21. Denies knowledge or information sufficient to form a belief as to paragraphs "64", "66", "67", "68" and "70".

22. As to paragraph "69" of the complaint, admits that charges against the plaintiff were dismissed, and denies knowledge or information sufficient to form a belief as to the balance of said paragraph.

23. Denies the allegations contained in paragraph "71".

AS TO THE FOURTH CAUSE OF ACTION

24. Denies the allegations contained in paragraph "72", except as hereinbefore otherwise specifically pleaded.

25. Denies the allegations contained in paragraphs "73", "75", "76", and "77".

26. Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph "74".

AS TO THE FIFTH CAUSE OF ACTION

27. Denies the allegations contained in paragraph "78", except as hereinbefore otherwise specifically pleaded.

28. Denies the allegations contained in paragraphs "79", "80" and "81".

AS TO THE SIXTH CAUSE OF ACTION

29. Denies the allegations contained in paragraph "82", except as hereinbefore otherwise specifically pleaded.

30. Denies the allegations contained in paragraph "83".

AS TO THE SEVENTH CAUSE OF ACTION

31. Denies the allegations contained in paragraph "84", except as hereinbefore otherwise specifically pleaded.

32. As to paragraph "85" of the complaint, admits that the charges against the plaintiff were dismissed, and denies knowledge or information sufficient to form a belief as to the balance of said paragraph.

33. Denies the allegations contained in paragraphs "86" and "87".

AS TO THE EIGHTH CAUSE OF ACTION

34. Denies the allegations contained in paragraph "88", except as hereinbefore otherwise specifically pleaded.

35. Denies the allegations contained in paragraph "89".

AS TO THE NINTH CAUSE OF ACTION

36. Denies the allegations contained in paragraph "90", except as hereinbefore otherwise specifically pleaded.

37. Denies the allegations contained in paragraph "91" and "92".

AS TO THE FIRST CAUSE OF ACTION
OF PLAINTIFF COALITION

38. Denies the allegations contained in paragraph "93", except as hereinbefore otherwise specifically pleaded.

39. Denies knowledge or information sufficient to form a belief as to paragraphs "94", "95", "96", "97", "103", "104" and "106".

40. Denies the allegations contained in paragraphs "101", "102", "105", "107", "108", "109" and "110".

AS TO THE SECOND CAUSE OF ACTION
OF PLAINTIFF COALITION

41. Denies the allegations contained in paragraph "111", except as hereinbefore otherwise specifically pleaded.

42. Denies the allegations contained in paragraphs "112", "113", "114" and "115".

AS AND FOR A FIRST DEFENSE

43. The arrest, detention and prosecution of the plaintiff, Michelson, were effectuated, if they were effectuated at all, with good and legal justification, based upon reasonable and probable cause.

AS AND FOR A SECOND DEFENSE

44. That the arrest, detention and prosecution of the plaintiff, Michelson, were effectuated, if they were effectuated at all, in good faith, without malice and with good and legal justification, based on reasonable and probable cause.

AS AND FOR A THIRD DEFENSE

45. That upon information and belief, no item of injury or damage, which plaintiffs claim to have sustained, was caused or in any way contributed to, by any culpable conduct on the part of the defendant, City of Albany, but if any such injury or damage was sustained, it was caused solely by the culpable conduct of the plaintiffs and/or some third party over whom this defendant has no control.

AS AND FOR A FOURTH DEFENSE

46. That the cause of action enumerated as, SIXTH CAUSE OF ACTION OF PLAINTIFF MICHELSON, fails to state a claim upon which relief may be granted.

AS AND FOR A FIFTH DEFENSE

47. That the complaint of the plaintiff Michelson, with respect to the FIFTH and EIGHTH CAUSE OF ACTION, cannot be sustained, as said plaintiff has failed to comply with the requirements of Section 50-e of the General Municipal Law of the State of New York.

AS AND FOR A SIXTH DEFENSE

48. That the defendant, City of Albany, is a municipality, and as such, cannot be held liable for punitive damages.

AS AND FOR A SEVENTH DEFENSE

49. That upon information and belief, the plaintiff Coalition, lacks the requisite standing to bring this action, and thus those portions of the plaintiff's complaint, fails to state a claim upon which relief may be granted.

