

Exhibit 3

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

MAY 08 1997

NANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT

M. VICTORIA CUMMOCK)
271 Vistalmar Street)
Coral Gables, FL 33143-6437)

Plaintiff,)

v.)

ALBERT GORE, JR., VICE PRESIDENT,)
CHAIRMAN, WHITE HOUSE COMMISSION)
ON AVIATION SAFETY AND SECURITY)
Office of the Vice President)
Old Executive Office Building)
Washington, DC 20501,)

C.A. No. _____

RODNEY SLATER)
SECRETARY OF TRANSPORTATION,)
UNITED STATES DEPARTMENT OF)
TRANSPORTATION)
400 7th Street, S.W.)
Washington, DC 20590,)

CASE NUMBER 1:97CV00981

JUDGE: Colleen Kollar-Kotelly

DECK TYPE: Civil General

DATE STAMP: 05/08/97

AND

WHITE HOUSE COMMISSION ON)
AVIATION SAFETY AND SECURITY)
c/o RODNEY SLATER,)
DESIGNATED FEDERAL OFFICIAL)
400 7th Street, S.W.)
Washington, DC 20590,)

Defendants.)

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Plaintiff, Commissioner M. Victoria Cummock ("Commissioner Cummock"), hereby alleges as follows:

Parties

1. Plaintiff, Commissioner Cummock, is the President of Families of Pan Am 103/Lockerbie and was a member of the Federal

4

Aviation Administration's Security Baseline Working Group. Commissioner Cummock is the widow of John Binning Cummock, a victim of the Pan Am 103/Lockerbie terrorism. Commissioner Cummock has, since that act of terrorism, worked to improve aviation security and enhance counterterrorism measures. Commissioner Cummock's efforts include working to bring about legislative action under the Aviation Security Improvement Act of 1990, the Iran and Libya Sanctions Act of 1996, the Antiterrorism and Effective Death Penalty Act of 1996, and the Aviation Disaster Family Assistance Act of 1996. Due to her long-standing efforts, President Clinton appointed Commissioner Cummock to the White House Commission on Aviation Safety and Security ("the Commission") on August 14, 1996. Commissioner Cummock is one of the twenty-one Commissioners.

2. Defendant Commission is a presidential advisory committee established on August 22, 1996, pursuant to the Federal Advisory Committee Act ("FACA") by Executive Order 13,015 ("E.O. 13,015"), 61 Fed. Reg. 43,937 (Aug. 27, 1996). Pursuant to E.O. 13,015, Defendant, Secretary, Department of Transportation ("DOT"), was designated to perform the functions of the President under the FACA. E.O. 13,015 sec. 4(a). Defendant, Vice President Albert Gore, Jr., was designated the Chair of the Commission. Id. sec. 1. The Secretary of Transportation is the Commission's Designated Federal Official. Charter sec. VI.

Jurisdiction and Venue

3. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. § 1331 (1994) in that it arises under the Federal Advisory Committee Act, 5 U.S.C. app. §§ 1-15 (1994). Relief may be granted under the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202 (1994), and the judicial review provisions of the Administrative Procedure Act (APA), as amended, 5 U.S.C. §§ 701-706 (1994). Venue is proper in this district pursuant to 28 U.S.C. § 1391(e) (1994).

Nature of Action/Background

4. By this action, Commissioner Cummock seeks to enjoin permanently the Commission and DOT from: (a) filing its "Final Report to President Clinton" ("Final Report") with the Library of Congress without the complete dissent of Commissioner Cummock, including supplemental materials attached thereto; (b) distributing, publishing or otherwise using the Final Report without Commissioner Cummock's complete dissent, including supplemental materials attached thereto; and (c) distributing, publishing, or otherwise using the Final Report with the misleading language of the Editor's Note currently included in the Final Report, including an accurate description of her dissent. Filing, distribution, publication or other use of the Final Report without Commissioner Cummock's complete dissent and with the misleading description of that dissent would constitute a violation of the Federal Advisory Committee Act ("FACA"), 5 U.S.C. app. §§ 1-15 (1994).

