

JUST MINUTES before the federal jury announced its decision, the Rev. Philip Berrigan and his six co-defendants were quietly emptying their purses and wallets, handing their money and personal papers and pictures to one of their lawyers' secretaries.

"What are you doing?" asked the secretary.

"We're going to be going to jail," said one of the defendants. The secretary started to cry. She had typed briefs about the defendants for over a year, and had come to know and like them very much. Now she shared the fatalistic atmosphere of the waiting room in Harrisburg, Pa., where the jury's decision, after seven days of deliberation, was to come at any moment.

It did. The jury was hung. The defendants, though not acquitted, had won a political victory. And the government had lost.

Later, chief prosecutor William S. Lynch, a man known for his prosecuting skill against organized crime, tried to minimize the government's embarrassment. "Seven out of 10 is pretty good," he said.

There were 10 counts in the indictment. The jury had convicted two of the defendants for smuggling seven letters in and out of a federal prison. But only one count mattered—the one that charged that the seven defendants—a Pakistani scholar and six Catholic former or present priests and nuns—conspired to kidnap presidential adviser Henry A. Kissinger, to bomb tunnels under federal buildings here and to raid federal offices.

On that count the jury was split 10 to 2 in favor of acquittal—a surprise to everyone, including the defendants. Just two hours before the announcement of the hung jury, they had heard U.S. District Judge R. Dixon Herman explain how easy it would be to convict them. The jury did not have to find them guilty of all elements of the conspiracy count—kidnaping, bombing and raiding—in order to convict them. Only one element—draft board raids alone, for instance—had to be proven in order to find guilt on the conspiracy count.

Still, the jury was hung.

How could a nice Middle American jury not agree with the most powerful law enforcement officer in the nation, FBI Director J. Edgar Hoover, that these people were dangerous conspirators? Hoover had publicly announced that they were guilty on Nov. 27, 1970, even before there was a grand jury investigating the case.

As it turned out, 10 jurors wanted to

acquitt the defendants without having ever heard a word from them. The defense presented no evidence, except as it developed a case through cross-examination of government witnesses.

Against the Odds

PRIOR TO the trial the odds seemed heavily against the defendants. Of nine East Coast locations where the government could have tried this case—judicial districts in which alleged overt acts took place—it chose the only predominantly rural

The Case of the Disappearing Conspiracy

By Betty Medsger

Staff writer Medsger covered the Harrisburg trial for The Washington Post.

many others had little beyond innuendo to contribute to the prosecution's case.

William D. Stephey, a barrel-chested man with a booming voice and 19 years' experience on the Wilmington, Del., police department, described how he rushed to the third floor of the Customs House there on June 19, 1970, to inspect what "appeared to be a flashlight but might have been an explosive."

Stephey, who heads the Wilmington police department's bomb squad, said he examined the foil-covered object that looked like a flashlight. And it turned out to be, as he put it, a "common flashlight." The jurors had the flashlight with them in the jury room during their deliberations.

It is difficult to understand its value to the jurors, except in case the electricity went out. It was not an explosive device. It bore no fingerprints of defendants. Two persons, neither of them defendants in this case, were arrested in connection with the June, 1970, raid on Selective Service boards in Delaware that the defendants are charged with as part of the conspiracy.

The FBI knew in advance about two of the three raids the defendants are charged with, but for some reason the government made no apparent move to prevent the raids. The presence of guards 24 hours a day probably would have done the trick.

The FBI had learned in advance of both the June 1970 raids in Delaware and the September 1970 raids in Rochester, N.Y., through Boyd Douglas. He informed them of the Delaware raids through letters he smuggled and phone calls from Sister McAlister. He learned about the Rochester raids, he testified, from Ted Glick, who called him from Rochester. Douglas, in fact, got a \$1,500 reward for his arrest of eight persons in the Rochester raid.

Glick has already been convicted for the raid and served time in prison. He is also a defendant in the Harrisburg case and will be tried separately if the government does not drop the charges against the other seven defendants. Glick was severed from the earlier trial because he wanted to represent himself.

Evidence about the Philadelphia draft raid in February, 1970, the only other raid charged as part of the conspiracy, also was frail. A Philadelphia police officer attempted to link Glick to the raid by virtue of the fact that a month before the raid Glick and another person were seen parked two blocks from a building that contained Selective Service records.