AS AND FOR AN EIGHTH DEFENSE

50. Inasmuch as the plaintiffs' complaint is directed toward the acts or ommissions of this defendant in its individual capacity, the complaint is a nullity and thus fails to state a claim upon which relief may be granted.

WHEREFORE, the defendant, City of Albany, demands judgment dismissing the plaintiffs' complaint, together with the costs and disbursements of this action, reasonable attorneys fees, and such other and further relief as to this Court may seem just and proper.

DATED: January 21, 1983

VINCENT J. McARDLE, JR.
Corporation Counsel
Attorney for Defendant City of Albany
100 State Street
Albany, New York 12207

TO: WALTER & THAYER, ESQS.
Attorneys for Plaintiffs
69 Columbia Street
Albany, New York 12207

U.S. DISTRICT COURT
N. D. OF N. Y.
FILED

MAY 16 1983

AT____O'CLOCK____M.
J. R. SCULLY, Clerk
ALBANY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

VERA MICHELSON, and CAPITAL DISTRICT COALITION AGAINST APARTHEID AND RACISM, BY ITS CHAIRMAN MICHAEL DOLLARD,

Plaintiffs,

v.

PAUL DALY, JAMES ROSE, Unknown Other Agents of the Federal Bureau of Investigation, et al,

Defendants.

NOTICE OF MOTION

Civil No. 82-CV-1413

(Hon. Roger J. Miner)

TO: HONORABLE JOSEPH R. SCULLY
Clerk, U.S. District Court
Northern District of New York
U.S. Post Office and Courthouse
Albany, New York 12207

ANITA THAYER, ESQ.
Walter and Thayer
69 Columbia Street
Albany, New York 12207

SIRS:

PLEASE TAKE NOTICE that upon the annexed papers and upon all papers filed and proceedings had herein the undersigned will move this Court at a Motion Day thereof, to be held in the United States Post Office and Courthouse, Albany, New York, on the 27th day of May, 1983, at 9:30 a.m., or as soon thereafter as counsel can be heard, for an

Order Dismissing Plaintiffs' Complaint in this action.

Dated: May 16, 1983

Respectfully submitted,

FREDERICK J. SCULLIN, JR.
UNITED STATES ATTORNEY
Northern District of New York

BY: William P. Fanciullo

WILLIAM P. FANCIULLO
ASSISTANT U.S. ATTORNEY
U.S. Post Office & Courthouse
Albany, New York 12207

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

5/16/83

Copy

VERA MICHELSON, and CAPITAL DISTRICT COALITION AGAINST APARTHEID AND RACISM, BY ITS CHAIRMAN MICHAEL DOLLARD,

Plaintiffs,

v.

PAUL DALY, JAMES ROSE, Unknown Other Agents of the Federal Bureau of Investigation, et al.,

FBI

Defendants.

Civil No. 82-CV-1413

(Hon. Roger J. Miner)

MEMORANDUM IN SUPPORT OF MOTION OF DEFENDANTS DALY, ROSE AND UNKNOWN FBI AGENTS TO DISMISS COMPLAINT

STATEMENT OF FACTS

On September 22, 1981 a City of Albany Police Court search warrant was executed at the residence of VERA MICHELSON. This warrant was based in part on information supplied by a confidential informant. The information indicated that armed members of the Communist Workers Party intended to provoke a violent confrontation at Bleeker Stadium in Albany, when the South African National Rugby Team, the Springboks, played a rugby game. The warrant was also based on confirmed possession of a weapon by a Communist Workers Party member, and threats by members against the life of the local head of the NAACP.

The office of Thomas Selfridge, the organizer of the rugby game, was bombed on September 21, 1981.

The source indicated that MICHELSON's apartment was being used as a base to plan activities to disrupt the rugby game. The apartment, in the vicinity of Bleeker Stadium, was searched, pursuant to the search warrant, for weapons. Plaintiff ESTIS alleges he was arrested in the apartment.

The plaintiffs allege a conspiracy between the FBI and the local police to "remove certain political activists from the Albany streets prior to the Springbok game . . .". The action is brought pursuant to Title 42, United States Code, Sections 1983, 1985, 1986 and 1988, and the First, Fourth, Fifth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitution. Plaintiffs also seek damages for the common law torts of malicious prosecution, abuse of process, false arrest, and false imprisonment. In addition, plaintiff Coalition seeks injunctive relief.