5. Commissioner Cummock also seeks a declaration that the Commission's proceedings were *ultra vires* in that the Commission violated FACA by: (a) preventing Commissioner Cummock from participating fully in the Commission's activities; (b) failing to publish timely notice of the Commission's meetings in the Federal Register; (c) conducting Commission activities prior to the filing of the Commission's charter; and (d) failing to provide to Commissioner Cummock and the public all documents made available to or prepared for or by the Commission. Commissioner Cummock requests that all documents made available to or prepared for or by the Commission be made available to her and that the detailed minutes of each Commission meeting also be made available to her. Due to the substantial flaws in the Commission's proceedings, Commissioner Cummock requests a permanent injunction prohibiting any use of the Final Report as an official report of a FACA advisory committee prior to the passage of a reasonable period of time within which Commissioner Cummock can review the additional information sought herein to determine whether modification to her dissent is appropriate.

6. From the outset, the Commission's operations have been marked by an apparent predetermined course for the Commission's final product. Even prior to the official establishment of the Commission and the required filing of its Charter, certain members of the Commission were undertaking activities, in violation of FACA, that led to recommendations eventually adopted by the Commission. Shortly after the appointment of the last of the Commissioners, and only two business days after the

Commission's initial hearing with all Commissioners present, the Commission submitted its initial report to President Clinton. Over the course of the Commission's existence, evidence accumulated that the Commission's efforts would be a "rush to judgment." Commission meetings were not timely noticed in the Federal Register and documents and information provided to the Commission were not made available to Commissioner Cummock in particular or the public generally.

7. The Commission's procedural irregularities and the Commission's refusal to publish her complete dissent have prevented Commissioner Cummock from meaningful participation in the Commission's activities and the Commission's apparently predetermined Final Report deprived Commissioner Cummock, and the public at large, of an opportunity to have the Commission perform its function of advising the President with full and reasoned consideration of the issues before it.

FACA Procedural Requirements

8. When Congress enacted FACA in 1972, it found that "standards and uniform procedures should govern the establishment, operation, administration, and duration of advisory committees." FACA § 2(b)(4). One of the primary reasons behind congressional enactment of FACA was the need to ensure that proceedings of advisory committees that were providing advice to the United States government were open to the public and that advisory committees have a fair balance of potentially affected viewpoints. Congress explicitly expressed a

concern that the operation of advisory committees had been captured by special interests and had not been providing advice in the best interests of the country.

9. In order to assure that appropriate viewpoints on a particular advisory committee's functions are heard, FACA specifically provides that the membership of advisory committees shall "be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee." FACA § 5(b)(2).

10. The General Services Administration ("GSA") has been delegated the authority for functions vested in the President under FACA, and has promulgated regulations to govern the operation of advisory committees. See 41 C.F.R. subpt. 101-6.10 (1996) ("Federal Advisory Committee Management"). That subpart "defines the policies, establishes minimum requirements, and provides guidance to agency management for the establishment, operation, administration, and duration of advisory committees" subject to FACA. Id. § 101-6.1001(a).

11. Pursuant to GSA regulations, an advisory committee member "has the full right and obligation to participate in the activities of the committee, including voting on committee recommendations." Id. § 101-6.1003 (definition of *Committee member*.)

12. Both FACA itself and GSA implementing regulations establish specific requirements designed to ensure that advisory committees provide advice to the government: (a) after appropriate public participation; (b) upon a full opportunity for

review of issues being considered by an advisory committee; and
(c) with the consideration of the points of view represented.

