered this moving memory of meeting Mr. Cunningham when Mr. Bass, a young  
7 man enrolled at the U.S. Naval Academy, was hospitalized with a serious injury and in  
8 great pain:

9 During this time, an unknown—and, by his blood stained hospital gown an  
10 obviously sick and pained man—hobbled into my hospital room with the aid of a  
11 cane and a hospital attendant. He came to my bedside and talked to me and told  
12 me a story that, unfortunately, I have lost in time (most likely due to the heavy  
13 doses of pain medicine). However, during that conversation, he flipped me a silver  
14 dollar (which I still have nestled safely in my grandfather's Bible) and told me that  
15 I would "certainly amount to something." After a few more minutes of small talk,  
16 he hobbled out.

17 Only later did I find out that he was a U.S. Congressman and a distinguished pilot  
18 (which was most impressive to me because I had joined with the specific intent to  
19 fly). The Admiral in charge of the base later told me that Mr. Cunningham made it  
20 a point to have the staff update him about any Academy students that were staying  
21 in the hospital.

22 (Hersey Decl. Ex. 8, Grayson Bass Letter.)

23 Dennis J. Carlo, Ph.D. remembers the time Mr. Cunningham, as a Top Gun  
24 instructor, spoke to Nancy Cunningham's kindergarten class, of which Dr. Carlo's son,  
25 Eric, was a member. Dr. Carlo recounts how Mr. Cunningham became the inspiration for  
26 Eric's eventual entry into the U.S. Air Force Academy:

27 [Mr. Cunningham] lifted each child and placed each one of them in the seat of a  
28 fighter jet. I will never forget my son's face; it was as if he were in a different  
world. From that day on, Eric wanted to fly. Later, Duke was to tell Eric to study  
hard, help others, and listen to your parents. He said, "If you do this, your dream  
will come true." Well, it did come true. Eric worked hard, did well in both  
academics and athletics, and eventually graduated from the U.S. Air Force  
Academy. He recently received his wings and will be training in F-15s within the  
next few months. Duke was a model for my son, and continued to encourage him  
throughout his school years. I would say Duke played a key role in my son's life.  
Duke was the kind of man my son wanted to be like. My son saw a man who was  
strong, disciplined, patriotic and compassionate.

1 (Hersey Decl. Ex. 11, Dennis J. Carlo Letter.)

2 Repeatedly throughout his life, Mr. Cunningham has shown compassion for those  
3 in difficult circumstances. In the 1980s, at a time when individuals of Iranian heritage  
4 sometimes faced discrimination, Mr. Cunningham used his position as Dean of the  
5 National University to reach out to Iranian-American students. Kourosh Hangafarin, who  
6 counts among his many activities service as President of the San Diego Persian  
7 Community Center and Library, remembers Mr. Cunningham's kindnesses while at  
8 National University:

9 I have known Randy "Duke" Cunningham since his days as a dean at National  
10 University. Randy provided much support and assistance to the Iranian American  
11 students at the University. Whenever an Iranian American student encountered a  
12 problem, Randy Cunningham would go out of his way to help the student find a  
13 way to resolve his or her problem. Randy never discriminated against the Iranian  
14 American students, nor did he ever stereotype them or judge them. He always  
15 encouraged us, supported us and protected us. He was definitely a champion of the  
16 Iranian American community.

14 (Hersey Decl. Ex. 21, Kourosh Hangafarin Letter.) Dee Dee Castro, a former staff  
15 member and campaign worker from the early 1990s, remembers Mr. Cunningham as not  
16 only as a good boss, but a down-to-earth man who was her friend:

17 When Lance, my youngest, was in the 3<sup>rd</sup> grade I asked Duke if I could work 4 –  
18 10 hour days in stead of 5, so I could spend a day helping out in his school. Duke  
19 thought it was a great idea and offered the rest of the staff the same deal. He also  
20 helped me deal with my oldest son's enlistment in the Navy, boot camp, and  
21 deployment. When he first became a Congressman, the members received a salary  
22 increase. Duke did not return the raise, but instead setup a checking account which  
23 he used to distribute to non-profits in his district. . . . I am not a person of wealth or  
24 position. I was basically raised in the barrio. I have worked in offices where the  
25 elected officials will not acknowledge your presence with a simple hello. I have  
26 nothing but pure respect and friendship for Duke.

23 (Hersey Decl. Ex. 13, Dee Dee Castro Letter.) Friend and former colleague,  
24 Representative Duncan Hunter, remembers how Mr. Cunningham always took an interest  
25 in talking to young people and veterans:

26 There is another side to Duke that I have seen regularly. It is his love for kids and  
27 fellow veterans. During our service, Duke couldn't pass a teenager without  
28 stopping to talk to them about respecting their parents and staying in school. He  
would change seats on an airplane to sit next to a youngster. Duke is the only  
member of Congress that I know who regularly held town meetings in high schools

1 and colleges.

2 (Hersey Decl. Ex. 23, Duncan Hunter Letter, 2/9/06.)

3 **B. Mr. Cunningham's Record of Military Service is Exceptional.**

4 Not surprisingly, Mr. Cunningham's exceptional military service had an effect on  
5 those who fought with him. Brian Grant, who flew wingman on May 10, 1972, the day  
6 Mr. Cunningham shot down three MiGs, is alive today because of Mr. Cunningham's  
7 heroism: "I have known Randall Cunningham for thirty six years, and flew as his  
8 wingman during combat operations in Vietnam on a 1971-1972 carrier deployment. . . .  
9 Randall Cunningham is an American hero, who placed comrade loyalty, mission  
10 accomplishment, and love of his country above all else. His defense of our national  
11 interest in wartime has earned him the nation's second highest award for valor—the Navy  
12 Cross. (Hersey Decl. Ex. 20, Brian E. Grant Letter.) In fact, as Congressman Hunter  
13 points out, "Mr. Cunningham was awarded the Navy Cross for diving into a pack of Migs  
14 to save his wingman." (Hersey Decl. Ex. 23, Duncan Hunter.)

15 Keith Crenshaw was also in the skies on May 10, 1972. He writes in his letter to  
16 the Court as follows:

17 I have known Randy since July of 1971 when I served with him as a fellow officer  
18 in Fighter Squadron 96 during a combat cruise to South East Asia. I have flown  
19 with and alongside Randy under the most adverse conditions and feel qualified to  
20 offer my opinion on his character.

21 Randy Cunningham was a fine Naval Officer and a good pilot who served his  
22 country bravely and with honor. He always set a good example for me and the  
23 other officers in the squadron by his hard work and preparation. I feel this example  
24 helped bring me back safely from the numerous cruises I made in my 24 year Navy  
25 flying career.

26 (Hersey Decl. Ex. 15, Keith Crenshaw Letter.)

27 As referenced above, Mr. Driscoll flew with Mr. Cunningham on 170 combat  
28 missions, including all 5 MiG kills. He also earned the title Ace and is himself a recipient  
of the Navy Cross as well as many other honors. Mr. Driscoll and Mr. Cunningham have  
been loyal friends for almost thirty-five (35) years. In his letter to the Court, Mr. Driscoll  
notes that Mr. Cunningham's heroism and skill directly saved the lives of many of his

1 fellow pilots. Mr. Driscoll's letter vividly captures the events of May 10, 1972, which  
2 have been recounted *supra* and will not be recited again here (Hersey Decl. Ex. 45,  
3 William P. Driscoll Letter.)

4 **C. Mr. Cunningham Regularly Contributed His Time and Money to Local**  
5 **Charities.**

6 Before entering politics, Mr. Cunningham went out of his way to help charitable  
7 causes, giving generously of his time and talent. Father Joe Carroll of Father Joe's  
8 Villages recalls one such incident:

9 I have been a friend of Duke Cunningham for most of these past 23 years. When I  
10 first met Duke, I was relatively unknown and was trying to get support for my new  
11 idea of how to help the homeless. I asked Duke to help me use his fame and the  
12 popularity of the movie "Top Gun" to get some notice for my work and also raise  
13 much needed funds. I asked him to let us have him as the main attraction for a trial  
14 lawyer's dinner. Even though [sic] not yet in politics, this was not exactly his kind  
15 of people. But because it was for me and my work, he agreed. We had a great  
16 dinner with "Top Gun" as the theme and he got a Top Gun pilot for each table.

17 (Hersey Decl. Ex. 12, Father Joe Carroll Letter.) Bishop George D. McKinney of St.  
18 Stephen's Cathedral Church of God in Christ Ministries has similar recollections from his  
19 25 year friendship and association with Mr. Cunningham:

20 [Mr. Cunningham] has worshiped and spoken at St. Stephen's and I've had the  
21 privilege of performing the marriage ceremony of his daughter, April to Hal. In  
22 addition to his excellent representation in congress he has been personally involved  
23 in supporting the St. Stephen's Christian School. We're proud of the flag that has  
24 flown at our school for years was presented by Duke. Recently, Duke has been  
25 very supportive in our efforts to mobilize the faith-based community and  
26 government in responding to the HIV AIDS Crisis. As a matter of fact, Duke met  
27 with me in Washington at Ambassador Tobias's office in regards to the HIV AIDS  
28 crisis. I have appreciated his wise counsel and his compassionate support.

(Hersey Decl. Ex. 31, Bishop George D. McKinney, Ph.D., D.D. Letter.)

29 Sister Claire Frawley of St. Clare's Home recalls the personal interest Mr.  
30 Cunningham took in the work of her facility:

31 Mr. Cunningham has been a supporter of St. Clare's home for several years. He  
32 and former Congressman Ron Packard took a tour of our facility. We had a  
33 banquet in their honor. Mr. Cunningham enrolled us in the library of Congress.  
34 He donated 100 lbs of beef to our Day care. He has always been a friend to  
35 agencies whose purpose is to assist those less fortunate. I have always found Duke



1 to be aware of and supportive of causes that assist the needy and programs for  
2 youth.

3 (Hersey Decl. Ex. 17, Sister Claire Frawley Letter, 2/14/06.) Anti-war activist Mr. Peter  
4 Yarrow of Peter, Paul and Mary fame founded a group called Operation Respect, which is  
5 a non-profit organization that provides school preparation support for disadvantaged  
6 children. Mr. Yarrow explains in his letter to the Court that, despite being polar opposites  
7 on the political spectrum, he and Mr. Cunningham became close friends because of Mr.  
8 Cunningham's active involvement in Operation Respect:

9 This letter might come to you as a surprise, as it is well known that Randy I are  
10 politically polar opposites. However, each of us trusts and embraces the other as a  
11 friend, and trusts that the common ground we have found in our efforts on behalf of  
12 children should not, and must not, be part of the politically polarized dialogue that  
13 plagues our nation.

14 Together, over the past 5 years, we have worked together as friends and allies in  
15 the arena of children's welfare, health and education, with particular attention to  
16 children from less fortunate circumstances, whose resources are frequently  
17 miniscule compared to those of others.

18 Both of us are deeply committed to assuring all children a safe, caring ridicule-free  
19 school environment in which they can get [a] good start in life by virtue of a fine  
20 education.

21 (Hersey Decl. Ex. 41, Peter Yarrow Letter.)

22 **D. Mr. Cunningham's Civic Accomplishments are Exceptional.**

23 Capt. Ronald Ress, U.S. Naval Reserve (Retired) wrote to thank Mr. Cunningham  
24 for using his influence in government to save the life of his wife, Oanh:

25 Oanh and I will never forget how you personally helped us in the Spring of 2001,  
26 when we had no one else to turn to. Oanh had been traveling on business in  
27 Vietnam, and for reasons which are still a mystery, she was taken into custody by  
28 the Communist government and jailed for "investigation." Despite the best efforts  
of our State Department, we were unable to secure her release. After nearly three  
months, I was allowed a visa to visit her in the Saigon prison and found her in very  
poor condition. I called you the next day from Bangkok and told you that if we did  
not get her released quickly she would not survive. You promised on the spot to  
call two people: Ambassador Pete Peterson and President Bush. And you kept that  
promise. Shortly thereafter, when Secretary of State Colin Powell visited Vietnam,  
he intervened personally with the Vietnamese President on behalf of Mrs. Ress.  
She was released almost immediately. You made that happen. Duke, I am certain  
that without your personal intervention my family would be grieving the loss of my  
wife today.

1 (Hersey Decl. Ex. 36, Capt. Ronald Ress Letter.) Brian Grant recalls a time when Mr.  
2 Cunningham helped a sick constituent:

3 I was able to see Mr. Cunningham on several occasions during his tenure as a  
4 United States Representative, and on every occasion I was impressed by his work  
5 ethic and compassion towards his constituency. Some years ago I was approached  
6 by a friend who was diagnosed with a terminal lung disease to ask if I would speak  
7 on his behalf to Congressman Cunningham. Randall Cunningham was able to  
8 obtain a compassionate use waiver from the Food and Drug Administration to  
9 enable my friend to extend his life with an experimental drug regime that would  
10 have been otherwise unavailable.

11 (Hersey Decl. Ex. 20, Brian E. Grant Letter.)