The defendants Daly, Rose, and other unknown members of the FBI move to dismiss the complaint with respect to themselves, in that the plaintiffs' have failed to state a claim upon which relief can be granted, these defendants were acting under color of federal law at all times and in all matters pertinent to this case and are not subject to suit under the civil rights laws cited in the complaint, these defendants are immune from liability for common law torts, and the plaintiff "Coalition" lacks standing.

I. ARGUMENT

The Civil Rights Conspiracy Statutes Do Not Apply To Federal Officials Acting Under Color Of Federal Law.

Federal officers acting under color of federal law are immune from suit under the Civil Rights Act of 1871. Seibert v. Baptist, 594 F.2d 423, 429 (5th Cir. 1979), on reh., 599 F.2d 743 (5th Cir. 1979), cert. denied, 446 U.S. 918 (1979), reh. denied, 447 U.S. 930 (1980); Ryan v. Cleland, 531 F.Supp. 724, 733 (E.D.N.Y. 1982); see also District of Columbia v. Carter, 409 U.S. 418, 430 (1973). The legislative history of the Act, as recounted by the Supreme Court, permits no other conclusion. See Monroe v. Pape, 365 U.S. 167, 173-180 (1961); Griffin v. Breckenridge, 403 U.S. 88, 100-101 (1971); Monell v. New York City, 436 U.S. 658, 665-69 (1978). The Act was passed in response to a twofold evil, which did not include misconduct of federal officials. First, the Act "was passed by a Congress that had the [Ku Klux Klan] 'particularly in mind'" in order to prevent private conspiracies against black persons and advocates of their cause. See Monroe v. Pape, supra, at 174. See also, Griffin v. Breckenridge, supra, at 101. A second element of concern to Congress was that, "by reason of prejudice, passion, neglect, intolerance or otherwise," state agencies were not enforcing state laws against such private lawlessness "with an equal hand". Monroe v. Pape, supra, 365 U.S. at 174, 180.

Thus, the Civil Rights Act, which affords access to the federal courts for the deprivation of federal rights, was aimed specifically and exclusively at state officials and private bands who had been terrorizing blacks. Congress did not intend to bring federal officials acting under color of federal law within the reach of the Civil Rights Act or its offspring. This conclusion was reinforced by the Supreme Court's decision in District of Columbia v. Carter, supra, where the court acknowledged that the statutes derived from the Civil Rights Act and on which plaintiffs now rely, do not extend to federal officials:

> The rationale underlying Congress'decision not to enact legislation similar to §1983 with respect to federal officials [was] the assumption that the Federal Government could keep its own officers under control.

Id. at 429-30. See also Koch v. Zuieback, 316 F.2d 1, 2 (9th Cir. 1963). Because the courts "are not at liberty to recast this statute to expand its application beyond the limited reach Congress gave it," District of Columbia v. Carter, supra, at 432, the complaint fails to state a claim against the federal defendants under these civil rights statutes.

Congress did not intend for the Civil Rights Act to reach all tortious, conspiratorial interferences with the rights of others. 403 U.S. at 101. See Canlis v. San Joaquin Sheriff's Posse Comitatus, 641 F.2d 711, (9th Cir. 1981), cert. denied, 454 U.S. 967 (1981).

To ensure that the statute is not construed as a "general federal tort law," the Supreme Court has narrowly interpreted that element of Section 1985(3) requiring a showing that the conspiracy alleged was undertaken "for the purpose of depriving . . . any person or class of persons of the equal protection of the laws . . . ." Griffin supra, at 102-03. Accordingly, a complaint under this provision must allege a sufficient "racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." Id. See also Canlis, supra, at 719.

Although the courts have expanded the reach of Section 1985(3) beyond its literal historical scope to recognize other protected classes, see, e.g. Life Insurance Co. of North America v. Reichardt, 591 F.2d 499, 505 (9th Cir. 1979)(sex discrimination), "the boundary is not unlimited." Canlis, supra, at 720. "[P]recision must be retained." Furumoto v. Lyman, 362 F.Supp. 1267, 1286 (N.D. Cal. 1973). The courts have, accordingly, required the class for which the animus is held to be "based upon 'immutable characteristics' for which the members . . . have no responsibility." Carchman v. Korman Corp., 594 F.2d 354, 356 (3d Cir. 1979), cert. denied, 444 U.S. 898 (1979). Consistent with the purpose of the statute, the courts have also limited its coverage to only those groups that have traditionally required and warranted special federal assistance in protecting their civil rights and have been accorded such assistance.