13. FACA's provisions and GSA's implementing regulations require that:

(a) every advisory committee file a charter before it meets or takes any action, FACA § 9(c);

(b) "[n]o advisory committee may operate, meet, or take any action until the charter has been filed," 41 C.F.R. § 101-6.1013;

(c) each meeting of an advisory committee shall be timely noticed in the Federal Register, see FACA § 10(a)(2);

(d) absent "exceptional circumstances" an agency "shall publish" a notice in the Federal Register "at least 15 calendar days prior to an advisory committee meeting," 41 C.F.R. § 101-6.1015(b)(1), (2);

(e) all "documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location," FACA § 10(b); and

(f) "[d]etailed minutes" of each advisory committee are maintained and that the advisory committee chair certify the minutes of all such meetings, FACA § 10(c);

Establishment of the Commission

14. On August 21, 1996, the Commission filed its Charter pursuant to FACA § 9(c).

15. The Charter provides that DOT is the Commission's official sponsor and that the Secretary of Transportation, or his designee, serves as the Commission's Designated Federal Official ("DFO"). Charter at 2.

16. The Charter provides that all members other than the Vice President "shall be appointed by the President to assure a balanced representation among those persons who have experience or expertise in the matters to be addressed by the Commission." Charter at 1.

17. The Commission was formally established on August 22, 1996 with President Clinton's signing of E.O. 13,015.

18. Pursuant to E.O. 13,015 the Commission's term of existence was six months from the date of the August 22, 1996 Order, unless extended by the President. E.O. 13,015 sec. 4(b).

19. Mr. Gerald Kauvar, an employee of the United States Department of the Air Force, was appointed Staff Director for the Commission.

Commission Activities

20. Almost one month before filing the Charter, on July 25, 1996, President Clinton announced the formation of the Commission. Only a few days later, "Vice President Gore led a site visit to Dulles International Airport, where he and other Commissioners saw airport and airline operations first-hand, and discussed issues with front line workers." Final Report to President Clinton, Feb. 12, 1997, at 2. This event constituted a

functioning of the Commission in violation of FACA and its implementing regulations.

21. On August 6, 1996, the FAA Security Baseline Work Group conducted a meeting at which Commissioner Loh attended and identified himself as a member of the Commission. During that FAA Security Baseline Work Group meeting a presentation was made by Commissioner Loh regarding the status, charter, and activities of the Commission. This activity constituted a functioning of the Commission in violation of FACA and its implementing regulations.

22. On August 22, 1996, at 9:00 a.m., the Commission had its initial executive session with only five Commissioners present. During that executive session, Commissioner Loh presented a document with approximately nineteen (19) draft recommendations for the initial report to the President. Commissioner Cummock, and presumably other Commissioners as well, had not previously had an opportunity to review that document. The document must have been prepared prior to the filing of the Commission's charter and prior to the President signing E.O. 13,015. Notwithstanding the lack of prior review, the Vice President, who had apparently previously seen the document, went through the recommendations with the intent of including them in an initial report to the President. As Commissioner Cummock made numerous points regarding the issues with which she was familiar, she was assured by the Vice President that those issues would be addressed. The preparation of this document constituted an

operation of the Commission and violated FACA and its implementing regulations.

23. Following the executive session on August 22, 1996, Commissioner Cummock met with Staff Director Kauvar and suggested to him that she would be most useful to the Commission on issues regarding aviation security and victim assistance. Based on her prior experience in the advertising industry, Commissioner Cummock suggested the use of focus groups to determine the perceptions of passengers and airline personnel with respect to aviation safety and security. The Commission subsequently acted on her suggestion and conducted aviation security focus groups, but Commissioner Cummock was not even made aware of the use of the focus groups until after a report was issued detailing the results of those focus groups.

24. During the executive session prior to the Commission's public meeting on September 5, 1996, Commissioner Cummock provided the Commission with talking points identifying issues and concerns that she had with the initial draft recommendations that were presented by Commissioner Loh on August 22, 1996 and that had been incorporated into a draft document provided to Commissioner Cummock on the Saturday of Labor Day weekend, August 31, 1996.

25. On September 5, 1996, the full Commission had its initial meeting. The September 5, 1996 meeting was the initial participation in Commission activities for the eleven (11) newly appointed Commissioners. During that meeting the full Commission first reviewed together a document with approximately twenty (20)

recommendations. The Vice President went through the recommendations with the intent of including them in the initial report to the President. As Commissioner Cummock made numerous points regarding the issues with which she was familiar, Commissioner Cummock was assured by the Vice President that those issues would be addressed.