12 Representative Duncan Hunter recalls that Mr. Cunningham used his influence in  
13 Congress to increase funding for children with disabilities as well as help disabled  
14 veterans and police officers: "He set up a special program for disabled veterans that  
15 resulted in disabled veterans being able to participate and enjoy recreational facilities on  
16 our bases. He was also very supportive of police officers, so much so he was selected as  
17 their Legislator of the Year three times." (Hersey Decl. Ex. 23, Duncan Hunter Letter,  
18 2/9/06.) Congressman Hunter added that Mr. Cunningham "worked tirelessly to increase  
19 funding for children with disabilities and to increase funding for Title I disadvantaged  
20 children." (*Id.*)

21 One of Mr. Cunningham's first flight instructors, Ronald Gary, remembers Mr.  
22 Cunningham's many accomplishment in Congress:

23 I maintained contact with Randy after I left the Navy in 1977. I was very  
24 enthusiastic about his decision to run for Congress. I was willing to support his  
25 campaign because I knew him to be hard working, conscientious and committed to  
26 doing the right thing for his constituents. Over his terms in office he worked  
27 tirelessly in his district and on behalf of his constituents. He supported local  
28 charities and youth groups and fought for issues that were important to the  
residents in his district. Randy gave generously of his time and resources.

(Hersey Decl. Ex. 19, Ronald Darrell Gary Letter.) A small business owner from Cardiff-  
by-the-Sea, Richard Pettinato, met Mr. Cunningham during Mr. Cunningham's first run  
for Congress. He notes that Mr. Cunningham took an interest in helping his small closed-  
captioning business: "Duke Cunningham took the time, in 1998, to visit our office in

1 Carlsbad. He had a genuine interest in how closed captioning was done, and the fact that  
2 we were creating jobs as a small business. He believed in the principle of full and fair  
3 consideration—we never asked for more—, nor did he offer more—in the use of Federal  
4 funds for closed captioning.” (Hersey Decl. Ex. 34, Richard Pettinato Letter.)

5 Mr. Hangafarin recalls Mr. Cunningham’s service in Congress as follows:  
6 As a United States Congressman, Randy Cunningham continued his support of  
7 Americans of all ethnic backgrounds. His door was always open to all members of  
8 the community, regardless of race, ethnic background or religious beliefs. Randy  
9 was always available to participate in any event that would benefit the community.  
He was a selfless volunteer and supporter of community organizations, and not  
once did he ever ask for a political contribution in return. In all the years I have  
known Randy Cunningham, he has been a true and humble servant of the San Diego  
community and its citizens.

10 (Hersey Decl. Ex. 21, Kourosh Hangafarin Letter, 2/9/06.)

11 **E. Mr. Cunningham Has Openly Confessed His Wrongdoing and Should**  
12 **be Punished in a Manner that Offers Him Some Hope of Redemption**  
13 **with His Family.**

14 People who have spoken to Mr. Cunningham attest to his broken spirit and search  
15 for renewal. Bishop McKinney of St. Stephen’s Church writes:

16 I have personally spoken with Duke since he entered the guilty plea. I’m  
17 convinced that he is repentant and remorseful. I believe that the depth of his grief  
18 and remorse reflect his disappointment with himself in failing to respect the law.  
As a Christian, Duke has openly confessed his wrong doings and has turned from  
them. He regrets his actions because they were wrong. He’s made no attempt to  
excuse his behavior. He accepts full responsibility for his behavior.

19 (Hersey Decl. Ex. 31, Bishop George D. McKinney, Ph.D., D.D. Letter.) Father Joe  
20 Carroll adds: “I felt betrayed, but in my conversations since he admitted his guilt, I can  
21 feel his own embarrassment and shame. He prays that the good he did in his life, will give  
22 him the strength he will need in the years ahead. He is truly remorseful, not for his own  
23 loss, but for the disappointment of his constituents and people like myself.” (Hersey Decl.  
24 Ex. 12, Father Joe Carroll Letter.)

25 Longtime friend Dan McKinnon has spent time with Mr. Cunningham as he  
26 prepares for a life in prison: “For the last three months or so I’ve watched this broken  
27 man and his behavior. We’ve had him walking, chopping wood, digging weeds (even a  
28

1 case of poison oak) and eating to gain back his strength from loss of weight from 262 to  
2 185 pounds. In the process I've spent a lot of time talking with him. He is totally and  
3 utterly disgusted with himself as he reflects back on his actions. He's a mentally tortured  
4 man." (Hersey Decl. Ex. 32, Dan McKinnon Letter.) Childhood friend Donald V.  
5 Lassiter believes, as do many others who have written, that Mr. Cunningham will spend  
6 the rest of his life seeking redemption for what he has done:

7       Only time will tell if the boyhood friend that I have known for over sixty years  
8       could, once again, make a positive contribution to our nation. I honestly believe  
9       that he would. Even more, I believe that, regardless of the punishment meted out  
10      to Randy by the Court, he will spend the remaining years of his life attempting to  
11      make amends for the crimes that he has committed. He would do so because he  
12      knows that individuals, such as myself, still believe in the inherent nature of his  
13      goodness and that we would be watching to see him prove that capacity and  
14      renewed commitment to us as his trusting friends.

15 (Hersey Decl. Ex. 28, Donald V. Lassiter Ph.D. Letter.)

16       Mr. Cunningham's family -- devastated by the events of the past eight months --  
17      hopes for a time of private reconciliation if Mr. Cunningham survives incarceration. His  
18      brother, Rob Cunningham, writes about his desire for more time with brother and his fear  
19      for their mother:

20       Our mother is 91 and not in very good health. Only God knows how much time  
21      she may have left here. It is tearing her apart thinking she may have seen him for  
22      the last time. I pray [] that they will be able to spend a lot of time together before  
23      we lose her. I too want to spend a lot of time with him both as a brother and friend  
24      to help him through this disaster. He has told me that he recognizes the  
25      wrongfulness of his actions, that he is sincerely remorseful for what he has done,  
26      and that he wants to live the rest of his life trying to make up for his crimes. Judge  
27      Burnes, I ask that you give strong consideration to all of the good things Randy has  
28      done in addition to his age and health and consider a sentence that would  
29      realistically allow him time to spend with his family.

30 (Hersey Decl. Ex. 6, Robert Cunningham Letter.) Mr. Cunningham's daughter, April,  
31 writes about her dream of building a stronger bond with her father in the future:

32       I have made sacrifices all along so that my father could be a public servant. I have  
33      struggled to maintain a father-daughter bond despite distance and difference. If  
34      you will give my father a shorter sentence rather than a longer one, I can work on  
35      building a relationship with my father as he is now—significantly changed by the  
36      damage of his decision and the trauma of the last several months. He is not likely  
37      to ever truly return from a long sentence and that would be a personal tragedy for

1 me that I do not deserve. . . . I plan to have children and have expected my father to  
2 be as loving a grandfather to them as my grandfathers were to me. . . . A long  
3 sentence will guarantee that I cannot hope for this: watching my children delight in  
4 getting to eat Grandpa's French Toast for dinner.

4 (Hersey Decl. Ex. 1, April Cunningham Letter.) His daughter, Carrie, writes about the  
5 emptiness that her father's absence will mean:

6 He had expressed many times his regret at not being around more when we were  
7 growing up, and his desire to make this up to us in the future. I find it hard now to  
8 think about the future because I still do not fully understand the consequences that  
9 all of this will have for my family. I know my future has changed, and what I had  
10 imagined is now gone. It is especially difficult to think that I may not have any  
11 hope of replacing some of these images with new memories with my father.

10 (Hersey Decl. Ex. 2, Carrie Cunningham Letter.) Nancy Cunningham echo's her  
11 daughters' sentiments and asks the Court for leniency for the sake of her children:

12 We all fully recognize and understand the enormity of the situation. I know the  
13 children feel and hope that, with Mr. Cunningham's demonstration of both remorse  
14 and continued cooperation, they will sometime in the future be able to spend time  
15 with their father, free of a prison setting. For the benefit of the children, I hope the  
16 court will take the foregoing, as well as Mr. Cunningham's previous military  
17 service to his country, into consideration when contemplating the term of  
18 imprisonment.

16 (Hersey Decl. Ex. 5, Nancy Cunningham Letter.) In summary, fellow Viet Nam  
17 pilot Richard W. Redditt neatly captures what so many who have written letters to the  
18 Court have also expressed:

19 I imagine it is a daunting task to pronounce sentencing on a high profile public  
20 figure and former war hero like Randy. I cannot offer information about his recent  
21 transgressions and undisputed bad judgment. Apparently some human flaws got  
22 the best of him late in life. But he was not always the person you will see in your  
23 courtroom. He has done great good in the vast majority of his lifetime of service to  
24 our country. For the majority of his life, he was inspirational and a powerful  
25 example who worked for the best interests of our country. I cannot begin to  
26 imagine the pain and anguish that his recent actions have caused him as he  
27 compares his current situation to all the high standards of behavior and morality he  
28 has sworn to uphold in the past. I am certain he is remorseful for his behavior. I  
29 know the law will constrain to some degree your decision on the day of sentencing.  
30 But I ask that you search for whatever latitude might be available to reduce the  
31 sentence as much as possible and to use your years of experience on the bench to  
32 temper appropriate punishment for this American hero who has fallen from grace.

27 (Hersey Decl. Ex. 35, Richard Redditt Letter, 2/15/06.)

28 At his best, Mr. Cunningham embodies a truly unique combination of

1 characteristics. As a warrior, he risk his own life to save the lives of his comrades. As a  
2 congressman, he rescued a helpless woman from a hopeless situation and helped to  
3 prolong the life of a terminally ill patient. His words of encouragement had a lasting  
4 effect on a kindergarten boy and on an injured Naval Academy midshipman. Mr.  
5 Cunningham reached out to people in need: Iranian American students; a priest trying to  
6 attract support for a new homeless shelter; a young Latina mother whom he employed and  
7 befriended; an African-American fighter pilot facing discrimination, among many others.  
8 He joined forces with a famous folk singer and Viet Nam war protester in the cause of  
9 helping disadvantaged children. As the letters submitted to the Court conclusively  
10 establish, Mr. Cunningham's life represents an exceptional record of military, civic and  
11 charitable achievement that heavily mitigates the severity of his admittedly serious  
12 criminal conduct. USSG §§ 5H1.1, 5H1.3 and 5H1.11.

#### 13 **VI. SENTENCING RECOMMENDATION**

14 The statutory maximum sentence for Count I of the Information – Conspiracy -- is  
15 five (5) years. 18 U.S.C. § 371. Count I also provides for a fine of no more than  
16 \$250,000, a mandatory special assessment of \$100 and a term of supervised release of up  
17 to three (3) years. *Id.* The statutory maximum sentence for Count II of the Information –  
18 Tax Evasion – is also five (5) years. 18 U.S.C. § 7201. Count II similarly provides for a  
19 fine of up to \$250,000 as well as a mandatory special assessment of \$100 and a term of  
20 supervised release of up to three (3) years. *Id.*

21 The Plea Agreement memorializes the parties' stipulations regarding sentencing in  
22 this case. It recites that the sentence to be imposed on Mr. Cunningham will be based  
23 upon the factors set forth in 18 U.S.C. § 3553(a), and notes that the United States  
24 Sentencing Guidelines ("Guidelines") are no longer mandatory. Plea Agreement at 22.  
25 Because the Guidelines must still be considered by the Court along with the other factors  
26 enumerated in Section 3553(a), the parties have stipulated to certain facts necessary to the  
27 determination of the Guidelines Range and the application of other Guidelines'  
28 provisions. *Id.* at 23-25. These stipulations include the following:

- 1           • Use of the November 2004 Guidelines Manual;
- 2           • the Factual Basis of the Plea Agreement is “relevant conduct” under Guidelines
- 3           § 1B1.3;
- 4           • total offense level of 33;<sup>6</sup>
- 5           • Criminal History Category of I;<sup>7</sup>
- 6           • Guidelines Range of 135 months to 168 months;
- 7           • the parties are free to argue for and against any upward or downward departures
- 8           from the Guidelines Range;
- 9           • application of Guidelines § 5G1.2(d); and
- 10          • the parties agree that it is premature to evaluate whether Mr. Cunningham has
- 11          provided “substantial assistance” to the government’s ongoing investigation for
- 12          purposes of a departure under Guidelines § 5K1.1 but, if the United States
- determines at a later date that Mr. Cunningham has provided “substantial
- assistance”, it will move for a reduction of sentence pursuant to Federal Rule of
- Criminal Procedure 35(b).

13          *Id.* The parties reached no agreement regarding whether a fine should be imposed by the

14          Court but did stipulate that Mr. Cunningham should pay a special assessment of \$200 at

15          the time of sentencing. *Id.* at 26.

---

17          <sup>6</sup> This offense level is based on the stipulation by the parties that, for purposes of Count I,

18          the Base Offense Level is 14, *see* USSG § 2C1.1(a)(1), which is enhanced by 2 levels

19          because the offense conduct involved more than one bribe, *see* USSG § 2C1.1(b)(1), 4

20          levels because Mr. Cunningham was an elected public official, *see* USSG § 2C1.1(b)(3),

21          and 16 additional levels because of the value of the benefits and payments received from

22          the conspiracy. USSG § 2C1.1(b)(2). This total offense level of 36 is then reduced by 3

23          levels to an offense level of 33 because the parties agree that Mr. Cunningham has

24          accepted responsibility for his crimes. USSG § 3E1.1. With respect to Count II, the

25          parties stipulated that the Base Offense Level is 20, *see* USSG § 2T4.1(H), which is

26          enhanced by 2 levels because the amount of the tax loss in any single year exceeds

27          \$10,000, *see* USSG § 2T1.1(b)(1), and another 2 levels because the evasion of taxes was

28          effected by use of sophisticated means. USSG § 2T1.1(b)(2). This total offense level of

            24 is then reduced by 3 levels to an offense level of 21 because the parties agree that Mr.

            Cunningham has accepted responsibility for his crimes. USSG § 3E1.1.