DeSantis v. Pacific Telephone and Telegraph Co., 608 F.2d 327, 333 (9th Cir. 1979)(homosexuals not a traditionally suspect or quasi-suspect class so as to require protection under §1985(3)). Furthermore,

> the class status providing the motivating animus must be created by a fact other than possession of the right deprived--otherwise virtually every conspiratorial deprivation of a primary right would be actionable under §1985(3). . . .

Lopez v. Arrowhead, 523 F.2d 924 (9th Cir. 1975); See also Regan v. Sullivan, 557 F.2d 300 (2nd Cir. 1977). The purported class in this case against which the defendants' alleged animus was allegedly based satisfied none of these requirements.

In these cases, it is unclear what "class" the plaintiffs allege to be a part of. The complaint speaks of "political activists," certainly a vague and amorphous group, even if limited to anti-apartheid activities. If the class is meant to be the Capital District Coalition Against Apartheid and Racism, the plaintiffs have still failed to define a class intended to receive the protection of the Civil Rights Laws. The plaintiffs in the Michelson complaint describe the Coalition as an affiliation of "approximately forty civil rights, civic, student, labor, community and neighborhood organizations," whose purposes and actions "are and were grounded in political and moral abhorence for the institution of apartheid. . . ."

Thus, like the purported class in Rodgers v. Tolson, 582 F.2d 315, 317-18 (4th Cir. 1978), plaintiffs here "define their class in

vague and amorphous terms such as 'political and philosophical opposition'. . . and 'outspoken criticism.'" Accord Furumoto v. Lyman, supra, at 1286 (class consisting of "non-white opponents of racism" and "disrupters of university operations for social or political reasons" not sufficiently limited to pass the Griffin test). Such terms do not identify criteria for which the purported class members have no responsibility and preclude objective identification of the class. See Rodgers v. Tolson, supra, at 317-18.

Nor can plaintiffs show that their "class" has traditionally warranted and received special federal assistance. In addition, the purported class is not cognizable under Section 1985(3) because it is only created by the common possession of the right allegedly deprived--the right to express opposition to the system of apartheid. See Lopez v. Arrowhead, supra. To hold otherwise "would make §1985(3) 'applicable to all conspiratorial interferences with the rights of others, as there are no bounds upon the ingenuity of counsel in pleading novel and diverse classes to fit every conceivable situation.'" Silkwood v. Kerr-McGee Corp., 637 F.2d 743, 748, (10th Cir. 1980), cert. denied, 454 U.S. 833 (1981)(quoting district court opinion).

Plaintiffs' claims under Section 1985(3) must also fail for failure to allege any facts showing invidious discrimination. See A & A Concrete, Inc. v. White Mountain Apache Tribe, 676 F.2d 1330, 1333 (9th Cir. 1982); Aldabe v. Aldabe, 616 F.2d 1089, 1092 (9th Cir.

1980). While plaintiffs here, like those in Ligon v. State of Maryland, 448 F.Supp. 935, 941 (D. Md. 1977),

> have alleged in conclusory form a denial of equal protection . . ., the allegations fail to disclose any class-based discriminatory intent, e.g., that persons in a class different than plaintiffs would have been accorded treatment different from that plaintiffs received. Hence, no cause of action is stated under 42 U.S.C. §1985(3).

See also Griffin, supra, at 102. The complaint, accordingly, fails to state a claim under Section 1985(3) and must be dismissed.

The Complaint Fails To State A Claim Under Section 1986.

Plaintiffs also assert a claim under 42 U.S.C. §1986, which provides a cause of action against persons

> having knowledge that any of the wrongs conspired to be done, and mentioned in Section 1985 . . ., are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses to do so. . . .

An action under Section 1986, however, is "derivative of a §1985 conspiracy and merely gives a remedy for misprision of such a conspiracy." Martinez v. Winner, 548 F.Supp. 278, 328 (D. Colo. 1982). Thus, "[a]n indispensible prerequisite for a . . . §1986 claim is the existence of a conspiracy actionable under . . . §1985". Wagar v. Hasenkrug, 486 F.Supp. 47, 51 (D. Montana 1980). Since plaintiffs do not state a claim under Section 1985 against the federal defendants or otherwise, "they cannot state one under §1986." See Phillips v. International Assn. of Bridge, Structural & Ornamental Iron Workers, Local 118, 556 F.2d 939, 941 (9th Cir. 1977).

