

Silent in Berrigan Case, Nun Is Upheld on Appeal

By DONALD JANSON
Special to The New York Times

MAY 29 1971

PHILADELPHIA, May 28— The Government suffered another setback today in its conspiracy case against the Rev. Philip F. Berrigan and others.

The United States Court of Appeals for the Third Circuit ruled here in a 5-to-2 decision that Sister Jogues Egan, named as a co-conspirator but not a defendant, may not be required to testify before the investigating grand jury in Harrisburg, Pa., to question based on information obtained through illegal wiretapping.

The ruling will affect several other persons who have been subpoenaed as witnesses but have refused to testify.

Father Berrigan and seven others are charged with conspiring to kidnap Henry A. Kissinger, President Nixon's national security adviser, and to commit other antiwar acts. Sister Jogues was one of the first witnesses subpoenaed to testify in the continuing investigation.

She was jailed in January for contempt of court by Federal District Judge R. Dixon Herman for refusing to answer grand jury questions after being granted immunity from prosecution. The 52-year-old nun, a member of the Order of the Sacred Heart of Mary in New York, appealed, and a three-judge panel ruled against her.

Continued on Page 7, Column 3

THE NEW YORK TIMES, SATURDAY, MAY 29, 1971

COURT BACKS NUN IN BERRIGAN CASE

Continued From Page 1, Col. 3

She was given a rehearing last month by the entire court on the wiretap issue and today's ruling followed.

Because of its importance to the Berrigan case and numerous other Government cases, William T. Coleman Jr., an attorney for the nun, said he expected the Government to appeal to the Supreme Court.

Sister Jogues had refused to testify on the ground that the questions put to her in Harrisburg stemmed from information obtained from illegal wiretapping and violated her constitutional right to privacy.

Judge Arlin M. Adams noted, in a 36-page majority opinion, that the Government had never suggested that it did not tap her telephone, or that any electronic surveillance used had been authorized by court order.

The appeals court vacated the contempt judgment and remanded her case to the district court for a hearing to determine whether the questions asked of the nun resulted from illegal wiretapping.

Judge Adams noted that the Omnibus Crime Control Act of 1968 barred questioning anyone before a grand jury if the interrogation was based on electronic surveillance conducted without a warrant.

Contention Is Rejected

The court rejected the Government's plea that to permit witnesses to require a hearing to determine whether this happened would slow the grand jury investigation.

The possibility of impeding the investigation, the court said, is an insufficient reason for curtailing the Fourth Amendment right to protection against illegal invasion of privacy.

The Justice Department stressed that Sister Jogues had received immunity from prosecution, but the court said the Government could not use that to excuse invasion of privacy.

"It is an inadequate response," the opinion said, "for the Government to say, in effect, 'We may have invaded your privacy but we will not prosecute you as a result of our misconduct, and thus you have no standing to complain of the invasion of your privacy.'"

The court said immunity protects against self-incrimination, but that in addition a witness "still has the right that his

person and home not be improperly searched and if it is . . . the fruits of such search may not be used."

It noted that Sister Jogues was not complaining of violations of the Fifth Amendment, but of the Fourth.

Even though she has been offered immunity, it said, "she continues to have a substantial interest in preventing the Government from compounding its original violation of her privacy by forcing her to answer questions that would concededly not be asked absent the information discovered through the use of unwarranted wiretaps."

"If the Government becomes a lawbreaker," the ruling said, "it breeds contempt for law. To declare that the Government may commit crimes in order to secure the conviction of a criminal may well bring unfortunate retribution."