26          <sup>7</sup> The parties did not resolve Mr. Cunningham’s Criminal History Category under the

27          Guidelines but stipulated in the Plea Agreement to the appropriate Guidelines Range

28          based on the assumption that he had no prior criminal record. *See* Plea Agreement at 24

            & 25. The PSR has since confirmed that Mr. Cunningham has no prior criminal record

            and that Criminal History Category I is the proper assignment in this case. PSR at 20.

1           The PSR in this case recommends that the Court impose the statutory maximum  
2 sentence on Mr. Cunningham for both counts of the Information. PSR at 46. The PSR  
3 also recommends that the sentences run consecutively for a total prison term of ten (10)  
4 years. *Id.* With regard to the advisory Guidelines range, the PSR recommends that the  
5 Court enhance the base offense level by five (5) levels – three levels pursuant to  
6 Guidelines § 3B1.1 (Role in the Offense) and two (2) levels pursuant to Guidelines §  
7 3C1.1 (Obstruction of Justice). *Id.* at 41-42. As a result, the PSR calculates Mr.  
8 Cunningham’s base offense level as thirty-eight (38) and, with a Criminal History  
9 Category of I, sets his Guidelines range at 235 to 293 months. *Id.* 42. Because the  
10 statutory maximum sentence of 120 months is well below the low-end of the Guidelines  
11 range, the PSR concludes that there is no basis to sentence Mr. Cunningham to less than  
12 ten (10) years. *Id.* In fact, since the PSR concluded that there was no basis to depart from  
13 the advisory Guidelines range sufficient to produce a sentence for Mr. Cunningham below  
14 the statutory maximum, it declined to recommend a departure in this case. *Id.* at 43.  
15 Finally, the PSR recommended that the Court not fine Mr. Cunningham. *Id.* at 46. It  
16 reached this conclusion based on the belief that Mr. Cunningham’s limited ability to make  
17 future payments to the government should be dedicated to his outstanding tax liability  
18 rather than a fine. *Id.* To that end, the PSR recommended that the Court order Mr.  
19 Cunningham to make restitution for the total tax loss as result of the conspiracy, which it  
20 calculated as \$875,956. *Id.*

21           The PSR was filed on February 14, 2006, and pursuant to Federal Rule of Criminal  
22 Procedure 32, Mr. Cunningham is permitted fourteen (14) days to determine whether he  
23 will file objections to its contents. Fed. R. Crim. P. 32. However, to accommodate the  
24 current briefing schedule for Mr. Cunningham’s sentencing, he will file and serve his  
25 formal objections pursuant to Rule 32 early next week. For purposes of this Sentencing  
26 Memorandum, Mr. Cunningham is prepared to identify certain objections to the PSR that  
27 are readily apparent at this time. He reserves his right under Rule 32 to supplement the  
28 objections stated herein both in his formal objections to the PSR that will be filed next



1 week and also in his reply memorandum authorized under the Court's Standing Order in  
2 Criminal Cases.

3 Mr. Cunningham concurs in the following respects with the sentencing  
4 recommendations set forth in the PSR, but also states the following objections:

- 5
- 6 • The Court should impose the statutory maximum sentence on Count I of the  
7 Information.
- 8 • The Court should not impose the statutory maximum sentence on Count II of  
9 the Information but should instead impose a sentence of one (1) year  
10 imprisonment.
- 11 • The Court should impose the sentences for Counts I and II of the Information  
12 consecutively for a total sentence of seventy-two (72) months or six (6) years  
13 incarceration.
- 14 • The Court should not upwardly adjust the base offense level for Mr.  
15 Cunningham's role in the offense or for obstruction of justice.<sup>8</sup>
- 16 • The Guidelines range in this case should be the range stipulated in the Plea  
17 Agreement.
- 18 • The Court should impose a sentence below the statutory maximum of ten (10)  
19 years based on the sentencing factors of 18 U.S.C. § 3553(a) but, if the Court  
20 elects to impose a sentence predicated primarily on the Guidelines, it should  
21 depart downward from the applicable offense level to offense level twenty-  
22 seven (27) and impose a sentence of seventy-two (72) months.
- 23 • The Court should impose a three (3) year term of supervised release for Counts  
24 I and II of the Information with Count II to run concurrent to Count I.
- 25 • The Court should not impose a fine in this case.
- 26 • The Court should impose restitution commensurate with Mr. Cunningham's  
27 outstanding tax obligations to the United States but it should not impose a  
28 specified amount of restitution until such time as the Internal Revenue Service

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<sup>8</sup> The United States produced to Mr. Cunningham on February 16, 2006 substantial discovery that it contends is relevant to its requests for these upward adjustments in the base offense level. Based on this discovery, Mr. Cunningham may withdraw his objections to the proposed adjustments thereby negating the need for any evidentiary presentation on those disputed issues. Because Mr. Cunningham did not receive the PSR recommending the five (5) level upward adjustment until February 14, 2006, and because he has not yet had the opportunity to review the relevant discovery produced on February 16, 2006, he will reserve his objections to those adjustments at this time.

1 and Mr. Cunningham have agreed to the precise amount of that loss.

2  
3 Mr. Cunningham recognizes the extremely serious nature of his crimes and that  
4 imposition of a prison term is entirely appropriate in this case. Thus, he makes no request  
5 for supervised release, home confinement or other alternative forms of punishment in lieu  
6 of incarceration. Indeed, Mr. Cunningham concedes that a *lengthy* prison term is  
7 necessary to reflect the seriousness of his criminal conduct and to afford adequate  
8 deterrence to other public officials in the future. But, there is no contention that Mr.  
9 Cunningham poses a threat to the public that requires imposition of the maximum  
10 sentence available by statute of ten (10) years. Thus, in selecting a sentence, Mr.  
11 Cunningham asks this Court to consider the entirety of his life -- not just his recent  
12 misconduct. He specifically requests that the Court consider the following mitigating  
13 factors -- all of which weigh substantially in favor of leniency in this case:

- 14 • Mr. Cunningham lived the first fifty-nine (59) years of his life as an honorable  
15 man -- indeed, a distinguished man with no prior criminal record.
- 16 • Mr. Cunningham admitted his guilt before he was charged and waived his right  
17 to a jury trial.
- 18 • Mr. Cunningham resigned his congressional office and publicly accepted  
19 responsibility for his wrongdoing in a very sincere statement of remorse.
- 20 • Mr. Cunningham agreed to assist the government in its ongoing criminal  
21 investigation and provided such assistance even before the Plea Agreement in  
22 this case was finalized.
- 23 • Mr. Cunningham's military service evidences an exceptional and self-  
24 sacrificing contribution to the nation as well as heroism that literally saved the  
lives of numerous American soldiers, sailors and airmen.
- 25 • Mr. Cunningham's contributions to charitable organizations in San Diego  
26 County and elsewhere reflect an extraordinary commitment to at-risk children  
27 and the disadvantaged.
- 28

- 1           • Mr. Cunningham's career as a public servant, while obviously marred by  
2           deplorable acts of corruption, also demonstrates his enormous contributions to  
3           the health, education and welfare of the people in San Diego County.
- 4           • Mr. Cunningham is sixty-four (64) years old and, because of prior bouts with  
5           aggressive prostate cancer, he has an estimated life expectancy of only seven  
6           (7) years.

6           Based upon these considerations, Mr. Cunningham asks the Court to impose the  
7           statutory maximum sentence of five (5) years imprisonment on Count I and one (1) year  
8           of incarceration on Count II. Thus, the Court should impose a total sentence of (6) years  
9           executed incarceration. He further requests that the Court impose a three (3) year term of  
10          supervised release as recommended in the PSR. Because Mr. Cunningham has already  
11          agreed to forfeit to the United States virtually all of his assets, and because Mr.  
12          Cunningham has committed to repay in the future a significant tax liability owed to the  
13          United States, he requests that the Court impose no fines in this case. Finally, as noted  
14          above, the parties agree that Mr. Cunningham should remit the \$200 special assessment at  
15          the time of sentencing.

16          As will be explained in more detail *infra*, the proposed sentence requested by Mr.  
17          Cunningham is a just and appropriate application of 18 U.S.C. § 3553(a). Such a sentence  
18          satisfies the statutory requirement that the Court impose punishment "sufficient, but not  
19          greater than necessary to comply with the purposes set forth in" Section 3553(a)(2).  
20          Importantly, the sentence proposed by Mr. Cunningham is entirely consistent with the  
21          Guidelines. As noted *infra*, the policy statements issued by the United States Sentencing  
22          Commission support a downward departure from the Guidelines Range in this case to  
23          reflect Mr. Cunningham's unique offender characteristics. USSG § 5H1.1; USSG §  
24          5H1.11. Those offender characteristics are present to a substantial degree in his case, *see*  
25          USSG § 5K2.0(a)(4), and, when taken together, make Mr. Cunningham's sentencing an  
26          exceptional one. USSG § 5K2.0(c). Accordingly, to the extent the Court chooses to  
27          select a particular sentence by reference to the Guidelines, Mr. Cunningham asks that the  
28          Court depart downward from the Guidelines range by lowering his offense level to

1 twenty-seven (27), which produces a corresponding Guidelines range of seventy (70) to  
2 eighty-seven (87) months. As noted above, Mr. Cunningham requests that the Court  
3 impose a sentence of seventy-two (72) months -- six (6) years -- in prison.

4 **VII. LAW & ARGUMENT**

5 In selecting the sentence in this case, the parties agree that the Court is bound by  
6 the statutory mandate of 18 U.S.C. § 3553(a). The statute commands that, when  
7 determining the proper sentence to be imposed, the Court shall consider seven factors:

- 8
- 9 (1) the nature and circumstances of the offense and the history and  
10 characteristics of the defendant;
  - 11 (2) the need for the sentence imposed –
    - 12 (A) to reflect the seriousness of the offense, to promote respect for  
the law, and to provide just punishment for the offense;
    - 13 (B) to afford adequate deterrence to criminal conduct;
    - 14 (C) to protect the public from further crimes of the defendant; and
    - 15 (D) to provide the defendant with needed educational or vocational  
16 training, medical care, or other correctional treatment in the  
most effective manner;
  - 17 (3) the kinds of sentences available;
  - 18 (4) the kinds of sentence and the sentencing range established for –
    - 19 (A) the applicable category of offense committed by the applicable  
20 category of defendant as set forth in the guidelines issued by  
the Sentencing Commission pursuant to section 994(a) of title  
21 28, United States Code, and that are in effect on the date the  
defendant is sentenced;
  - 22 (5) any pertinent policy statement issued by the Sentencing Commission  
23 pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the  
defendant is sentenced;
  - 24 (6) the need to avoid unwarranted sentence disparities among defendants  
25 with similar records who have been found guilty of similar  
conduct; and
  - 26 (7) the need to provide restitution to any victims of the offense.

27 The fourth and fifth factors pertain to the Guidelines range applicable to the case as well  
28

1 as any departures from that offense level which might be warranted based on the policy  
2 statements issued by the U.S. Sentencing Commission.

3 **A. Federal Sentencing After the U.S. Supreme Court's Decision in Booker.**

4 Prior to the United States Supreme Court's decision last year in *United States v.*  
5 *Booker*, 543 U.S. 220 (2005), district courts were obligated to select a sentence based on  
6 the Guidelines without regard to the other statutory considerations enumerated above. *See*  
7 18 U.S.C. § 3553(b) (stating that "court shall impose a sentence of the kind, and within  
8 the range, referred to in subsection (a)(4) unless the court finds that there exists an  
9 aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into  
10 consideration by the Sentencing Commission in formulating the guidelines that should  
11 result in a sentence different from that described"). "The Supreme Court's decision in  
12 *Booker/Fanfan* significantly altered the sentencing regime that has existed since the  
13 Guidelines became effective on November 1, 1987." *United States v. Crosby*, 397 F.3d  
14 103, 108 (2d Cir. 2005).

15 *Booker* held that the Sixth Amendment's guarantee of a jury trial was inconsistent  
16 with the judicial fact-finding process so central to the Guidelines when those factual  
17 findings had a determinate and specified impact on a defendant's punishment. *Booker*,  
18 543 U.S. at 243-244. Thus, the Supreme Court remedied the constitutional infirmity by  
19 "finding the provision of the federal sentencing statute that makes the Guidelines  
20 mandatory, 18 U.S.C. § 3553(b)(1), incompatible with [the] constitutional holding." *Id.* at  
21 245. The *Booker* Court explained that, by striking § 3553(b)(1), the Guidelines would  
22 henceforth be advisory only. *Id.* The Supreme Court added that, after *Booker*, a  
23 sentencing court should "consider the Guidelines ranges . . . but it permits the court to  
24 tailor the sentence in light of other statutory concerns as well." *Id.* (citing seven factors of  
25 18 U.S.C. § 3553(a)).

26 As this Court is no doubt aware, over the last year, the lower courts have  
27 undertaken to fashion basic rules for sentencing in the wake of *Booker*. The United States  
28 Court of Appeals for the Ninth Circuit – as well as other federal courts around the nation -

1 - have provided guidance on several questions that are pertinent to Mr. Cunningham's  
2 sentencing.