Berrigan was linked to the Philadelphia raid by a witness who said he was at a party at a North Philadelphia community center where another witness

said she found a diagram believed to be of Philadelphia Selective Service offices. The witness, who arranged to have the diagram stolen from the house, did not give it to the FBI until 14 months after the raids.

Defendant Mary Cain Scoblick, a former nun from Baltimore who knew several nuns who lived and worked at the Philadelphia house, was linked to the Philadelphia raids, said the prosecution, by testimony that she was seen entering the house a month before the raids.

Chase Testimony

SEVERAL of the FBI agents who testified had nothing to say about the case being tried. One afternoon of the government's 24 days of testimony was consumed largely by several agents who described the round-the-clock surveillance they maintained on Sister McAlister in the summer of 1970.

It was exciting chase testimony. They described following the young nun from Ithaca, N.Y., to New York City, spending the night in a car in front of her convent of the Sisters of the Sacred Heart of Mary, watching her mail letters, then following her at 6 a.m. as she headed toward the Lincoln Tunnel and down the New Jersey Turnpike for her ultimate destination, Haverford, a western suburb of Philadelphia.

It took agents from New York and Philadelphia offices to tell the story. Philadelphia agents had followed her on her return trip to New York. At one point they called New Jersey state police and asked them, said the agent on the stand, to stop her for speeding. But defense lawyers said the policeman who stopped her only asked her to identify herself and her passengers. As first presented, the testimony suggested that these FBI agents were chasing someone who might be a sus-

SP. RETURN



"Men, our next case will be: female, blindfolded, armed and considered dangerous . . ."

pected kidnaper or bomber.

Oh, no, they all explained in cross-examination. They were just looking for the Rev. Daniel Berrigan, brother of Philip Berrigan. For four months in 1970 Daniel Berrigan was a federal fugitive, refusing to turn himself in to begin a federal prison term for the destruction of Selective Service records, the same crime for which his brother is serving a six-year sentence.

In fact, said an agent from the New York FBI office, surveillance of Sister McAlister was suspended Aug. 11, 1970, the day Daniel Berrigan was arrested on Block Island, R.I. There was no surveillance of her again, said the agent, until Jan. 12, 1971, the day she was arrested on charges of conspiring to kidnap and bomb.

Inasmuch as the FBI allegedly believed after seeing letters exchanged in August, 1970 by Philip Berrigan and Sister McAlister that she was a leader of a kidnaping-bomb plot, it seems strange that she was not under surveillance. Douglas, who portrayed Philip Berrigan as the pope of the Catholic

Left, said Sister McAlister was in charge of coordinating both the kidnap and bomb plots.

By the time Delmar Mayfield, the Lewisburg FBI agent who had engaged inmate Douglas as an informer, took the stand, Daniel Berrigan was on parole and in the audience. His mouth was gaping as he heard Mayfield testify that Douglas' services as a letter smuggler were engaged in early June, 1970, in order to get leads on where he, Daniel Berrigan, was hiding. And, indeed, a letter from Sister McAlister in early August, 1970, provided the tip that was wanted by the FBI.

Although the subject of much testimony, Daniel Berrigan was not on trial in Harrisburg despite the best efforts of J. Edgar Hoover. Hoover had announced that both Philip and Daniel Berrigan were leading the plot from their cells at Danbury, Conn., Federal Prison. The grand jury, in its first indictment in the case, named Daniel Berrigan as one of seven unindicted co-conspirators. But in its second indictment he was dropped altogether.

Fear Of Violence

AND THEN there was the one witness, besides Boyd Douglas, who had heard someone use the word "kidnap."

"And there was discussion of whether kidnapping was a proper tactic?" asked William Connelly of Anthony Barone. The question sounded as though it was a buildup to what would be the first evidence about the sensational plot to run off with Kissinger.

But the witness said it was just a brief general discussion, three to five minutes, at an open Washington meeting of the Catholic Peace Fellowship. A plot? No, said the witness in cross-examination, the discussion occurred because a Canadian present was "a bit upset" about the recent kidnaping of British diplomat James Cross by the Quebec Liberation Front in Canada.

Barone and another witness, John Millard, were expected to add strong corroboration to Douglas' testimony about the tunnels plot. Instead, they tended to bear out the defense contention that such an idea had been ruled out because it could not be done non-violently.