26. On September 5, 1996, shortly after the conclusion of the public meeting, Vice President Gore held a press conference announcing the twenty (20) recommendations that would be submitted to the President. Attached to the September 5, 1996 press release were the twenty security recommendations that had been placed before the full Commission for the first time only hours earlier.

27. On September 9, 1996, only four calendar days after the Commission's first meeting and only two business days after the Commission's first meeting, the Commission submitted its initial report to President Clinton. This initial report did not reflect Commissioner Cummock's views and did not address the issues she raised regarding the security recommendations in that they lacked specificity, had no specific timetable for implementation, and had no specific funding mechanism.

28. Following the initial meeting, Commissioner Cummock's efforts at participation in the Commission's activities were frustrated by late notice of meetings, events, and documents requiring review, as well as a failure to provide requested documents on a timely basis, if at all.

29. At the Commission's executive session subsequent to the November 20, 1996 meeting, Commissioner Coleman (former Secretary of Transportation William T. Coleman, Jr.) specifically noted that he had not had sufficient opportunity to review the documents being considered and requested that in the future documents to be discussed by the Commission be provided ten days in advance of the meeting. Commissioner Cummock joined in this request. Staff Director Kauvar acknowledged this request and agreed to a ten day review period. Notwithstanding the request of two Commissioners, documents were rarely provided ten days in advance of consideration. Indeed, documents for consideration were never made available to Commissioner Cummock ten days in advance of Commission meetings.

30. During the November 20, 1996 Commission meeting, Commissioner Cummock became aware that a fellow Commissioner, John Deutch, received an approximately one-inch thick briefing paper from Commission staff entitled "White House Commission on Aviation Safety and Security Recommendations" by Gerald Kauvar to Vice President Gore, November 18, 1996, that he was reviewing during the public hearing. Following the public hearing, Commissioner Cummock requested a copy of the briefing paper that had been provided to Commissioner Deutch, and apparently to the Vice President as well. Subsequently, Commissioner Cummock received four pages from Staff Director Kauvar that were purportedly what had been provided to the Vice President. Commissioner Cummock received no additional information in response to her request.

31. On numerous occasions throughout the Commission's final proceedings references were made to a "classified annex" where certain documents and recommendations were to be included. Notwithstanding Commissioner Cummock's requests and her "level three" security clearance, Commissioner Cummock was not given any information regarding the classified annex.

32. The Commission received other information and documents that were not provided to Commissioner Cummock. For example, Commissioner Cummock requested documents submitted to the Commission from the Air Transport Association (ATA) and/or its President, Carol Hallett, as well as any documents sent from the Commission to the ATA or its President. In addition, the Commission staff did not establish a directory or index of documents that had been submitted to the Commission that was regularly made available to Commissioner Cummock, notwithstanding Commissioner Cummock's request that she be provided with such a directory or index.

33. Although the Commission had six days of meetings, September 5, 1996, November 20, 1996, December 5, 1996, January 16, 1997, February 11, 1997, and February 12, 1997, on no occasion was notice provided in the Federal Register fifteen calendar days prior to such meetings.

34. On only two such occasions, for the November 20, 1996 and December 5, 1996 Commission meetings, were "exceptional circumstances" even cited as the basis for the untimely notice. On these two occasions the exceptional circumstances were the same -- the uncertainty of the Vice President's schedule.

Commissioner Cummock's Dissent

35. On January 8, 1997, at approximately 2:30 p.m., Commissioner Cummock received a copy of the "Preliminary Staff Recommendations to Commissioners" ("Preliminary Staff Report") from Staff Director Kauvar. Although only received on January 8, Staff Director Kauvar requested that comments on the Preliminary Staff Report be provided by 5:00 p.m. on January 9, 1997. Staff Director Kauvar further explained that the Preliminary Staff Report would be discussed during telephone conferences scheduled for 4:00 p.m. on January 8 and 9, 1997. Due to the late receipt of this document, Commissioner Cummock was not able to provide her response in this short time frame. On January 11, 1997, after reviewing the document in detail, Commissioner Cummock provided Staff Director Kauvar with her response to the recommendations in the Preliminary Staff report. Commissioner Cummock's January 11, 1997 response identified her numerous concerns with the Preliminary Staff report.