3       *First*, the seven factors set forth in 18 U.S.C. § 3553(a) govern the selection of Mr.  
4 Cunningham's sentence and the Guidelines range is just one of the seven factors to be  
5 considered. *E.g.*, *United States v. Plouffe*, No. 05-30045, 2006 U.S. App. LEXIS 1086, at  
6 \*1-2 (9th Cir. Jan. 18, 2006) (holding that evaluation of sentence is "guided by the  
7 sentencing factors set forth in 18 U.S.C. § 3553(a), including the sentencing range  
8 established by the Sentencing Guidelines"); *United States v. Cantrell*, No. 03-30562, 2006  
9 U.S. App. LEXIS 814, at \*18 (9th Cir. Jan. 13, 2006) (noting that "18 U.S.C. § 3553(a) is  
10 still operative [after *Booker*], and requires district courts to take the applicable Guidelines  
11 range into consideration when sentencing, along with other sentencing factors enumerated  
12 by Congress"). While the sentencing factors listed in Section 3553(a) existed prior to  
13 *Booker*, their import has taken on added significance after *Booker* because district court's  
14 are no longer bound by the Guidelines. The United States Court of Appeals for the  
15 Second Circuit recently explained:

16       Prior to *Booker/Fanfan*, the section 3553(a) requirement that the sentencing judge  
17 "consider" all of the factors enumerated in that section had uncertain import  
18 because subsection 3553(b)(1) required judges to select a sentence within the  
19 applicable Guidelines range unless the statutory standard for a departure was met.  
20 Now, with the mandatory duty to apply the Guidelines excised, the duty imposed  
21 by section 3553(a) to "consider" numerous factors acquires renewed significance.

22 *Crosby*, 397 F.3d at 111.

23       *Second*, while a few courts have held that the Guidelines range is entitled to  
24 presumptive force in determining the appropriate sentence, *see United States v. Wilson*,  
25 350 F. Supp.2d 910, 911 (D. Utah 2005); *United States v. Wanning*, 354 F. Supp.2d 1056,  
26 1058 (D. Neb. 2005); *United States v. Peach*, 356 F. Supp.2d 1018, 1022 (D.N.D. 2005),  
27 the overwhelming weight of authority is that the Guidelines range is one of seven factors  
28 that the Court must consider but it carries no greater weight in the sentencing calculus  
than any of the other factors identified in Section 3553(a). *E.g.*, *United States v. Ranum*,  
353 F. Supp.2d 984, 985-86 (E.D. Wis. 2005) (holding that, "in every case, courts must

1 now consider all of the § 3553(a) factors, not just the guidelines” and noting that “*Wilson*  
2 is inconsistent with the holdings of the merits majority in *Booker*, rejecting mandatory  
3 guideline sentences based on judicial fact-finding, and the remedial majority in *Booker*,  
4 directing courts to consider all of the § 3553(a) factors, many of which the guidelines  
5 either reject or ignore”); *United States v. Myers*, 353 F. Supp.2d 1026, 1028 (S.D. Iowa  
6 2005) (“To treat the Guidelines as presumptive is to concede the converse, i.e., that any  
7 sentence imposed outside the Guideline range would be presumptively unreasonable in  
8 the absence of clearly identified reasons. If presumptive, the Guidelines would continue  
9 to overshadow the other factors listed in [S]ection 3553(a), causing an imbalance in the  
10 application of the statute to a particular defendant by making the Guidelines, in effect, still  
11 mandatory.”); *United States v. Biheiri*, 356 F. Supp.2d 589, 594 n.6 (E.D. Va. 2005) (“No  
12 individual factor is singled out as having greater weight; instead, the richness of factual  
13 diversity in cases calls on sentencing judges to consider all of the factors and to accord  
14 each factor the weight it deserves under the circumstances. Thus, the Guidelines  
15 sentencing range is not entitled to ‘heavy weight,’ but it is a useful starting point in  
16 fashioning a just and appropriate sentence.”); *United States v. Jaber*, 362 F. Supp.2d 365,  
17 370-71 (D. Mass. 2005) (rejecting analysis in *Wilson* and noting that, “the existing set of  
18 rules – the Guidelines – are very important, but they cannot be outcome-determinative  
19 without running afoul of *Booker*”); *Simon v. United States*, 361 F. Supp.2d 35, 40  
20 (E.D.N.Y. 2005) (“I adopt the view that the Guidelines are advisory and entitled to the  
21 same weight accorded to each other factor that the Court is instructed to consider by §  
22 3553(a).”); *United States v. Phelps*, 366 F. Supp.2d 580, 587 (E.D. Tenn. 2005) (stating  
23 that “the Court does not believe the advisory Guideline range should be treated as a  
24 starting point or necessarily understood as representing a presumptively reasonable  
25 sentence in a given case. The Guidelines are one of a universe of factors pertinent to the  
26 Court’s sentencing decisions, albeit a significant or substantial factor, and nothing in  
27 *Booker* or 18 U.S.C. § 3553(a) operates to make the advisory Guidelines range uniquely  
28 primary among those factors.”); *United States v. Moreland*, 366 F. Supp.2d 416, 418

1 (S.D. W. Va. 2005) (“Importantly, while I respect the advice of the Guidelines and give it  
2 serious consideration, I do not view that advice as carrying greater weight than any of the  
3 other § 3553(a) factors. That is, I do not view the advisory Guideline range as being  
4 ‘presumptively reasonable.’”); *United States v. Pacheco-Soto*, 386 F. Supp.2d 1198, 1203  
5 (D.N.M. 2005) (rejecting reasoning of *Wilson* and *Wanning*, and finding that Guidelines  
6 are advisory and carry no presumptive weight relative to other factors in 18 U.S.C. §  
7 3553(a)). Most courts have reached this conclusion for three compelling reasons: 1) the  
8 text of Section 3553(a) affords no added weight to the Guidelines relative to the other  
9 sentencing factors; 2) *Booker* did not indicate that the Guidelines range was entitled to  
10 presumptive force; and 3) treating the Guidelines as presumptively correct “is the  
11 equivalent of imposing a ‘de facto mandatory sentence’ on a defendant”, which would run  
12 contrary to *Booker*. *E.g.*, *Simon*, 361 F. Supp.2d at 40; *Moreland*, 366 F. Supp.2d at 418.  
13 Therefore, though the Guidelines range in this case is relevant to the determination of Mr.  
14 Cunningham’s sentence, it is not presumptively correct or entitled to greater deference  
15 from the Court than any of the other factors in 18 U.S.C. § 3553(a).

16 *Third*, in selecting a sentence in this case, the Court may rely on specific offender  
17 characteristics that it believes are relevant to Mr. Cunningham’s punishment even though  
18 the Guidelines prohibit or discourage the Court from considering those characteristics.  
19 *E.g.*, *United States v. Menyweather*, 431 F.3d 692, 700 (9th Cir. 2005); *United States v.*  
20 *Ameline*, 409 F.3d 1073, 1093 (9th Cir. 2005) (en banc) (Wardlaw, J., concurring in part  
21 and dissenting in part on other grounds); *United States v. Gorsuch*, 404 F.3d 543, 548 (1st  
22 Cir. 2005); *United States v. Ryder*, 414 F.3d 908, 920 (8th Cir. 2005).

23 In *Menyweather*, the United States Court of Appeals for the Ninth Circuit affirmed  
24 a district court’s decision to depart from the applicable Guidelines range based on specific  
25 offender characteristics that the Guidelines instruct are normally irrelevant to the  
26 sentencing judgment. The Court of Appeals concluded that, even if the departure was  
27 erroneous under the Guidelines, the error was harmless because the district court was free  
28 to consider the same information after *Booker* without regard to the Guidelines. The



1 Court of Appeals explained as follows:

2 In the “broader appraisal,” available to district courts after *Booker*, courts can  
3 justify consideration of family responsibilities, an aspect of the defendant’s  
4 “history and characteristics”, 18 U.S.C. § 3553(a)(1), for reasons extending beyond  
5 the Guidelines. “District courts now . . . have the discretion to weigh a multitude  
6 of mitigating and aggravating factors that existed at the time of mandatory  
7 Guidelines sentencing, but were deemed ‘not ordinarily relevant,’ such as age,  
8 education and vocational skills, mental and emotional conditions, employment  
9 record, and family ties and responsibilities.”

10 *Menyweather*, 431 F.3d at 700 (citing *Gorsuch*, 404 F.3d at 548 and quoting *Ameline*, 409  
11 F.3d at 1093). The United States Court of Appeals for the First Circuit reached the same  
12 judgment, holding that “in the post-*Booker* world, the sentencing guidelines are only  
13 advisory and the district court may justify a sentence below the guideline level based upon  
14 a broader appraisal.” *Gorsuch*, 404 F.3d at 548. In remanding the case for re-sentencing,  
15 the First Circuit advised the district court that the defendant’s “serious mental illness,  
16 maternal responsibilities, and lack of a criminal record may be *more relevant* than under  
17 the pre-*Booker* regime of mandatory guidelines.” *Id.* at 545 (emphasis added). Likewise,  
18 in *Ryder*, the United States Court of Appeals for the Eighth Circuit remanded the case for  
19 re-sentencing because the district court had declined to consider the defendants’ ages and  
20 medical conditions in refusing to depart downward from their applicable Guidelines  
21 ranges. The Eighth Circuit held as follows:

22 The prior mandatory nature of the Guidelines deprived the district court of the  
23 opportunity to consider age and physical condition in any manner other than as a  
24 basis for a Guidelines departure. Now coupled with the requirements in § 3553(a)  
25 that a district court consider a defendant’s characteristics and the need to provide  
26 medical care in the most effective manner when sentencing a defendant, the district  
27 court would be well within its discretion to at least consider [the defendants’] ages  
28 and medical conditions as non-Guideline factors on remand.

23 *Ryder*, 414 F.3d at 920. Thus, while this Court must consider the policy statements in the  
24 Guidelines regarding the relevance of particular offender characteristics when determining  
25 whether to depart from Mr. Cunningham’s Guidelines range, it is not bound by those  
26 policy statements and may consider those offender characteristics in selecting his ultimate  
27 sentence under Section 3553(a). *E.g.*, *Ranum*, 353 F. Supp.2d at 986 (noting that policy  
28 statements in Guidelines normally prohibit consideration of defendant’s age, education,

1 family condition, employment record, and military service but that, “in cases in which a  
2 defendant’s history and character are positive, consideration of all of the § 3553(a) factors  
3 might call for a sentence outside the guideline range”); *United States v. Nellum*, No. 2:04-  
4 CR-30-PS, 2005 WL 300073, at \*3-4 (N.D. Ind. Feb. 3, 2005) (finding that, under 18  
5 U.S.C. § 3553(a), the defendant’s age, medical condition, family ties and military service  
6 warranted a sentence below the applicable Guidelines range even though these offender  
7 characteristics are normally not relevant under the Guidelines); *Jaber*, 362 F. Supp.2d at  
8 376 n.21 (“Neither of these cases required that I take into account factors discouraged or  
9 prohibited under the Guidelines, although *Booker* anticipated such situations. *Booker*  
10 plainly allows courts to look carefully at those factors and to determine to what degree  
11 they are relevant to individual cases.”); *Simon*, 361 F. Supp.2d at 40 (sentencing  
12 defendant below applicable Guidelines range because of his age and medical condition  
13 and noting that “age, educational and vocational skills, mental and emotional conditions,  
14 physical conditions, employment record and family ties and responsibilities are not  
15 normally relevant. USSG §§ 5H1.1-6. Yet these are the sort of characteristics a court is  
16 likely to find relevant when determining ‘the history and characteristics of the defendant’  
17 as required by § 3553(a)(1)”); *Phelps*, 366 F. Supp.2d at 592-593 (noting that policy  
18 statements in Guidelines § 5H may conflict with 18 U.S.C. § 3553(a)(1) and 18 U.S.C. §  
19 3661 and, thus, court “will not consider itself bound by the provisions of USSG § 5H in  
20 exercising the discretion afforded by *Booker*”); *Pacheco-Soto*, 386 F. Supp.2d at 1206-  
21 1207 (considering age, education and family circumstance in selecting sentence of  
22 defendant because “the Guidelines’ prohibition of considering these factors cannot be  
23 squared with the § 3553(a)(1) requirement that the court evaluate the ‘history and  
24 characteristics’ of the defendant in the wake of *Booker*”).

25 *Fourth*, in selecting Mr. Cunningham’s sentence, 18 U.S.C. § 3553(a) requires the  
26 Court to “impose a sentence sufficient, but not greater than necessary to comply with the  
27 purposes set forth” in Section 3553(a)(2). Paragraph (a)(2) lists the general goals and  
28 objectives of sentencing, such as the need for deterrence and to promote respect for the

1 law. 18 U.S.C. § 3553(a)(2). Thus, the statute cabins the Court’s discretion to select a  
2 sentence within the Guidelines range if a lower sentence would be “sufficient” to advance  
3 the objectives of 18 U.S.C. § 3553(a)(2). *See, e.g., Ranum*, 353 F. Supp.2d at 986 (noting  
4 that, “in some cases the guidelines will clash with § 3553(a)’s primary directive: to  
5 ‘impose a sentence sufficient, but not greater than necessary to comply with the purposes’  
6 of sentencing” and, in turn, sentencing defendant to non-Guidelines sentence of one (1)  
7 year because Guidelines range of thirty-seven (37) to forty-six (46) months “was much  
8 greater than necessary to satisfy purposes of sentencing set forth in § 3553(a)”); *Myers*,  
9 353 F. Supp.2d at 1029 (“Henceforth, this Court will strive to ‘impose a sentence  
10 sufficient, but not greater than necessary, to comply with the purposes of paragraph 2.”);  
11 *Nellum*, 2005 WL 300073, at \*5 (sentencing defendant to 108 months after rejecting  
12 sentence within Guidelines range because “the sentence called for by the guidelines, 168-  
13 210 months, was greater than necessary to satisfy the purposes of sentencing set forth in §  
14 3553(a)(2).”); *Biheiri*, 356 F. Supp.2d at 594 (“Fairly read and taken as a whole, therefore,  
15 § 3553 calls upon sentencing judges to consider specific enumerated factors, including the  
16 Sentencing Guidelines range, and then to impose a sentence that is sufficient but not  
17 greater than necessary to comply with the goals of” paragraph (a)(2)); *Simon*, 361 F.  
18 Supp.2d at 47 (sentencing defendant to 262 months imprisonment but rejecting Guidelines  
19 range of 324 to 405 months and noting that sentencing court “must pay particular attention  
20 that the sentence imposed is not impermissibly ‘greater than necessary’” to comply with  
21 the goals of 18 U.S.C. § 3553(a)(2)); *Phelps*, 366 F. Supp.2d at 589 (commenting that,  
22 after *Booker*, “[a]t all times, the Court will be guided by § 3553(a)’s general parsimony  
23 provision (‘court shall impose a sentence sufficient, but not greater than necessary . . .’”).