Further, the strict one-year statute of limitations of Section 1986 bars recovery in this suit. Martinez v. Winner, supra, at 329 n.87. Plaintiffs' cause of action, if any, under Section 1986 accrued on the date of the occurrence of the alleged wrongful acts, September 22, 1981. See Allen v. Fidelity & Deposit Co. of Maryland, 515 F.Supp. 1185, 1188 (D. S.C. 1981). The complaint does not allege any other "wrongful act" that occurred within the one-year period. The summons in this case was issued on December 15, 1982. Plaintiffs' claims under Section 1986 are, accordingly, barred by the statute of limitations.

Absolute Immunity Doctrine Bars Suits Against Federal Defendants for Common Law Torts.

Plaintiffs seek to pursue several causes of action sounding in state tort law, specifically, malicious prosecution, abuse of process, false arrest, and false imprisonment. All actions taken by the federal defendants in these cases were the result of their employment as federal investigators conducting a federal criminal investigation. Federal officers acting within the scope of their employment have absolute immunity from suits alleging common law torts. Barr v. Matteo, 360 U.S. 564, 3 L.Ed2d 1434, 79 S.Ct. 1335 (1959). In Barr, the Supreme Court stated that it is:

> important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties-suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous and effective administration of policies of government. Barr, supra, at 571.

The "Coalition" Lacks Standing To Sue For Constitutional Violations.

Plaintiff "Coalition" unveils a novel legal theory by attempting not only to claim a constitutional deprivation on behalf of unnamed members of the group, but also by basing the constitutional harm on the alleged "illegal" search of a third party's residence. The Supreme Court in Rakes v. Illinois, 429 U.S. 128, 99 S.Ct. 421 (1978), held that Fourth Amendment rights are personal and may not be vicariously asserted. See also, Flast v. Cohen, 392 U.S. 83, 92 (1969); McGowan v. Maryland, 366 U.S. 420, 429 (1961). Further, the Coalition fails to fulfill the three criteria set forth by the Supreme Court in order to allow an organization to bring suit on behalf of its members. Warth v. Seldin, 422 U.S. 490, 45 L.Ed.2d 343, 95 S.Ct. 2197 (1975); Hunt v. Washington Apple Advertising Commission, 432 U.S. 333, 53 L.Ed.2d 383, 97 S.Ct., 2434 (1977). Those criteria are:

> (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit.

Hunt, supra, at 394.

The Coalition, in paragraph 96 of the MICHELSON complaint, is described as being an affiliation of "approximately forty civil rights, civic, student, labor, community and neighborhood organizations." It is unclear which, if any, individual members of

these groups have been the alleged victims of alleged unconstitutional conduct of defendants Daly, Rose or other unknown FBI agents. In order to win damages under a Bivens theory, it is necessary for the individual plaintiff to prove unconstitutional behavior on the part of each defendant. Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1977). Nor is it shown that the organizations purpose is germane to the lawsuit.

The Coalition also accuses the defendants of "damaging the reputation" of the Coalition by making certain public statements, thus depriving the Coalition of "equal protection of the law," etc. This is deficient. A plaintiff must do more than just allege tortious conduct on the part of a federal official; rather, the official's conduct, itself, must be unconstitutional. Baker v. McCollan, 443 U.S. 137 (1979); Birnbaum v. U.S., 588 F.2d 319 (2d Cir. 1978). The Coalition is attempting to paint an alleged common law tort of slander as though it were constitutional in nature. Such attempts were anticipated by the Supreme Court in Butz v. Economou, 438 U.S. 478 (1978).

The Court in Butz recognized that actions under Bivens create a danger of interference with the normal operations of the Executive branch - a danger that the public interest requires to be minimized. To that end, the Court enjoined that the District Courts be "alert to the possibilities of artful pleading"; that "[i]nsubstantial lawsuits can

be quickly terminated by federal courts"; and that a "firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by insubstantial lawsuits." 438 U.S. at 507-8.

Plaintiff Coalition Is Not Entitled To Injunctive Relief.

Paragraphs 94 and 95 of the MICHELSON complaint state that the Coalition was formed in 1981 for the purpose of opposing the U.S. tour of the South African Rugby Team. Despite the fact that the tour is over and plaintiff has not established that further tours are contemplated, plaintiff seeks broad injunctive relief.