36. On February 4, 1997, Staff Director Kauvar circulated the latest draft version of the Commission's report to the Commissioners. Memorandum for Commissioners from Gerald B. Kauvar of Feb. 4, 1997. Staff Director Kauvar specifically noted the Administration's review of the draft and stated "this version incorporates comments that Administration officials made after reviewing the document today, February 4, 1997."

37. The February 4, 1997 memorandum further noted that the Commission was reconvening on February 11, 1997, and would

commence discussions regarding the issues raised in Commissioner Cummock's January 11, 1997 response.

38. Finally, the February 4, 1997, memorandum noted that the final public session was scheduled for February 12, 1997, from 9:00 a.m. until 12:00 noon and that the Final Report would thereafter be presented to the President at 1:00 p.m. on that same day.

39. Although the Commission had been in receipt of her response to the Preliminary Staff recommendation since January 11, 1997, Commissioner Cummock's response was not taken up by the Commission until the closed session one month later. In the period from January 11, 1997 to February 11, 1997, there had been numerous meetings and opportunities for consideration of Commissioner Cummock's January 11, 1997 response, including executive session meetings on January 16, 17, 27, and 28, 1997. At or before each of those meetings, Commissioner Cummock requested that the Commission review her response to the Preliminary Staff recommendations, but no review was conducted until one day prior to the presentation of the Final Report to the President, February 11, 1997. On February 11, 1997 the Commission convened and for fourteen (14) hours reviewed Commissioner Cummock's response for the first time.

40. During the course of the February 12, 1997 public meeting, Commissioner Cummock was informed that only one of the security recommendations from the initial report would be presented during the public hearing because they had been "considered" prior to the submission of the initial report and

due to the scheduled presentation to the President in the Oval Office slated for later that same day. Upon learning that the security recommendations would not be discussed during the public meeting, Commissioner Cummock discreetly communicated to the Chair, Vice President Gore, her request that the security recommendations in the initial report to the President be discussed. Upon receiving her request, Vice President Gore made the following representation to Commissioner Cummock:

And I want to say here at this point, also, Commissioner Cummock, that without objection, we will make available a place in the report for the full expression of any dissenting views that you would like to contribute to the report.

Transcript of February 12, 1997 Public Hearing (emphasis added).

41. On February 12, 1997, the Final Report was presented to President Clinton with a transmittal letter. Neither the Final Report nor the cover letter reflected in any way the existence of a dissent or that a dissent would be included in the Final Report.

42. On February 13, 1997, Mr. Kauvar informed Commissioner Cummock via fax that the Final Report would be sent "to the printer" in about seven days and that if her dissent was to be included, he would need to receive it before February 20, 1997. Staff Director Kauvar further requested that Commissioner Cummock indicate whether she intended to sign the transmittal letter to the President that would accompany the Final Report if her dissent was included.

43. On February 14, 1997, Commissioner Cummock advised Mr. Kauvar via fax that the Commission would be in receipt of her dissent by February 19, 1997. Commissioner Cummock further informed Mr. Kauvar that she would not be signing the transmittal letter.

44. On February 19, 1997, Commissioner Cummock transmitted her dissent to the Commission via fax and Federal Express. Commissioner Cummock's dissent consisted of nineteen pages of narrative and an additional twenty-three pages of supplemental materials.

45. The narrative portion of Commissioner Cummock's dissent appears in the printed Final Report, but her supplemental substantiating materials are not included.

46. An Editor's Note to the printed Final Report contains the erroneous statement that Commissioner Cummock's dissent raises issues "far beyond those registered in public" and "presents for the first time material and arguments the other Commissioners did not have an opportunity to consider." This statement is untrue. All of the issues raised in Commissioner Cummock's dissent were previously identified and discussed by the Commission through her September 5, 1996 talking points, in her response to the Preliminary Staff report, at the February 11, 1997 closed meeting of the Commission, or through submission of letters and documents from victims groups or passenger groups that Commissioner Cummock forwarded to the Commission via Staff Director Kauvar with her transmittal letter identifying issues of concern. The Commission was fully cognizant of Commissioner

Cummock's objections to the Final Report on the date it was voted on and presented to the President.