24 With this general sentencing framework post-*Booker* in mind, Mr. Cunningham  
25 now turns to the analysis of 18 U.S.C. § 3553(a).

26 **B. 18 U.S.C. § 3553(a) Requires a Sentence Below the Statutory Maximum**  
27 **of Ten Years Imprisonment.**

28 As noted above, this Court must consider the seven (7) sentencing factors

1 enumerated in 18 U.S.C. § 3553(a) when determining the proper punishment for Mr.  
2 Cunningham. Two of those factors have no particular relevance in this case because they  
3 are not in dispute. Section 3553(a)(3) requires the Court to consider the kinds of  
4 sentences available, while Section 3553(a)(7) instructs the Court to evaluate the need for  
5 restitution to any victims of the criminal offense. Here, Mr. Cunningham agrees with the  
6 United States that his conduct warrants incarceration. Thus, the Court need not evaluate  
7 the propriety of other forms of punishment, such as home detention, that are alternatives  
8 to executed incarceration. Likewise, Mr. Cunningham agrees with the PSR that he should  
9 make restitution to the United States. The Plea Agreement requires him to file corrected  
10 tax returns for the relevant years of the criminal conspiracy and to make payment on taxes  
11 owed to the United States Treasury. Therefore, this Court's sentencing determination will  
12 turn only upon the remaining five (5) factors of 18 U.S.C. § 3553(a).

13           1.       **The Nature and Circumstances of Mr. Cunningham's Offense**  
14                   **and Mr. Cunningham's History and Characteristics.**

15           Mr. Cunningham committed serious criminal acts and the circumstances of those  
16 crimes evidence true culpability. He will not minimize the severity of his misconduct or  
17 the injury he has caused. (Hersey Decl. Ex. 3, Duke Cunningham Letter.) There is no  
18 dispute that Mr. Cunningham's criminal conduct involved a conspiracy that spanned  
19 multiple years and involved numerous other participants. He did not violate the law out of  
20 passion but rather base greed. Moreover, when his crimes were discovered, Mr.  
21 Cunningham did not *immediately* confess his wrongdoing but instead lied to his  
22 constituents, his former colleagues, friends and even his family. *See supra* at II. Mr.  
23 Cunningham recognizes that his breach of the public trust has undermined confidence in  
24 government. (Hersey Decl. Ex. 3, Duke Cunningham Letter.)

25           However, there are several points of context that are relevant to the Court's  
26 understanding of the "nature and circumstances of the offense" in this case. *First*, Mr.  
27 Cunningham believed in the merits of the military intelligence programs that he supported  
28 in the appropriations and contracting process. (*Id.*) In fact, he stills believes in the value

1 of those programs to the national security of the United States. (*Id.*) This belief is  
2 evidenced by the fact that, when he was in Congress, Mr. Cunningham instructed his staff  
3 to vet the programs with DOD officials. (*Id.*) Mr. Cunningham and his staff even  
4 received written and oral statements from DOD officials attesting to the merits of the  
5 programs. (*Id.*) They also consulted with DOD officials regarding their views about  
6 appropriate funding levels. (*Id.*) Support of these programs by DOD officials does not  
7 transform Mr. Cunningham's graft into honorable public service. But his subjective belief  
8 in the value of these military intelligence programs does shed some light upon his state of  
9 mind.

10 *Second*, by the time this conspiracy commenced, each of the coconspirators  
11 referenced in the Plea Agreement had become personal friends of Mr. Cunningham. (*Id.*)  
12 He socialized with three of the four coconspirators with some frequency and his family  
13 even socialized often with the family of one of the coconspirators. *Id.* Over time, he  
14 permitted those personal relationships to cloud his moral judgment.

15 *Third*, Mr. Cunningham's military experience and the resulting adulation that it  
16 generated created a sense of entitlement that rendered him unusually susceptible to  
17 corrupting influences. As the report of Dr. Saul F. Faerstein of the UCLA School of  
18 Medicine indicates, during his service in the Viet Nam War, Mr. Cunningham developed  
19 certain coping mechanisms that allowed him to face the fear and danger of combat. *See*  
20 Hersey Decl. Ex. 43, Letter of Dr. Saul F. Faerstein to The Honorable Larry Burns, United  
21 States District Court for the Southern District of California, at 7 (Feb. 14, 2006).<sup>9</sup> Dr.  
22 Faerstein refers to these mechanisms as "adaptive psychological defenses". (*Id.*) In his  
23 report, Dr. Faerstein notes that Mr. Cunningham's "repetition of this behavior and the  
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25 <sup>9</sup> In his letter to the Court, Mr. Cunningham's close friend and "back-seater" during Viet  
26 Nam, Willie Driscoll, offered similar observations as a lay person about these coping  
27 mechanisms: "However, those character traits, so essential for fighter pilot success in  
28 combat, have little value in civilian life. Readjustments must be made. However, it's  
extremely difficult if not impossible to completely 'readjust.'" (Hersey Decl. Ex. 45,  
William P. Driscoll Letter.)

1 reinforcement of the Navy, from his peers and his superiors, strengthened this defense  
2 mechanism. He learned how to block out the consequences and focus on the goals. He  
3 was praised and rewarded for his conduct in the Navy, fostering a sense of grandiosity.  
4 The magnitude of his accomplishments increased his self-esteem as well as his  
5 invulnerability.” (*Id.*) While these adaptive psychological defenses were essential to Mr.  
6 Cunningham’s success and indeed survival in combat, Dr. Faerstein concludes that they  
7 were “maladaptive” for a career in Congress. (*Id.*) Dr. Faerstein found that Mr.  
8 Cunningham’s “capacity to rationalize his conduct was increased by his sense of  
9 invulnerability to any harm. The process of rationalizing his behavior blinded him to the  
10 corruption it entailed, and led him to behave in ways totally antithetical to his life history,  
11 his family background and his moral and religious values.” (*Id.* at 7-8.) In his report, Dr.  
12 Faerstein explains that the maladaptive defense mechanisms that Mr. Cunningham  
13 developed in Viet Nam permitted him to justify his misconduct based on his subjective  
14 belief in the merits of the intelligence programs he was asked to support by people he  
15 considered personal friends. (*Id.*)

16         Of course, this context does not justify Mr. Cunningham’s illegal behavior and Mr.  
17 Cunningham now recognizes this obvious truth. In his letter to the Court, Mr.  
18 Cunningham readily admits that, “I convinced myself that I wasn’t selling my good  
19 offices because I believed in the programs that I supported. But denying reality does not  
20 change what I have done. And the reality is I received money in exchange for giving my  
21 friends special attention in Congress. I am so ashamed and deeply sorry for what I have  
22 done.” (Hersey Decl. Ex. 3, Randall “Duke” Cunningham Letter.) Although it took  
23 several months, Mr. Cunningham eventually faced his misconduct honestly and instructed  
24 his counsel to advise the Office of the United States Attorney that he intended to accept  
25 responsibility for his crimes. As the sealed memorandum filed concurrently with this  
26 memorandum reflects, Mr. Cunningham communicated his intent to admit wrongdoing  
27 well before his Plea Agreement was finalized. *See* Supplemental Submission re:

1 Acceptance of Responsibility and Assistance to the Government's Investigation (Under  
2 Seal).

3 In addition to entering his Plea Agreement in advance of indictment by the grand  
4 jury, Mr. Cunningham also provided affirmative assistance to the government's ongoing  
5 investigation before the Plea Agreement was reached. (*Id.*) Accordingly, when  
6 evaluating the "nature and circumstances of the offense", it is also entirely proper for the  
7 Court to credit Mr. Cunningham for promptly coming to terms with his wrongdoing and  
8 for taking steps to assist the United States with its investigation of the conspiracy.

9 In addition to the offense conduct, 18 U.S.C. § 3553(a)(1) also requires the Court  
10 to consider the "history and characteristics of the defendant". Sections IV and V describe  
11 in great detail the life history and characteristics of Mr. Cunningham and that information  
12 will not be repeated in detail again here. It is sufficient for purposes of Section 3553(a)(1)  
13 to highlight several pertinent conclusions about Mr. Cunningham that cannot be seriously  
14 disputed and which mitigate the severity of his punishment in this case.

15 *First*, before his guilty plea in this case, Mr. Cunningham had no prior criminal  
16 convictions and lived his life as a law-abiding citizen. PSR at 20. He also is a loving man  
17 who cares deeply for his wife and children. (Hersey Decl. Exs. 1, 2, 7, April, Carrie and  
18 Todd Cunningham Letters.) Further, he is widely respected for his kind heart and  
19 generous spirit. (Hersey Decl. Exs. 8, 13, 25, 33, Grayson Bass, Dee Dee Castro, Donna  
20 Judge and Charles W. Nesby Letters.)

21 *Second*, Mr. Cunningham distinguished himself as a Navy fighter pilot in the Viet  
22 Nam War and, because of his gallantry, the lives of numerous American servicemen were  
23 saved. (Hersey Decl. Exs. 45, 20, William P. Driscoll and Brian E. Grant Letters.) He  
24 was honorably discharged at the rank of Commander and received decorations for valor  
25 and bravery, including two Silver Stars, fifteen Air Medals, the Purple Heart, the  
26 Presidential Unit Citation, a Navy Unit Citation, the Cross of Gallantry, and the Navy  
27 Cross. PSR at 27. Mr. Cunningham was also nominated for the nation's highest military  
28 honor -- the Congressional Medal of Honor -- for his heroism in the skies over North Viet

1 Nam when he became the first Navy Ace and the first Ace of the Viet Nam War. *Id.*

2 *Third*, Mr. Cunningham has been active in local and national charities both before  
3 and after he entered Congress. His charitable works have included the donation of  
4 significant time and money to charitable organizations such as Father Joe's Villages, St.  
5 Stephen's Cathedral Church of God in Christ, Sister Claire's Home for Women, and Peter  
6 Yarrow's Operation Respect. (Hersey Decl. Exs. 12, 17, 31, 41, Father Joe Carroll, Sister  
7 Claire Frawley, Bishop George D. McKinney, and Peter Yarrow Letters.) Mr.  
8 Cunningham's charitable work has focused primarily on the needs of children, the  
9 homeless and the HIV AIDS crisis. (*Id.*) As the letters from some of those charitable  
10 organizations attest, he has devoted not only money but significant amounts of his time to  
11 these causes. (*Id.*)

12 *Fourth*, despite his recent transgressions, Mr. Cunningham's public service has  
13 been notable for his many contributions to San Diego County and the nation. He was  
14 instrumental in securing funding for children with disabilities and he founded the House  
15 of Representatives Impact Aid Coalition, which worked to ensure that school districts  
16 with a large military presence like San Diego were reimbursed for their loss of tax  
17 revenues. Mr. Cunningham was very active in education policy and hosted more than  
18 fifteen (15) high school technology fairs that were attended by more than 1,500 local  
19 students each year. (Hersey Decl. Ex. 23, Duncan Hunter Letter.) And, of course, Mr.  
20 Cunningham championed the cause of veterans, particularly disabled veterans and the  
21 families of POW/MIAs during his many years in Congress. (*Id.* See also Hersey Decl.  
22 Ex. 39, Lee E. Wilson Letter.)

23 All of these offender characteristics evidence a man who has devoted most of his  
24 adult life to his country and community. Any punishment that can be called just must  
25 account for the contributions and service of such a man. As Dr. Donald Lassiter, a long-  
26 time friend of Mr. Cunningham, noted in his letter to the Court: "I believe that mercy  
27 based on meritorious national service must be part of our national judicial consciousness."  
28 (Hersey Decl. Ex. 28, Donald V. Lassiter, Ph.D. Letter.)



1                   2.       **The Guidelines Range Applicable to Mr. Cunningham.**

2                   As noted *supra*, 18 U.S.C. § 3553(a)(4) requires the Court to consider the advisory  
3 Guidelines range in this case. The parties stipulated in the Plea Agreement to certain facts  
4 necessary to the calculation of the advisory Guidelines range, which is 135 to 168 months.  
5 Plea Agreement at 23-25.

6                   The United States has notified Mr. Cunningham that it intends to ask the Court to  
7 adjust the offense level applicable to his conduct pursuant to Guidelines § 3B1.1 (role in  
8 the offense) and Guidelines § 3C1.1 (obstructing or impeding the administration of  
9 justice). Based solely upon information provided by the United States, the PSR  
10 recommends that the Court upwardly adjust Mr. Cunningham's offense level by five (5)  
11 levels. PSR at 40-41. It recommends a three (3) level adjustment based on the  
12 determination that Mr. Cunningham was a "manager or supervisor" of the criminal  
13 activity, as defined in Guidelines § 3B1.1(b), and an adjustment of two (2) levels based on  
14 the determination that he obstructed the government's investigation in its early days, as  
15 defined by Guidelines § 3C1.1. *Id.*

16                   Mr. Cunningham only received the PSR's findings on these upward adjustments on  
17 February 14, 2006, and more importantly, only received the discovery from the Office of  
18 the United States Attorney on February 16, 2006. As such, he is not yet in a position to  
19 determine whether he will ultimately dispute the upward adjustments to his offense level  
20 recommended by the PSR. In order to reserve his rights in this regard, however, Mr.  
21 Cunningham disputes these upward adjustments at this time.