In addition, plaintiff has not alleged any facts which are sufficient to entitle it to relief along these lines. Injunctive relief is designed to deter future injury and not to redress past conduct. Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 62 (1975). The complaint does not allege that there is a real, immediate and specific threat of injury which would warrant injunctive relief.

A party seeking injunctive relief must demonstrate the existence of present objective injury or a threat of specific future harm. United States v. Richardson, 418 U.S. 1766 (1974); Laird v. Tatum, 408 U.S. 1, 14 (1972).

"Moreover, judicial supervision of police activity predicated on future abuse must be based on the imminence of future misconduct . . . [t]he mere possibility of future misconduct is simply not enough." Reporters Committee for Freedom of the Press v. AT&T, 593 F.2d 1030, 1069 (D.C. Cir. 1978), cert. denied, 440 U.S. 949 (1979). In short,

there must be a showing "that there is a substantial risk that future violations will occur." Long v. District of Columbia, 469 F.2d 927, 932 (D.C. Cir. 1972). Plaintiffs have failed to make such a showing. They are plainly seeking:

> a broad scale investigation, conducted by themselves as private parties armed with the subpoena power of a federal district court and the power of cross examination, to probe into the [United States investigative and law enforcement] activities, with the district court determining at the conclusion of that investigation the extent to which those activities may or may not be appropriate . . .
>
> * * *
>
> Carried to its logical end, this approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action; such a role is appropriate for the Congress acting through its committees and the 'power of the purse'; it is not the role of the judiciary absent actual present or imminently threatened injury resulting from unlawful governmental action. Laird, supra, at 14-15.

In addition, any attempt to enjoin the United States in this action is barred by the doctrine of sovereign immunity. See Midwest Growers Co-op Corp. v. Kirkemo, 533 F.2d 455 (9th Cir. 1976). In Midwest Growers, the plaintiff sought injunctive relief, inter alia, against the individual federal official, the Interstate Commerce Commission and the United States by claiming that it had been subjected to an unreasonable search and seizure in violation of the Fourth Amendment. The Ninth Circuit declared, at 465, that:

> Insofar as the injunction seeks to restrain the United States and its agencies, it is barred by the doctrine of sovereign immunity. It is well established that suits to enjoin the United States or its agencies, like damage suits, cannot be maintained unless the Government first consents. Dugan v. Rank, 372 U.S. 609, 617-619, 83 S.Ct. 999, 1004-05, 10 L.Ed.2d 15, 21-22 (1963); City of Fresno v. California, 372 U.S. 627, 629, 83 S.Ct. 996, 997, 10 L.Ed.2d. 28, 30 (1963); Cotter Corporation v. Seaborg, 370 F.2d 686, 691 (10th Cir. 1966). Congress has enacted no statute which may be interpreted as providing consent for this suit. The injunction against the United States accordingly is improper.

Thus, unless the plaintiff can point to some statute waiving sovereign immunity for the relief he seeks in this suit, the court is without jurisdiction to grant declaratory and injunctive relief against the United States.

CONCLUSION

The complaint in this action employs a shotgun approach; it does not contain a short and plain statement of the claim showing the pleader is entitled to relief. Rule 8, Federal Rules of Civil Procedure. The complaint fails to state a claim upon which relief can be granted, these defendants are not subject to suit under the Civil Rights statutes cited, these defendants are immune from civil liability for common law torts, and the "Coalition" lacks standing and is not entitled to injunctive relief.

For all of the above reasons, the Motion of defendants Daly,

Rose and other FBI agents to Dismiss the Complaint in this action, with respect to them, should be granted.

Respectfully submitted,

FREDERICK J. SCULLIN, JR.
UNITED STATES ATTORNEY

BY: William P. Fanciullo

WILLIAM P. FANCIULLO
ASSISTANT U.S. ATTORNEY

Sworn to before me this

16th day of May, 1983.

Mary Ann Tangorre
Notary Public

MARY ANN TANGORRE
Notary Public, State of New York
Qualified in Rensselaer County
Commission Expires March 30, 19 84
4765629

U.S. Department of Justice

MAY 17 RECD

United States Attorney
Northern District of New York

United States Courthouse and Post Office
Albany, New York 12207

518/472-5522
FTS/562-5522

May 16, 1983

Anita Thayer, Esq.
Walter and Thayer
69 Columbia Street
Albany, New York 12207

Re: Vera Michelson, et al v. Paul Daly, et al
Civil No. 82-CV-1413

Dear Ms. Thayer:

Enclosed herewith is a copy of Notice of Motion, Motion to Dismiss Complaint and Memorandum in Support of Motion to Dismiss Complaint which was filed in U.S. District Court on this date in the above-referenced case.