47. The Editor's Note further states that Commissioner Cummock's dissent was transmitted to the Commission one week after the report was voted on in public session and presented to President Clinton. While technically accurate, this statement is deceptive. The absence of Commissioner Cummock's dissent was simply a function of the fact that the actual language of the Final Report was not available until the commencement of the public meeting on February 11-12, 1997, and the fact that the Commission's presentation to the President immediately followed that meeting. Until the Commission considered Commissioner Cummock's objections on February 11-12, 1997, and until she saw the actual language of the Final Report, Commissioner Cummock was uncertain as to whether, and to what extent, a dissent would be necessary.

48. Commissioner Cummock's complete dissent is not included in the Final Report being distributed to the public in that it does not include her supplemental materials. Moreover, the reference to Commissioner Cummock's dissent in the Final Report is materially misleading.

Requests for Information

49. On March 5, 1997, counsel for Commissioner Cummock, Herbert L. Fenster, McKenna & Cuneo, L.L.P., wrote to the Vice President and Mr. Kauvar requesting that the Commission provide

the date for the planned publication of the Final Report; no further response has ever been received.

50. In that letter, Mr. Fenster sought information regarding the operations of the Commission. In particular, Mr. Fenster requested information and documents that were developed prior to the Commission's formation and documents prepared prior to November 17, 1996. Mr. Fenster also requested that he be provided with information regarding all formal and informal meetings of two or more members of the Commission. Mr. Fenster further requested copies of classified materials that were used by the Commission.

51. In addition, Mr. Fenster requested the basis for the Commission's refusal to publish Commissioner Cummock's dissent as part of the official Final Report.

52. Finally, Mr. Fenster requested that he be provided with the identity of the person(s) who "made or authorized" the public representation that certain portions of Commissioner Cummock's dissent were not raised during the Commission's proceedings.

53. Upon receiving no response to his March 5, 1997 letter, Mr. Fenster reiterated his request in a letter dated March 13, 1997.

54. On March 14, 1997, Mr. Fenster received a telephone call from Mr. Steve Okun, Special Assistant to the General Counsel of the Department of Transportation who acknowledged receipt of both letters. Mr. Okun informed Mr. Fenster that DOT would respond to Mr. Fenster's inquiries but would give no indication of when a response could be expected. Mr. Okun was

also unable to provide Mr. Fenster with a date for publication of the Final Report; no further response has ever been received.

55. On April 11, 1997, Mr. Fenster again sent a letter requesting information regarding the composition of the Final Report, seeking the anticipated publication date for the Final Report, and reiterating the request for information and documents contained in the earlier letters. Mr. Fenster specifically requested a reply by April 18, 1997, but has received no communication whatsoever regarding his request.

56. At the time of the April 11, 1997 letter, Commissioner Cummock had received information that her complete dissent would be included in the Final Report. Since that time, Commissioner Cummock has learned that the printed Final Report does not contain her complete dissent, but only the narrative portion thereof, and contains a misleading Editor's Note.

Injury to Commissioner Cummock

57. The Commission's violations of FACA and GSA requirements excluded Commissioner Cummock from full participation in the Commission's activities and violated the requirement that all viewpoints be fairly represented on the Commission.

58. The failure of the Commission to abide by FACA's statutory requirements and GSA regulations prevented Commissioner Cummock's full participation in the Commission's deliberations and precluded the submission of advice and recommendations to the President that included her input.

59. The failure to include Commissioner Cummock's complete dissent in the official Final Report impairs Commissioner Cummock's right as a Commissioner to participate in the Commission's work.