22                   In the unique circumstances of this case, however, it is unnecessary for the Court to  
23 resolve this factual question before imposing sentence. The United States Court of  
24 Appeals for the Ninth Circuit as well as the United States Court of Appeals for the Second  
25 Circuit have recognized that, after *Booker*, there may be circumstances where it is  
26 unnecessary to calculate the advisory Guidelines range. *E.g., Crosby*, 397 F.3d at 112  
27 n.12 ("We recognize that additional situations may arise where the sentencing judge  
28 would not need to resolve every factual issue and calculate the precise Guidelines range,

1 because the resolution of those issues might not affect a non-Guidelines sentence if the  
2 sentencing judge chooses to impose it.”); *Cantrell*, No. 03-30562, 2006 U.S. App. LEXIS  
3 814, at \*19 n.3 (citing *Crosby* and stating that normally sentencing courts must determine  
4 the correct Guidelines range but reserving question of “whether, and under what  
5 circumstances, district courts may find it unnecessary to calculate the applicable  
6 Guidelines range”). This is such a case. The statutory maximum sentence available to the  
7 Court is already below the low end of the advisory Guidelines range to which the parties  
8 stipulated in the Plea Agreement. Thus, whether Mr. Cunningham was a manager of the  
9 offense pursuant to Guidelines § 3B1.1 is not critical to the Court’s ultimate determination  
10 of punishment in this case. That is, whether the advisory Guidelines range is 135 to 168  
11 months or 235 to 293 months, either range is well above the statutory maximum sentence  
12 available to the Court. Because the statutory maximum sentence of 120 months is  
13 “greater than necessary” to achieve the purposes of 18 U.S.C. § 3553(a)(2), the Court  
14 need not resolve every factual dispute pertinent to determining the advisory Guidelines  
15 range.

16 Moreover, after *Booker*, the Court is not required to give “presumptive force” or  
17 “substantial weight” to this Guidelines range. *E.g.*, *Ranum*, 353 F. Supp.2d at 985-86;  
18 *Myers*, 353 F. Supp.2d at 1028; *Biheiri*, 356 F. Supp.2d at 594 n.6; *Jaber*, 362 F. Supp.2d  
19 at 370-71; *Simon*, 361 F. Supp.2d at 40; *Phelps*, 366 F. Supp.2d at 587; *Moreland*, 366 F.  
20 Supp.2d at 418; *Pacheco-Soto*, 386 F. Supp.2d at 1203; *but see Wilson*, 350 F. Supp.2d at  
21 912. In determining the appropriate punishment for Mr. Cunningham, the Court should  
22 not give substantial weight to the advisory Guidelines range for two important reasons.

23 First, the Guidelines range fails to account for Mr. Cunningham’s personal history  
24 and unique offender characteristics as required by 18 U.S.C. § 3553(a)(1). Indeed, the  
25 only feature of Mr. Cunningham’s personal history that is accounted for in the advisory  
26 Guidelines range is his lack of criminal record. The Guidelines range is punishment  
27 calculated to address only his offense conduct and criminal history. *E.g.*, *Ranum*, 353 F.  
28 Supp.2d at 986 (“The only aspect of a defendant’s history that the guidelines permit courts

1 to consider is criminal history. Thus, in cases in which a defendant's history and  
2 character are positive, consideration of all of the § 3553(a) factors might call for a  
3 sentence outside the guidelines range.”); *Nellum*, No. 2:04-CR-30-PS, 2005 WL 300073,  
4 at \*1 (noting that sentencing after *Booker* is complicated because “many of the § 3553(a)  
5 factors – such as the history and characteristics of the defendant, *see* § 3553(a)(1) – are  
6 factors that the guidelines ‘either reject or ignore’”). As a consequence, the advisory  
7 Guidelines range overstates the punishment that is appropriate for Mr. Cunningham. A  
8 sentence of ten (10) years might well be proper for a younger and healthier public official  
9 who engaged in Mr. Cunningham’s criminal offense without having demonstrated a long  
10 life of exceptional service to country in war and peace. Such a lengthy sentence might  
11 also be justified if the public official had failed to accept responsibility for his criminal  
12 conduct and forced the government to charge him and prove his guilt in a court of law.  
13 But vesting the advisory Guidelines range in this case with substantial weight unduly  
14 punishes the crimes in the abstract -- not the man who committed the crimes.

15       Second, the advisory Guidelines range in this case conflicts with the command of  
16 18 U.S.C. § 3553(a), which directs the Court to “impose a sentence sufficient, but not  
17 greater than necessary to comply” with the goals of sentencing set forth in Section  
18 3553(a)(2). For the reasons discussed in more detail *infra*, the United States cannot  
19 seriously contend that sentencing the 64 year-old Mr. Cunningham to six (6) years in  
20 prison is insufficient to reflect the seriousness of the offense, promote respect for the law,  
21 provide just punishment and deter future corruption by other public officials. Because the  
22 advisory Guidelines range suggests punishment much “greater than necessary” to achieve  
23 the purposes of sentencing in this case, the Court should not afford the Guidelines range  
24 substantial weight in its sentencing judgment. *E.g., Simon*, 361 F. Supp.2d at 47; *Ranum*,  
25 353 F. Supp.2d at 986.

26                   **3. The Guidelines Policy Statements Support a Downward**  
27                   **Departure from Mr. Cunningham’s Guidelines Range.**  
28

1           The next sentencing factor in this case requires the Court to consider the policy  
2 statements issued by the U.S. Sentencing Commission. 18 U.S.C. § 3553(a)(5). Thus,  
3 even if the Court is inclined to accept the advisory Guidelines range in this case as  
4 presumptively reasonable, the policy statements issued by the U.S. Sentencing  
5 Commission counsel in favor of a downward departure below the statutory maximum  
6 sentence of ten (10) years.

7           The Guidelines Manual includes policy statements that authorize the Court to  
8 consider Mr. Cunningham's age, medical condition, psychological condition, military  
9 service, civic works and charitable contributions when deciding whether to depart from  
10 the applicable Guidelines range. USSG §§ 5H1.1, 5H1.3 and 5H1.11. The Sentencing  
11 Commission identifies these offender characteristics as normally not relevant to the  
12 departure decision but notes that they may be pertinent "if a combination of such  
13 circumstances makes the case an exceptional one." USSG Ch.5, Pt.H, intro. comment.  
14 Guidelines policy statements specifically provide that the Court "may depart from the  
15 applicable guideline range based on a combination of two or more offender characteristics  
16 or other circumstances, none of which independently is sufficient to provide a basis for  
17 departure" if those characteristics, taken together, make the case exceptional, each unique  
18 offender characteristic is present to a substantial degree, and each offender characteristic  
19 is a permissible ground for departure even if ordinarily not relevant. USSG § 5K2.0(c).  
20 In a decision that pre-dates *Booker*, the United States Supreme Court held in *Koon v.*  
21 *United States*, 518 U.S. 81 (1996) that to warrant a departure, "certain aspects of the case  
22 must be found unusual enough for it to fall outside of the heartland of cases in the  
23 Guidelines. To resolve this question, the district court must make a refined assessment of  
24 the many facts bearing on the outcome, informed by its vantage point and day-to-day  
25 experience in criminal sentencing."

26           Here, Mr. Cunningham's truly unique military service, important civic works,  
27 extraordinary charitable contributions, advanced age and tenuous medical condition  
28 warrant a departure below the statutory maximum sentence of ten (10) years. All of these

1 offender characteristics are present to a “substantial degree” in Mr. Cunningham’s case  
2 and, when taken together, weigh heavily in favor of a substantial departure in his offense  
3 level. USSG § 5K2.0(c).

4 The evidence that supports a departure in this case has already been recited *infra* in  
5 Sections IV and V in connection with the discussion of Mr. Cunningham’s history and  
6 characteristics. There is no need to belabor that evidence here as well. But, clearly, the  
7 evidence warranting a departure in this case is far more substantial than evidence found  
8 sufficient to justify departures in other cases both before and after *Booker*. See, e.g.,  
9 *United States v. Menyweather*, 431 F.3d 692, 702 (9th Cir. 2005) (affirming downward  
10 departure of eight (8) levels from Guidelines range of twenty-one (21) to twenty-seven  
11 (27) months for defendant convicted of mail and wire fraud because of defendant’s  
12 diminished capacity and extraordinary family circumstances); *United States v. Serafini*,  
13 233 F.3d 758, 776 (3rd Cir. 2000) (affirming departure of three (3) levels for state  
14 legislator convicted of perjury because of defendant’s exceptional civic and charitable  
15 contributions); *United States v. Collins*, 122 F.3d 1297, 1308 (10th Cir. 1997) (affirming  
16 downward departure of eleven (11) levels for sixty-four (64) year-old defendant convicted  
17 of drug distribution because he suffered from heart disease, high blood pressure, ulcers,  
18 arthritis and would be nearly seventy (70) years old when he was released from jail);  
19 *United States v. Sabino*, 274 F.3d 1053, 1078-79 (6th Cir. 2001) (affirming downward  
20 departure of three (3) levels and ordering home confinement for defendant convicted of  
21 conspiracy to evade taxes because he was seventy-two (72) years old, suffered from  
22 numerous medical conditions and did not present a flight risk, even though defendant was  
23 subject to Guidelines range of twelve (12) to eighteen (18) months).

24 Departures based on Guidelines § 5K2.0(c) are necessarily fact-specific inquiries  
25 and the case law reviewing those departures is understandably varied. However, a recent  
26 case from the United States Court of Appeals for the Second Circuit illustrates that a  
27 departure in this case is entirely warranted. In *United States v. Canova*, 412 F.3d 331 (2d  
28 Cir. 2005), the defendant was convicted after a jury trial of a wide-ranging conspiracy to

1 defraud the Medicare program of \$5 million and of making false statements to the  
2 government. The district court ultimately determined that the defendant's base offense  
3 level was fourteen (14) and, with no criminal history, set the Guidelines range at fifteen  
4 (15) to twenty-one (21) months. However, relying on the defendant's prior community  
5 service as a volunteer fire-fighter and his prior honorable service in the military, the  
6 district court departed by six (6) levels pursuant to Guidelines § 5K2.0. As a  
7 consequence, the district court sentenced the defendant to four (4) consecutive  
8 *probationary* terms of one (1) year. *Id.* at 334-36, 343.

9 On appeal of the sentence by the United States, the Second Circuit affirmed the  
10 departure.<sup>10</sup> The court of appeals explained that, while Guidelines § 5H1.11 discourages  
11 departures on the basis of military service and civic contributions, it does not prohibit  
12 such departures if those factors are present to a substantial degree. *Id.* at 358. The court  
13 took note that the defendant had volunteered for the Marine Corps as a college student and  
14 honorably served his country for six (6) years, mostly in the active reserves. It also relied  
15 on the fact that the defendant had served for seven (7) years as a volunteer fire fighter and  
16 had sustained injuries in the line of duty after risking his life for fire victims. *Id.* at 358-  
17 59. While the military and most of the volunteer service was almost twenty (20) years  
18 prior to the sentencing, the court agreed that these selfless contributions justified "granting  
19 a downward departure for extraordinary public service and good works." *Id.* at 359.

20 Mr. Cunningham's circumstances obviously compare favorably with the facts in  
21 *Canova*. Mr. Cunningham not only volunteered for military duty and received an  
22 honorable discharge like *Canova*, he served two combat tours of duty in the Viet Nam  
23 War. He put his life on the line more than once to save the lives of his fellow Americans  
24 and was nearly killed when his plane was struck by an enemy missile. One of those  
25 American pilots, Brian Grant, put it bluntly in his letter to the Court: "I am able to write

26  
27 <sup>10</sup> Though the court of appeals affirmed the departure, it remanded to the district court for re-sentencing in the wake  
28 of *Booker* and because of an error in the calculation of the offense level. The court indicated that, on remand, the  
district court good reevaluate the size of the departure in light of the revised offense level or it was free to impose a  
non-Guidelines sentence pursuant to 18 U.S.C. § 3553(a). *Canova*, 412 F.3d at 359 n.29.