Very truly yours,

FREDERICK J. SCULLIN, JR.
UNITED STATES ATTORNEY

BY: Mary Ann Tangorre

MARY ANN TANGORRE
LEGAL CLERK

/mat
Enclosures

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

VERA MICHELSON, and CAPITAL DISTRICT COALITION AGAINST APARTHEID AND RACISM, BY ITS CHAIRMAN MICHAEL DOLLARD,

Plaintiffs,

v.

PAUL DALY, JAMES ROSE, Unknown Other Agents of the Federal Bureau of Investigation, et al,

Defendants.

MOTION OF DEFENDANTS DALY, ROSE AND OTHER UNKNOWN AGENTS OF THE FBI TO DISMISS THE COMPLAINT

Civil No. 82-CV-1413

(Hon. Roger J. Miner)

Come now the defendants, DALY, ROSE, and Other Unknown FBI agents, by their attorney, Frederick J. Scullin, Jr., United States Attorney for the Northern District of New York, William P. Fanciullo, Assistant United States Attorney, of counsel, and respectfully move this Court for an Order Dismissing Plaintiffs' Complaint in this action with respect to defendants Daly, Rose and other unknown agents of the FBI.

Submitted herewith is a memorandum in support of defendants' motion.

Dated: May 16, 1983
Albany, New York

Respectfully submitted,

FREDERICK J. SCULLIN, JR.
UNITED STATES ATTORNEY
Northern District of New York

BY: William P. Fanciullo

WILLIAM P. FANCIULLO
ASSISTANT U.S. ATTORNEY
U.S. Post Office & Courthouse
Albany, New York 12207

CERTIFICATE OF SERVICE BY MAIL

VERA MICHELSON, ET AL,
Plaintiffs,
v.
PAUL DALY, JAMES ROSE, ET AL,
Defendants.

Notice of Motion, Motion to Dismiss and Memo in Support of Motion to Dismiss

The undersigned hereby certifies that s/he is an employee in the Office of the United States Attorney for the Northern District of New York and is a person of such age and discretion as to be competent to serve papers.

That on May 16, 1983 s/he served a copy of the attached

Notice of Motion, Motion to Dismiss and
Memo in Support of Motion to Dismiss

by placing said copy in a postpaid envelope addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es), and by depositing said envelope and contents in the United States Mail at Albany, New York

Address(s):

ANITA THAYER, ESQ.
Walter and Thayer
69 Columbia Street
Albany, New York 12207

Mary Ann Tangorre

Form USA-20
FEB 1978

6/20/83

copy

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

VERA MICHELSON, and CAPITAL DISTRICT COALITION AGAINST APARTHEID AND RACISM, by its Chairman MICHAEL DOLLARD,

Plaintiffs,

-against-

PAUL DALY, AGENT IN CHARGE, FEDERAL BUREAU OF INVESTIGATION; JAMES J. ROSE, SPECIAL AGENT, FEDERAL BUREAU OF INVESTIGATION; and UNKNOWN OTHER AGENTS OF THE FEDERAL BUREAU OF INVESTIGATION; UNKNOWN NEW YORK STATE POLICE OFFICERS; ALBANY COUNTY DISTRICT ATTORNEY SOL GREENBERG; ALBANY COUNTY ASSISTANT DISTRICT ATTORNEY JOSEPH DONNELLY; ALBANY COUNTY ASSISTANT DISTRICT ATTORNEY JOHN DORFMAN; UNKNOWN OTHER ALBANY COUNTY DISTRICT ATTORNEYS; THE COUNTY OF ALBANY; THE CITY OF ALBANY POLICE CHIEF THOMAS BURKE; CITY OF ALBANY ASSISTANT POLICE CHIEF JON REID; CITY OF ALBANY POLICE LIEUTENANT WILLIAM MURRAY; CITY OF ALBANY DETECTIVE JOHN TANCHAK, UNKNOWN OTHER CITY OF ALBANY POLICE OFFICERS; and THE CITY OF ALBANY,

Defendants.