Government investigators did not find Barone and Millard, the only persons besides Douglas who gave testimony about the tunnels project or who mentioned kidnaping, until October, 1971, the month the trial originally was scheduled to begin and six months after the final indictment was handed down.

Barone said he was surprised when he arrived at his desk at the Civil Service Commission on the morning of Oct. 19, 1971, to be called to the office of the deputy security chief of the commission. When he got there the office was crowded. In addition to the security chief were two FBI agents, chief prosecutor Lynch and two other prosecuting attorneys, Connelly and J. Philip Krajewski. He said they interviewed him for three hours about the meeting where someone mentioned the word "kidnap" and about another meeting where a defendant, the Rev. Joseph Wenderoth, said he and Philip Berrigan had walked into the tunnels under the Forrestal Building but feared that any plan to shut off the heating system in the tunnels would endanger lives.

"He (Wenderoth) made it clear they would not go forward with anything that involved any danger to a human

life," said Barone, one of the government's hottest witnesses.

The Informer

BOYD DOUGLAS was on the stand for 14 of the 24 days of the government's presentation. And, as Lynch himself said one day in the corridor, "the case is Boyd Douglas."

But 10 members of the jury apparently had a problem believing Douglas. One of them said after the deliberations that Douglas was a "joke."

The witness admitted that he lied numerous times to Philip Berrigan, whom he met in prison at Lewisburg. He also conceded that he had attempted to recruit persons for the peace movement, a movement which he said he held in deep contempt but which seemed a good way to make a buck in 1970, the year of Cambodia and Kent State.

Though an indictment had been handed down Jan. 12, 1971, on the basis of Douglas' testimony, the FBI agent in charge of the informer, Mayfield, testified that he had never had a long talk with Douglas until after the first indictment. So he went to Phoenix and conferred with Douglas, who earlier had asked for \$50,000 for his services in the case, for five weeks.

Defense attorneys claimed that Douglas, even during that Phoenix session, continued to have trouble distinguishing between Wenderoth and another defendant, the Rev. Neil McLaughlin, also a Baltimore priest. The defense also made much of a lapse in his testimony, when Douglas was asked whether Berrigan had ever talked to him about peace and nonviolence.

"No," said Douglas, adding that he recalled a conversation he had with Berrigan after the bombing of the Army research building on the campus of the University of Wisconsin.

"He said, 'What's one life in Wisconsin when they're killing many and many every day in Vietnam?' But Douglas had already messed up that story. Earlier he had testified that the last time he talked with Berrigan was on Sunday, Aug. 23. The bombing in Wisconsin occurred Aug. 24 and Berrigan was transferred from the prison Aug. 25.

Unanswered Questions

LYNCH CLAIMED the evidence was adequate, that the letters, together with Douglas' testimony, showed a conspiracy. He said it all added up to "the inevitable evolution to violence of people who take the law into their own hands."

The defense maintained the case was

the work of a con man who was unable to move the defendants to agreement, let alone action. Referring to numerous persons whom Douglas tried to get involved in the plot but who didn't reply to Douglas' overtures, defense attorney Terry Lenzner said in his summation, "Everyone who came into contact with him was in jeopardy. Every one who came to Lewisburg to see him was subject to prosecution."

For those who take the Berrigan philosophy and example of nonviolent resistance seriously, there may remain serious moral questions—even for those who hold, along with 10 members of the jury, that there was no conspiracy.

Did some of the defendants, these persons might ask, think that kidnaping or turning off the heat in federal buildings could be done nonviolently? Or that such acts would be good protests?

Some of the defendants say that in the heat of the violence in Indochina in 1970 they talked about whether such things would be possible. But the question was barely asked, they say, when it was rejected because of a fear that such things could not be done nonviolently and because the political impact of such acts would be disastrous.

The government's evidence would seem to bear out the contention of some defendants that they ruled out the feasibility of such projects very quickly. Virtually no government evidence showed that a plan developed in the fall of 1970 after Philip Berrigan left Lewisburg, despite the fact that the idea of a kidnap had been introduced in letters exchanged just prior to his transfer. And despite the fact that Douglas made many telephone calls and wrote many letters trying to find out what was happening to the conspiracy in the fall and winter of 1970.

Other questions remain unanswered: Why was this case prosecuted? Why was the Justice Department willing to endure the inevitable embarrassment of such flimsy evidence?