60. If the Commission is not enjoined from filing the Final Report with the Library of Congress, Commissioner Cummock's rights as a Commissioner will be injured by the failure to include her complete dissent in the official version of the Final Report. Moreover, Commissioner Cummock's rights as a Commissioner will be injured by the distribution, publication, or other use of the Commission's report with the Editor's Note's description of her dissent and without the opportunity to amend her dissent after review of additional documents and information.

61. Commissioner Cummock has no adequate remedy at law.

COUNT I

(Violation of the Federal Advisory Committee Act)

62. Commissioner Cummock incorporates by reference paragraphs 1 through 61 above.

63. Commissioner Cummock "has the full right and obligation to participate in the activities" of the Commission. 41 C.F.R. § 101-6.1003.

64. The commencement of activities prior to the Charter filing, the failure to provide timely notice of Commission meetings, the failure to make all documents considered by the Commission available to Commissioner Cummock and the public and the refusal to include her complete dissent in the Final Report

deprive Commissioner Cummock of her "full right . . . to participate in the activities of the [Commission]."

65. FACA's procedural requirements are designed to ensure that the public has input into advisory committee proceedings, that an opportunity for reasoned consideration of issues is provided, and that all viewpoints are represented. These procedural requirements protect the right of individual Commissioners to participate fully in the Commission's activities.

66. FACA requires the Commission "to be fairly balanced in terms of the points of view represented." FACA § 5(b)(2). The procedural irregularities in the Commission's operation and the refusal to publish Commissioner Cummock's complete dissent renders this requirement null by denying Commissioner Cummock her right to participate fully and provide her point of view on the issues that were before the Commission.

67. The Commission's procedural irregularities and the publication of the Final Report without Commissioner Cummock's complete dissent and with the current Editor's Note, and with the current Editor's Note, violate the FACA and her rights as a Commission member.

68. The past actions of the Commission are *ultra vires* in that they were taken in violation of the rights afforded to Commissioner Cummock as a member of the Commission.

COUNT II

(Violation of The Federal Advisory Committee Act)

69. Commissioner Cummock incorporates by reference paragraphs 1 through 61 above.

70. The Commission Charter was filed on August 21, 1996.

71. The Commission conducted activities prior to the filing of its Charter, including a site visit to Dulles International Airport in late July or early August 1996.

72. Upon information and belief, the Commission conducted additional activities prior to the filing of the Charter on August 21, 1996, including, inter alia, the preparation of draft recommendations for the initial report, informational briefings, site visits and studies on aviation security threats and explosives detection technology.

73. FACA and GSA regulations prohibit any action by the Commission until after the Charter has been filed. See FACA § 9(c); 41 C.F.R. § 101-6.1013.

74. The Commission's activities prior to the filing of the Charter violated FACA and its implementing regulations.

75. The commencement of activities prior to the filing of the Charter necessarily impaired Commissioner Cummock's right to participation in the Commission's activities.

76. The past actions of the Commission are *ultra vires* in that they were taken in violation of the requirement that no advisory committee is permitted to take any action until such time as a Charter is filed.

COUNT III

(Violation of the Federal Advisory Committee Act)

77. Commissioner Cummock incorporates by reference paragraphs 1 through 61 above.

78. Upon information and belief, the Commission received information and documents that were not made available to Commissioner Cummock or the public for inspection and copying. Upon information and belief, certain documents were prepared prior to the establishment of the Commission.

79. Commissioner Cummock did not receive a briefing paper that was provided to Commissioner Deutch on November 20, 1996.

80. In addition, Commissioner Cummock did not receive documents that were designated for a "classified annex."

81. FACA § 10(b) requires that documents made available to, prepared for, or prepared by the Commission, be available for inspection and copying.

82. The failure of the Commission to make available to Commissioner Cummock, and to the public, all information and documents that it received, prepared, or reviewed violates FACA § 10(b).

83. The failure to provide Commissioner Cummock with all of the relevant information and documents prevented her from conducting a complete review of the materials relied on by the Commission and denied Commissioner Cummock the opportunity to present her viewpoint on this information and documents to the Commission.

84. These past actions of the Commission are *ultra vires* in that they were taken in violation of the requirement that all information and documents available to or prepared for or by the Commission be made available to the public and deprived Commissioner Cummock of the opportunity for full participation in the Commission's activities.