1 this letter, and [am] alive today, solely because of the selfless heroism and skilled  
2 airmanship of Mr. Cunningham.” (Hersey Decl. Ex. 20, Brian E. Grant Letter.) His  
3 service to the nation was so extraordinary that he was nominated for the Congressional  
4 Medal of Honor and received more decorations for valor than can be listed here. (Hersey  
5 Decl. Ex. 45, William P. Letter.) No one can credibly contest that Mr. Cunningham’s  
6 military service is exceptional. In addition, much more so than the defendant in *Canova*,  
7 Mr. Cunningham has devoted virtually his entire adult life to public service. In peace  
8 time, he trained the nation’s finest pilots at the Top Gun School at Miramar Naval Air  
9 Station. After leaving the military, he worked as a teacher and later ran for Congress.  
10 And, while he has certainly marred his historical legacy by the recent acts of corruption, it  
11 cannot be seriously contested that Mr. Cunningham was also instrumental in bringing  
12 good jobs to San Diego County and supporting disabled children and veterans during his  
13 tenure in Congress. (Hersey Decl. Ex. 23, Duncan Hunter Letter.) Indeed, the letter from  
14 Ronald Ress reciting how Mr. Cunningham was instrumental in securing the release of  
15 Mr. Ress’s wife from a Vietnamese prison in 2001 speaks volumes about the civic  
16 contributions of Mr. Cunningham. As Mr. Ress states, “I am certain that without [Duke’s]  
17 personal intervention, my family would be grieving the loss of my wife today.” (Hersey  
18 Decl. Ex. 36, Capt. Ronald G. Ress Letter

19 If the good works recited in *Canova* can warrant a departure of six (6) levels from a  
20 Guidelines range of fifteen (15) to twenty-one (21) months, then Mr. Cunningham’s  
21 military and civic service should certainly justify a comparable departure from his  
22 substantially higher Guidelines range. This is particular true given that Mr. Cunningham  
23 accepted responsibility for his criminal conduct before indictment, much less trial,  
24 whereas the defendant in *Canova* was sentenced after a guilty verdict. Furthermore, Mr.  
25 Cunningham can cite additional factors that support a departure which were not present in  
26 *Canova*. For instance, in *Canova*, there was no indication that the defendant engaged in  
27 significant charitable works in addition to his service as a volunteer firefighter. Likewise,  
28 there was no indication that the defendant was aged and suffering from medical conditions

1 that might render a lengthy sentence terminal. Here, Mr. Cunningham is sixty-four (64)  
2 years old and, if he receives the statutory maximum sentence, he will be seventy-four (74)  
3 years old when he is released. And, the medical evidence demonstrates that Mr.  
4 Cunningham suffers from a number of serious physical and mental ailments, including  
5 prior bouts with prostate cancer that leave him unlikely to survive a sentence in excess of  
6 seven (7) years. (Declaration of Dr. Timothy Donahue, Attachment.) In addition, the  
7 letters from Father Joe Carroll, Bishop McKinney, Sister Claire Frawley and Peter Yarrow  
8 leave little doubt that Mr. Cunningham gave his time, attention and money to local and  
9 national charities in a manner far beyond the norm. (Hersey Decl. Exs. 12, 17, 31, 41,  
10 Father Joe Carroll, Sister Claire Frawley, Bishop George D. McKinney, and Peter Yarrow  
11 Letters.) Importantly, his charitable efforts started long before he ever ran for public  
12 office and continued throughout his career in Congress. (*Id.*)

13 Thus, there can be no serious dispute regarding whether Mr. Cunningham's  
14 military, charitable and civic works are substantial – even when viewed relative to his  
15 egregious criminal conduct. These good works, when considered in conjunction with his  
16 advanced age and medical condition, certainly take this case out of the “heartland” of  
17 cases. USSG § 5K2.0(c); *see also Koon*, 518 U.S. at 96. For that reason, even if the  
18 Court elects to assign substantial weight to the Guidelines range in this case, it should  
19 depart downward well below the statutory maximum sentence of ten (10) years.

20 Notably, the PSR conceded Mr. Cunningham's extraordinary military and public  
21 service and even stated that it considered a downward departure pursuant to Guidelines §  
22 5K2.0. PSR at 43. But the PSR ultimately did not undertake a detailed analysis of the  
23 propriety of a downward departure because it erroneously concluded that the Court  
24 “would have to depart 13-levels or more for the defendant to benefit from a downward  
25 departure.” *Id.* As an initial matter, the PSR is incorrect when it states that no departure  
26 less than thirteen (13) levels would have any impact on Mr. Cunningham's sentence.  
27 Even assuming that the PSR is correct that the base offense level stipulated to by the  
28 parties in the Plea Agreement should be adjusted upward by five (5) levels to thirty-eight



1 (38), which is a disputed question at present, a downward departure of only seven (7)  
2 levels would generate a Guidelines range with sentences available to the Court below the  
3 statutory maximum of 120 months. As indicated above, Mr. Cunningham's unique  
4 history and contributions to the nation certainly would justify a downward departure of  
5 such magnitude. Further, given the exceptional nature of his contributions to his country  
6 and community, it would be entirely proper for the Court to depart as much as eleven (11)  
7 levels to the offense level recommended by Mr. Cunningham -- twenty-seven (27). For  
8 all of these reasons, the Court should not follow the recommendation in the PSR and  
9 should instead depart downward to offense level twenty-seven (27), assuming of course  
10 that the Court intends to rely primarily on the Guidelines when sentencing Mr.  
11 Cunningham.

12 4. **A Six Year Prison Term is Sufficient to Reflect the Seriousness of**  
13 **the Offense, Promote Respect for the Law, Punish Mr.**  
14 **Cunningham for His Crimes and Deter Other Public Officials**  
15 **from Engaging in Future Corruption.**

16 Regardless of the weight afforded the Guidelines in this case, the Court must select  
17 a sentence within the limitations imposed by 18 U.S.C. § 3553(a). As noted previously,  
18 this portion of the sentencing statute imposes a substantive limitation on the Court's  
19 discretion to select a sentence by requiring the Court to "impose a sentence sufficient, but  
20 not greater than necessary" to comply with the purposes of paragraph (a)(2). *E.g., Ranum,*  
21 *353 F. Supp.2d at 986; Myers, 353 F. Supp.2d at 1029; Nellum, 2005 WL 300073, at \*5;*  
22 *Biheiri, 356 F. Supp.2d at 594; Simon, 361 F. Supp.2d at 47; Phelps, 366 F. Supp.2d at*  
23 *589.* Thus, the question for the Court is what minimum sentence is sufficient to satisfy the  
24 goals of sentencing enumerated in 18 U.S.C. § 3553(a)(2).

25 In this case, a lengthy prison term of six (6) years is sufficient to comply with 18  
26 U.S.C. § 3553(a)(2). Conversely, the statutory maximum of ten (10) years incarceration  
27 requested by the United States is punishment that is far "greater than necessary" to fulfill  
28 the purposes of paragraph (a)(2). This fact is evident from a cursory review of the four  
subparts of that paragraph.

1 Two of the four subparts strongly weigh in favor of a sentence well below the  
2 statutory maximum in this case. Subpart (a)(2)(C) requires the Court to consider the need  
3 “to protect the public from further crimes of the defendant.” No one can plausibly  
4 contend that Mr. Cunningham presents a risk of recidivism. The PSR found that Mr.  
5 Cunningham had no prior criminal record and was “making every effort to atone for his  
6 mistakes.” PSR at 45. Based on his investigation, the Senior U.S. Probation Officer even  
7 stated that he “is confident that upon his release from custody, the defendant will remain a  
8 contributing member of the community and that he will comply with the terms of his  
9 supervised release.” *Id.* at 46. If the Court sentences Mr. Cunningham to six (6) years  
10 imprisonment, he will be seventy (70) years old at the time of his release. His public  
11 reputation is tarnished beyond recovery. It can be safely assumed that Mr. Cunningham  
12 will never again hold public office and that there is no risk of recidivism in this case. *See,*  
13 *e.g., Simon*, 361 F. Supp.2d at 48 (imposing sentence below Guidelines range based on,  
14 *inter alia*, analysis of Section 3553(a)(2)(C) because defendant would be almost fifty (50)  
15 years old when released from prison and thus presented less of a recidivism risk that  
16 might justify a longer sentence); *Nellum*, 2005 WL 300073, at \*3, \*5 (imposing sentence  
17 below Guidelines range based on, *inter alia*, analysis of Section 3553(a)(2)(C) because  
18 defendant was fifty-five (55) years old at time of sentencing and did not present a risk of  
19 recidivism warranting a longer sentence). *A fortiori*, there is no need to impose an  
20 additional four (4) years of imprisonment to protect the public from further criminal  
21 conduct by Mr. Cunningham.

22 Likewise, subpart (a)(2)(D) requires the Court to consider the need “to provide the  
23 defendant with needed educational or vocational training, medical care, or other  
24 correctional treatment in the most effective manner.” Mr. Cunningham presents no  
25 unique vocational, educational or correctional needs. But, depending upon the length of  
26 his sentence, Mr. Cunningham’s medical condition will likely present the need for  
27  
28

1 increasingly sophisticated and expensive care.<sup>11</sup>

2 As the declaration and letter of Dr. Donahue indicates, Mr. Cunningham's prostrate  
3 cancer is likely to have an impact on his life expectancy. (Declaration of Dr. Timothy  
4 Donahue, Attachment) ("Considering his initial surgery was performed in 1998, one could  
5 estimate his median survival to be another seven years."). Dr. Donahue also notes that  
6 "[t]he fact that [Mr. Cunningham's] PSA level remained elevated despite surgical  
7 resection of the prostate and its quick doubling time (less than 12 months) are both poor  
8 prognostic indicators for his overall survival. Patients with similar pathologic and clinical  
9 features typically have a median survival of between ten to thirteen years from the time of  
10 first treatment. Most commonly, patients in his situation will experience a period of time  
11 without gross evidence of disease recurrence but then progress to a rapidly progressing  
12 and fatal disease in the last few years of life." *Id.* Thus, the potential for Mr.  
13 Cunningham's prostate cancer to recur a third time and then quickly progress in the last  
14 years of his life weighs heavily in favor of a sentence below the statutory maximum of ten  
15 (10) years. While Mr. Cunningham's cancer is presently in remission, a six (6) year  
16 sentence reduces the risk that his illness will become an administratively difficult and  
17 costly burden on the Bureau of Prisons. *See, e.g., Nellum*, 2005 WL 300073, at \*3, \*5  
18 (imposing sentence below Guidelines range based on, *inter alia*, analysis of Section  
19 3553(a)(2) because defendant suffered from serious medical problems such as high blood  
20 pressure, blocked prostate and heart attack). Moreover, even if the Court concludes that  
21 Mr. Cunningham's medical prognosis presents no special needs that counsel in favor of a  
22 lower sentence, it is clear that subpart (a)(2)(D) does not justify a longer sentence.

23 The last two subparts of 18 U.S.C. § 3553(a)(2) weigh in favor of a substantial  
24 prison term but neither subpart justifies a sentence of ten (10) years. Subpart (a)(2)(B)  
25 requires the Court to consider the need for the sentence to "afford adequate deterrence to  
26

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27 <sup>11</sup> Furthermore, the report of Dr. Saul Faerstein demonstrates that Mr. Cunningham  
28 evidences "a Major Depressive Disorder with suicidal ideation" that will require treatment  
and medication. (Hersey Decl. Ex. 43, Dr. Faerstein Letter.)

1 criminal conduct.” This provision relates to the general deterrence of criminal conduct by  
2 persons other than Mr. Cunningham. *See Simon*, 361 F. Supp.2d at 47. There is no  
3 dispute that a lengthy prison term for Mr. Cunningham will advance the goal of deterring  
4 public corruption by others, particularly his former colleagues in Washington, D.C. But,  
5 the question for the Court is not whether a ten (10) year sentence will advance that  
6 important objective; the question is whether a lesser sentence will be “sufficient” to  
7 advance that objective equally well. If a lesser sentence is sufficient to communicate to  
8 other elected officials that they risk harsh sanction if they violate the public trust, then  
9 subpart (a)(2)(B) does not justify the statutory maximum sentence in this case. Under that  
10 circumstance, a ten (10) year sentence is by definition “greater than necessary” to advance  
11 the purposes of 18 U.S.C. § 3553(a)(2).

12 Here, no one can credibly contend that a six (6) year sentence for Mr. Cunningham  
13 is not equally “sufficient” to communicate to other public officials – and those that seek to  
14 influence them – the risk of severe consequences if they demand or accept bribes. His  
15 experience over the last seven (7) months is a cautionary tale for other elected officials.  
16 Even if the Court sentenced Mr. Cunningham to probation in this case, it is impossible to  
17 imagine that other elected officials could conclude that he had proven that crime pays.  
18 The PSR makes clear that, as a consequence of his own actions, Mr. Cunningham has lost  
19 almost everything that was once important to him. *See PSR* at 45. He will forfeit  
20 virtually all of his assets and he faces a huge tax liability that will take the rest of his life  
21 to repay. *Id.* at 46. He resigned in disgrace in front of television cameras and his  
22 humiliation was beamed into the living rooms of his fellow countrymen, including his  
23 family and closest personal friends. The President of the United States publicly chastised  
24 him. He had to face his wife, daughters, younger brother and even his ninety-one (91)  
25 year old mother with an admission not only of his crimes but that he misled them as well.  
26 (Hersey Decl. Ex. 3, Duke Cunningham Letter.)

27 One of his closest friends, Dan McKinnon, summed up well Mr. Cunningham’s  
28 current circumstance in his letter to the Court:

1 Since his admission to wrong doing back on November 28, 2005, Randy has been  
2 living an isolated life at my ranch. He arrived emaciated from the stress and guilt  
3 of what he did. . . . He came to the Congress as a genuine hero and now is  
4 disgraced. Few, if any, congressman who have gotten into trouble have fallen so  
5 far from grace. He's lost the respect of fellow congressman, supporters, friends  
6 and even the President of the United States. He had the personal trauma of saying  
7 goodbye to a loyal staff that trusted him and cleaning out an office and packing  
8 away memorabilia that he won't be able to someday look back on with fond  
9 memories but will be haunted with the pain and sorrow of what could have been.  
He's lost the respect of most of his Navy comrades in arms. . . . His name serves as  
a poster boy for greed and disgrace. He'll no longer be listed in aviation books as  
a hero or ace. He's lost his job. He's lost his home. He's lost his money. He's  
lost his wife. And on top of all the misery, he's about to lose his freedom. He's  
lost everything. He's a broken man.

