

The Case of the Disappearing Conspiracy

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the Harrisburg trial for the
Washington Post

JUST MINUTES before the federal jury announced its decision, the Rev. Philip Berrigan and his six co-defendants were quietly emptying their purses and

their purses and wallets, handing money and personal papers to a clerk to take to one of their lawyers' offices.

"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 stood in the fatiguing 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 F. Lynch, a man known for his prosecuting skill against organized crime, tried to minimize the government's embarrassing loss. "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 ex-Catholic, former or present priests and must-conspired to kidnap presidential adviser Henry A. Kissinger, to build 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

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 acquit 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 one with a liberal

one in the lot: the 11-county Middle District of Pennsylvania, a slice of Nixon country whose white Protestant farmers and working people share generally conservative views. Harrisburg, the most urban part of the Middle District, now has its first Democratic mayor in 10 years.

Another significant aid to the prosecution was the way it had redesigned the indictment. In the first indictment the jury would have had to assess the defendants' guilt or innocence on separate conspiracies. But after Lynch took the case a year ago, the state grand jury that first indicted the defendants reindicted them, added two more persons to the original six, and added draft board raids to the conspiracy. All elements of the conspiracy were placed within one net instead of each standing as a separate count.

Prospective jurors after prospective jurors—more than 400 were called before the final 12 plus six alternates were seated—expressed either total support for the Vietnam war or little interest in it.

Two of the 12 jurors chosen, however, appeared to have qualities that would make them sympathetic to the defendants. Lawrence A. Evans said during jury selection that he thought "our best clergy" should be involved in social action, such as protesting the war. And Kathryn Schwartz said she was the mother of four conscientious objectors, men who had taken that stance because of religious convictions about war.

Yet, in the end, it was Evans and Mrs. Schwartz who wanted conviction on all counts. Everyone else wanted acquittal on the major count, the conspiracy count. The nine women and three men ended their deliberations hung not only on the conspiracy count but also on two counts that charged Father Berrigan and Sister Elizabeth McAllister had exchanged "threatening" letters.

In addition to its other assets the government had a friend on the bench. Judge Herman, a 1968 Nixon appointee. At the end of the trial, after giving the jurors so complicated a charge on conspiracy law that they asked to have it reread four times, the judge summarized some of the government's evidence against each defendant, misstating some of the information.

Scuttling the Witness

BUT THE presentation of evidence didn't go well for the government. Despite two years of preparation at a cost of more than \$1 million, some of the chief prosecution witnesses turned out to be more helpful to the defense than to the government.

At times the government attorneys were visibly angry with their own witnesses. Prosecutor William Connelly concluded one direct examination saying to the witness, "Well, maybe you'll have something to say to them."

In his summation, Connelly attacked the credibility of one of his own witnesses, Joseph Joynt. The government's key witness, check forger and ex-convict Royd F. Douglas Jr., said Joynt was the man Berrigan wanted another defendant to ask for diagrams of the tunnel network the group allegedly planned to blow up in Washington.

Joynt, who regaled the grand jury a year ago with his praise of the FBI, testified that no one ever asked him for diagrams of the tunnels. None of the defendants, he said, had ever asked him about his job. Yes, he had seen Berrigan one time at his mother's house, but he was just passing through and there were a lot of people present, said Joynt in his slight Southern accent, and "it was just hello, how are you doin'. Then I'd bug out."

But Connelly, in summing up Joynt's testimony, sarcastically told the jury to remember that Joynt just happened to work at the Forrestal Building as an elevator repairman, and just happened to have access to the tunnels under that building, and just happened to have once met Philip Berrigan.

Of the 64 government witnesses, many others did 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 as the jury began during their deliberations.

It is difficult to understand its value to the jurors, except for the electric light which was used as an illustrative device. It bore no fingerprints of defendants. Two persons, neither of them defendant in this case, were arrested in connection with the June 1970 raid on Selective Service Boards in Delaware and the defendants are charged with it as part of the conspiracy.

The FBI knew nothing about the conduct of the three raids. The defendants are charged with it. For some reason the government made no attempt to prevent the raids. The presence of guards 24 hours a day in Philadelphia 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 Ray Douglas. He informed them of the Delaware raids through letters he smuggled and phone calls from Sister McAlistier. He learned about the Rochester raids, he testified, from Ted Glick, who called him from Rochester. Douglas, in fact, got a \$1,000 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 an other person were seen parked at blocks from a building that contained Selective Service records.

Berrigan was linked to the Philadelphia raid by a witness who said she was in 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 Seeblick, 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 McAlistier 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,

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 suspected 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 McAlistier 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 McAlistier 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 McAlistier 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 page 10. And in the audience, his mouth was open as he heard Mayfield testify that Douglas' services as a letter carrier were engaged in early June. In order to get leads on where he, Daniel Berrigan, was hiding. And in the letter from Sister McAulister in August, 1970, provided the information was wanted by the FBI.

The evidence... in Harrisburg... announced that both Philip and Daniel Berrigan were being held in their cells at Lewisburg... The grand jury... indicted Daniel Berrigan as one of seven unindicted conspirators... It was dropped altogether.

Fear Of Violence

AL THOUGH one of the one witnesses, besides Berrigan, who had heard someone say the word kidnap...

"And there was a discussion of whether kidnaping was a proper tactic," asked... Anthony Barone... sounded... about the... kidnappings.

But the witness... minutes, at an open... meeting of the... a plot? No, said... in cross-examination, the discussion occurred because a Canadian... was a bit upset about the recent... of British diplomat... by the Quebec Liberation... made.

Barone and another... John Millard... admitted... collaboration to Douglas' testimony about the tunnels... 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... 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 se-

curity 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 Forrestral 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-

being one of the government's witnesses.

The Informer

DOUGLAS was on the stand for... of the government's presentation... Lynch... Douglas was... "The kidnaping... apparently had a problem... Douglas... one of them said... Douglas was... "

The witness admitted... he admitted... Douglas... whom he... prison... he also... "I tried to recruit... peace movement... which seemed... 1970... and Kent's... "

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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. Everyone 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 pro-

Some of the defendants say that in the heat of the violence in Indochina... 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?