COUNT IV

(Violation of the Federal Advisory Committee Act and the Administrative Procedure Act)

85. Commissioner Cummock incorporates by reference paragraphs 1 through 61 above.

86. FACA § 10(a)(2) requires that timely notice be provided in the Federal Register prior to a Commission meeting. GSA regulations require that, absent exceptional circumstances, such notice be provided in the Federal Register at least fifteen days prior to the Commission meeting. See 41 C.F.R. § 101-6.1015(b)(1), (2).

87. On no occasion were the Commission meetings properly noticed in the Federal Register fifteen (15) calendar days in advance of the meetings. Indeed, for one meeting, November 20, 1996, the Federal Register notice did not even appear until the day following the meeting. See 61 Fed. Reg. 59,272 (Nov. 21, 1996).

88. The failure to provide timely prior notice of Commission meetings in the Federal Register violates FACA § 10(a)(2) and 41 C.F.R. § 101-6.1015(b)(1) and (2) and precludes full and open participation in the meetings as required by law.

89. DOT's actions in failing to timely publish in the Federal Register notice of the Commission's meeting was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law and violates the APA.

90. The past actions of the Commission are *ultra vires* in that they were taken in violation of the requirement that all Commission meetings be timely noticed in the Federal Register.

COUNT V

(Violation of the Federal Advisory Committee Act and Administrative Procedure Act)

91. Commissioner Cummock incorporates by reference paragraphs 1 through 61 above.

92. Notwithstanding the March 5, 1997, March 13, 1997 and April 11, 1997 requests of Mr. Fenster for information and documents required by law to be provided to members of the public and Commissioner Cummock as a Commissioner, neither Commissioner Cummock nor Mr. Fenster has received a written response to the requests for information and documents.

93. FACA § 10(b) requires that documents made available to, prepared for, or prepared by the Commission, be available for inspection and copying.

94. FACA § 10(c) requires that "[d]etailed minutes of each meeting of each advisory committee shall be kept."

95. The failure to make available the documents requested by Mr. Fenster and the detailed minutes of the Commission meetings violates FACA §§ 10(b) and (c) and constitutes arbitrary and capricious agency action in violation of the APA.

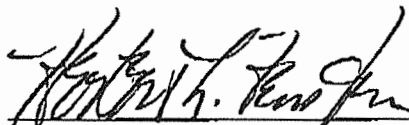
Request for Relief

WHEREFORE, Commissioner Cummock respectfully requests that this Court enter a judgment for Commissioner Cummock and award the following relief:

- (1) A permanent injunction prohibiting the Commission from filing the Final Report with the Library of Congress without the complete dissent of Commissioner Cummock, including supplemental materials attached thereto;
- (2) A permanent injunction requiring that the publication, distribution, or any other use of the Final Report shall include the complete dissent of Commissioner Cummock, including supplemental materials attached thereto;
- (3) A permanent injunction requiring that the Final Report be amended to correct the misstatements in the Editor's Note and to provide an accurate description of Commissioner Cummock's dissent;
- (4) A permanent injunction requiring that all documents made available to or prepared by or for the Commission be made available to Commissioner Cummock;
- (5) A permanent injunction requiring that the detailed minutes of each Commission meeting be made available to Commissioner Cummock;
- (6) An opportunity to amend her dissent after review of additional documents and information;

- (7) A declaration that the Commission has operated in violation of FACA and GSA implementing regulations and that the actions taken by the Commission to date are *ultra vires*;
- (8) A permanent injunction prohibiting the distribution of the Final Report as a FACA advisory committee report;
- (9) Award Commissioner Cummock her costs of suit;
- (10) Award such other relief as the Court may deem just and proper.

Respectfully submitted,



Herbert L. Fenster (No. 153825)
D. Michael Fitzhugh (No. 912980)
Gregory J. Madden
McKENNA & CUNEO, L.L.P.
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500

Attorneys for Plaintiff
Commissioner M. Victoria Cummock

May 8, 1997