10 (Hersey Decl. Ex. 32, Dan McKinnon Letter.) Another friend, Edward Yeats, expressed  
11 similar sentiments to the Court: "I saw his personal and professional life begin to unravel.  
12 I saw the toll this took physically, emotionally and spiritually. He was often exhausted  
13 and had an overwhelming sense of guilt for wrong doing. He was devastated by what he  
14 did." Hersey Decl. Ex. 42, Ted Yeats Letter.) Another long time friend, Barbara  
15 Woodbury, noted to the Court that she believes that Mr. Cunningham "would rather have  
16 been shot down in Vietnam. . . . I heard it in his voice. He is truly sorry for what he has  
17 done. . . . [W]e will get over it. He never will." (Hersey Decl. Ex. 40, Barbara Woodbury  
18 Letter.) After observing Mr. Cunningham's present circumstance, one can hardly imagine  
19 that a potential prison term would be material to the decision-making of a public official  
20 who contemplated graft.

21 Of course, in this case, Mr. Cunningham concedes that his conduct warrants a  
22 prison term – even a lengthy prison term. Given the public scorn heaped on Mr.  
23 Cunningham as well as the loss of his worldly possessions, it is simply not credible to  
24 argue that a sentence of six (6) years imprisonment for a sixty-four (64) year old war hero  
25 fails to send a warning to others who might consider a breach of the public trust. In fact,  
26 research suggests that, over the last four decades, no Member of Congress who pleaded  
27 guilty to public corruption has ever received a six (6) year prison term. Thus, the Court  
28

1 should find that subpart (a)(2)(B) does not support the imposition of the statutory  
2 maximum sentence in this case – such a sentence is far “greater than necessary” to afford  
3 adequate deterrence of criminal conduct by other public officials.

4 Subpart (a)(2)(A), the last of the four subparts, also fails to provide a compelling  
5 justification for a sentence in excess of six (6) years imprisonment. That provision  
6 requires the Court to consider the need for a sentence to “reflect the seriousness of the  
7 offense, to promote respect for the law, and to provide just punishment for the offense.”  
8 Mr. Cunningham recognizes – and has admitted publicly – that his crimes were serious  
9 violations of the public trust that warrant severe punishment. *See* Resignation Statement  
10 *supra* at pp. 4. He does not argue that a lengthy prison term is unjustified in this case. He  
11 agrees that such a sanction is necessary because promoting respect for the law demands a  
12 strong punishment for a public official who violates his loyalty to his constituents. But,  
13 quite simply, a prison term of ten (10) years is “greater than necessary” to achieve these  
14 objectives.

15 Mr. Cunningham contributions to his country, advanced age and medical condition  
16 temper the degree of punishment that is necessary to satisfy subpart (a)(2)(A) in this case.  
17 As reflected in the letters from his fellow Navy pilots, he literally saved the lives of many  
18 Americans during his time in Viet Nam. (Hersey Decl. Ex. 45, William P. Driscoll  
19 Letter.) After Viet Nam, he dedicated himself to teaching other American pilots how to  
20 survive combat. (Hersey Decl. Ex. 35, Richard W. Redditt Letter.) As an active member  
21 of his community before and after he went to Congress, Mr. Cunningham devoted  
22 substantial time and money to charitable causes, particularly helping disadvantaged  
23 children. (Hersey Decl. Exs. 12, 17, 31, 41, Father Joe Carroll, Sister Claire Frawley,  
24 Bishop George D. McKinney, and Peter Yarrow Letters.) And, as a Member of Congress,  
25 he used his public office for much good before and even during the period when he lost  
26 his way. (Hersey Decl. Ex. 23, Duncan Hunter Letter.) The Chief of Urology at Bethesda  
27 Naval Hospital estimates that, because of his prior bouts with prostrate cancer, Mr.  
28 Cunnigham’s life expectancy is seven (7) years. (Declaration of Dr. Timothy Donahue,

1 Attachment.) Under these unique circumstances, it would be odd indeed to contend that a  
2 six (6) year prison sentence for a man of Mr. Cunningham's age, medical condition and  
3 life achievement is insufficient to promote respect for the law or render just punishment.

4 5. **A Six Year Prison Term for Mr. Cunningham Would Not Create**  
5 **Unwarranted Disparities in Sentences Imposed on Public**  
6 **Officials Found Guilty of Corruption.**

6 The final sentencing factor that the Court must consider is "the need to avoid  
7 *unwarranted* sentence disparities among defendants with *similar records* who have been  
8 found guilty of similar conduct." 18 U.S.C. § 3553(a)(6) (emphasis added). While it  
9 sought to reduce unwarranted sentencing disparity, Congress did "not call for identical  
10 sentences from one end of the country to another. Differences justified by 'differences  
11 among offenses or offenders ' are *warranted* differences." *Jaber*, 362 F. Supp.2d at 376  
12 (quoting Senate Report on Sentencing Reform Act of 1984). In this case, a sentence  
13 below the statutory maximum of ten (10) years would not create such unwarranted  
14 disparities.

15 A six (6) year prison term for this offense conduct might create unwarranted  
16 disparities in sentencing if the defendant possessed no unique offender characteristics that  
17 justified lenity. For instance, the statutory maximum sentence might be proper for these  
18 crimes if a hypothetical congressman was a healthy forty (40) year old, who never  
19 accepted responsibility for his conduct, refused to plead guilty, forced the public to bear  
20 the cost and distraction of a trial, compelled the Congress to expel him from his public  
21 office after conviction, never wore the uniform of his country or put his life at risk for  
22 others, never gave his time or money for worthwhile charitable causes and did little to  
23 help the people of his district. Even former Representative James Traficant of Ohio  
24 received a lesser punishment than the sentence requested by the United States in this case.  
25 Mr. Traficant was sentenced to eight (8) years in prison in 2002 following his conviction  
26 by a jury for bribery, tax fraud and diversion of federal funds to his personal benefit. He  
27 certainly did not demonstrate Mr. Cunningham's commitment to country and community  
28 throughout his life and had to be forcibly expelled from the House of Representatives after

1 his jury conviction because he refused to resign. To this day, Mr. Traficant sponsors a  
2 website in which he claims that he was the target of a government vendetta.

3 Yet, the United States seeks to punish Mr. Cunningham for two (2) years longer  
4 than Mr. Traficant primarily because of the amount of money involved in this case.  
5 However, a lesser sentence that accounts for Mr. Cunningham's life history and  
6 undisputed positive contributions to the nation would create no unwarranted disparity in  
7 sentencing, when compared with the sentences imposed on other public officials who  
8 have been punished for public corruption. Research of criminal cases involving Members  
9 of Congress since 1965 found not a single instance in which a present or former member  
10 *who pleaded guilty* to a corruption-related offense was sentenced to as much as six (6)  
11 years.<sup>12</sup> And, that same research suggests that eight (8) years is the longest sentence ever  
12 imposed on a present or former Member of Congress for public corruption offenses.<sup>13</sup>  
13 Indeed, in just the last year, a federal judge in Connecticut sentenced former Governor  
14 John Rowland to one (1) year in jail after the Governor pleaded guilty to a single count of  
15 honest services wire fraud, involving his receipt of over \$100,000 of illegal benefits and  
16 payments. (Hersey Decl. Ex. 44, Judgment issued in *United States v. Rowland*.)

17 Further, a sentence of six (6) years is still exceedingly severe when compared with  
18 the punishment that federal courts have usually imposed for bribery and tax-related  
19 offenses. Statistics compiled by the United States Sentencing Commission indicate that,  
20 in fiscal year 2003, the average sentence for bribery was 9.7 months and the median  
21 sentence for bribery was six (6) months. Likewise, the average sentence for tax-related  
22 convictions was 12.3 months, while the median sentence for those offenses was eight (8)  
23 months. *See* Table 13, United States Sentencing Commission, Source Book of Federal  
24 Sentencing (2003). In fiscal year 2002, the average sentence for bribery was 13.8 months  
25 and the median sentence was six (6) months. For tax-related offenses, the average

26 \_\_\_\_\_  
27 <sup>12</sup> For example, former Representative Dan Rostenkowski of Illinois was sentenced to seventeen (17) months after  
28 pleading guilty to mail fraud in 1996, in connection with diversion of over \$700,000 of government funds to personal  
use over the span of three decades.

<sup>13</sup> This ignoble distinction belongs to Mr. Traficant and former Representative Mario Biaggi.



1 sentence was eleven (11) months, while the median sentence was 7.5 months. *See* Table  
2 13, United States Sentencing Commission, Source Book of Federal Sentencing (2002).  
3 Finally, for fiscal year 2001, the average sentence for bribery was eight (8) months and  
4 the median sentence was only three (3) months. The average sentence in 2001 for tax-  
5 related offenses was 10.7 months and the median sentence was six (6) months. *See* Table  
6 13, United States Sentencing Commission, Source Book of Federal Sentencing (2001). It  
7 is worth noting that these statistics reflect the sentencing practices of federal courts during  
8 the period of mandatory Guidelines sentencing and before the Supreme Court's decision  
9 in *Booker*.

10 Thus, it cannot be credibly asserted that a sentence of ten (10) years is "necessary"  
11 in this case to avoid unwarranted disparities in sentencing. *See Nellum*, 2005 WL 300073,  
12 at \*5 (imposing sentence of 108 months for cocaine distribution despite Guidelines range  
13 of 168 months to 210 months and noting that, under 18 U.S.C. § 3553(a)(6), uniformity of  
14 sentencing is important but, "while this sentence may be disparate from the sentence given  
15 to other defendants who are 'found guilty of similar conduct', given the particular  
16 circumstances of this case – Nellum's age, the likelihood of recidivism, his status as a  
17 veteran, his strong family ties, his medical condition, and his serious drug dependency –  
18 the Court does not view that disparity as being 'unwarranted'"). As noted above, a  
19 sentence of six (6) years for Mr. Cunningham will far exceed the punishment that has  
20 been previously meted out to Members of Congress who violated the public trust but will  
21 nevertheless account justifiably for his unique contributions to his country and his  
22 community throughout his long life.

23 C. **The Court Should Not Fine Mr. Cunningham Because, After Forfeiting**  
24 **All of His Possessions and Committing in the Plea Agreement to Pay**  
25 **Outstanding Taxes Owed to the United States, He Has No Ability to Pay**  
**a Fine in This Case.**

26 The PSR recommends against the imposition of a fine in this case. PSR at 46. The  
27 reasoning set forth in the PSR is sound and Mr. Cunningham asks the Court to adopt it.  
28

1 The PSR correctly notes that, as a result of Mr. Cunningham's agreement to forfeit  
2 virtually all of his assets, including over \$1.8 million in United States currency, any  
3 income stream that might be available to him will be needed to satisfy a substantial tax  
4 liability to the United States. *Id.* In the Plea Agreement, Mr. Cunningham has committed  
5 to file amended tax returns for the relevant years of the criminal conspiracy and to make  
6 payment of taxes owed to the United States, including interest and penalties. *See* Plea  
7 Agreement at 28-29. While the precise amount of that outstanding tax obligation has yet  
8 to be determined in consultation with the Internal Revenue Service, Mr. Cunningham  
9 concedes that it will be substantial.<sup>14</sup>

10 Under any sentencing scenario before the Court, Mr. Cunningham will be seventy  
11 (70) years old or more *if he survives his prison term*. His reputation is destroyed and,  
12 thus, his earning power at such an advanced age will be virtually nil. Accordingly, the  
13 only income stream that will be available to Mr. Cunningham to satisfy his substantial tax  
14 obligations will be various government pensions. Under these circumstances, Mr.  
15 Cunningham does not have the ability to pay *both* his back taxes and a fine. For that  
16 reason, the PSR correctly suggests that the Court focus its remedial order on Mr.  
17 Cunningham's restitution of his outstanding tax liability in lieu of a fine in this case. PSR  
18 at 48.

#### 19 **VIII. CONCLUSION**

20 For the foregoing reasons, Mr. Cunningham respectfully requests that the  
21 Court impose the statutory maximum sentence of (5) years imprisonment on Count I of

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22 <sup>14</sup> Mr. Cunningham objects to the tax loss amount set forth in the PSR. The Plea  
23 Agreement contemplates that Mr. Cunningham will work in consultation with the Internal  
24 Revenue Service to determine the correct amount of back taxes, including interest and  
25 penalties. Plea Agreement at 28-29. Those consultations have not yet occurred and the  
26 total loss amount set forth in the PSR includes sums attributable to Mr. Cunningham that  
27 should not be allocated to him as taxable income. The precise amount in question is not  
28 yet known. Accordingly, Mr. Cunningham requests that the Court hold in abeyance  
issuing a final restitution order until such time as Mr. Cunningham's tax counsel and the  
Internal Revenue Service can conclude a dialogue on the precise amount of taxes owed to  
the U.S. Treasury for the relevant years of the conspiracy.

1 the Information, and one (1) year of imprisonment on Count II. He asks that those  
2 sentences run consecutively pursuant to the Plea Agreement. Further, Mr. Cunningham  
3 asks the Court to adopt the recommendation in the PSR regarding the period of supervised  
4 release. Finally, in recognition of Mr. Cunningham's obligation to repay his substantial  
5 outstanding tax liability to the United States, he requests that the Court follow the  
6 recommendation in the PSR and not impose a fine in this case.

7 Dated: February 17, 2006

8 MARK HOLSCHER  
9 KRISTINA M. HERSEY  
O'MELVENY & MYERS LLP

10  
11 By *Kristina Hersey* for  
12 Mark Holscher  
13 Attorneys for Defendant  
Randall Harold Cunningham

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