CIVIL NO.
82-CV-1413

(Hon. Roger J. Miner)

MEMORANDUM ON BEHALF OF PLAINTIFFS IN OPPOSITION TO MOTION TO DISMISS PURSUANT TO FRCP 12(b) BY FEDERAL DEFENDANTS.

ANITA THAYER
LANNY E. WALTER
WALTER & THAYER
69 Columbia St.
Albany, New York 12207
(518) 462-6753

TABLE OF CONTENTS

BACKGROUND

Plaintiff Vera Michelson is a resident of the City of Albany who actively participated in the organization of a demonstration on September 22, 1981 in order to peacefully protest the policy of apartheid as represented by the South American Rugby team. On the evening of September 21st she was asleep in her apartment at 400 Central Avenue, Apartment 7K when it was invaded by certain defendants and other unknown law enforcement agents. Instead of attending the protest, plaintiff was arrested by this raiding party, and taken to the police station. Her apartment was ransacked, and numerous personal papers, and Coalition documents were confiscated. Plaintiff was charged with a petty offense and incarcerated in the Albany County Jail for three (3) days without bail in violation of New York law. The petty offenses charged against plaintiff were subsequently dismissed.

The Capital District Coalition Against Apartheid and Racism is an unincorporated association that was the local initiator and organizer of a protest rally against a rugby game scheduled between the apartheid South African Springbok team and a local rugby team. The size and effectiveness of this associational activity was severly diminished and impinged by the conduct of defendants, to wit: spreading false rumors of violence, disseminating unfounded threats to would be participants and supporters, placing the Coalition and its leaders and/or members under surveillance, maintaining records and files of activities protected by the First Amendment, arresting plaintiff Michelson

and other coalition members on the eve of the rally, and confiscating coalition documents.

Plaintiff Michelson brought suit in the Federal District Court for the Northern District of New York alleging the violation of various constitutional and statutory rights and invoking the Court's pendent jurisdiction with regard to various state tort claims.

Plaintiff Coalition has alleged a violation of its and its members' right to associate and to hold a public rally, and an invasion of their right of associational privacy through the confiscation of names, addresses and other coalition documents.

References are made to specific factual allegations of plaintiffs' complaint where necessary throughout this memorandum.

Defendants, Paul Daly, James Rose and Unknown Other Agents of the Federal Bureau of Investigation move to dismiss the complaint on grounds that (1) civil rights conspiracy statutes do not apply to federal officials, (2) federal officials have absolute immunity for Common Law Torts, (3) the Coalition lacks standing to sue, and (4) plaintiffs are not entitled to injunctive relief.

Defendants have made no objections to the direct constitutional claims of plaintiffs so the basis for liability of the federal defendants on these claims is not briefed herein.

ARGUMENT

POINT I: THE CIVIL RIGHTS CONSPIRACY STATUES DO APPLY TO THE FEDERAL DEFENDANTS.

A. THE FEDERAL DEFENDANTS ARE LIABLE UNDER 42 U.S.C. § 1983

The statutory language of 42 U.S.C. § 1983 makes it quite clear that the plaintiff must prove that the defendants acted under color of state law in causing an injury to the constitutional or federal rights of plaintiff. See generally, Monroe v. Pape, 365 U.S. 167 (1961).

The issue of whether or not the actions of federal officials may be subject to § 1983 if there is proof of conspiracy with state officials has never been decided by the U.S. Supreme Court. See Dombrowski v. Eastland, 387 U.S. 82, p.84 (1967).

However, the law in the Second Circuit is quite clear.

> "We can see no reason why a joint conspiracy between federal and state officials should not carry the same consequences under § 1983 as does joint actions by state officials and private persons. It was the evident purpose of § 1983 to provide a remedy when federal rights have been violated through the use or misuse of power derived from a state.... When the violation is a joint product of the exercise of a state power and of a non-state power then the test under the Fourteenth Amendment and § 1983 is whether the State or its officials played a 'significant' role in the result."
>
> Kletschka v. Driver, 411 F.2d 436, 448, 449 (1969)

In Hampton v. Hanrahan, 600 F.2d 600 (1979), a case with many factual similarities to the within complaint the Seventh Circuit cited Kletschka, supra, and ruled that "...when federal officials are engaged in a conspiracy with state officials to deprive constitutional rights, the state officials provide the requisite