

212 § 3). Either way, while charity should always suffuse the faithful's attitude toward their prelates, it is not a prerequisite to agreeing or disagreeing with the Kennedy funeral decision.

### Conclusion

More than a year after Senator Kennedy's funeral rights were debated and rites were conducted, the memory of that mess is beginning to fade. From these events, though, I think that two lessons bear preserving: (1) The standards for receiving a Catholic funeral are not nonexistent, but they are very, very low. Whether that is a good thing or a bad thing, I do not know, but I do know that is how the law reads. (2) When Catholic funerals are granted to persons, especially to famous

persons who, along with their entourages, are used to having their own way, prelates who grant said permissions should know that the funeral rites themselves are liable to be manipulated, and perhaps blatantly, by the deceased's followers. Special care should be taken, therefore, to minimize the risk of liturgical abuse and to guard against the public dissemination of potential debacles. ☩

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### ENDNOTE

- 1 See Edward Peters, "Lest amateurs argue canon law: a reply to Patrick Gordon's brief against Bishop Thomas Daily," *Angelicum* 83 (2006): 121-142, available on-line at [http://www.canonlaw.info/a\\_gordon.htm](http://www.canonlaw.info/a_gordon.htm).

# Confidential Consultations in the Selection of Bishops: Remarks on Law and Practice

By Edward Peters, JD, JCD

The proper evaluation of priestly candidates for the episcopacy is important for the well-being of the Catholic Church. Although history has seen a variety of procedures used for selecting bishops (including election by presbyterates and nomination by civil officials subject to ecclesiastical confirmation), today most bishops in the Roman Church are freely appointed by the Supreme Pontiff (Canons 377 §1 and 378 §2). Part of that papal appointment process involves making confidential inquiries among selected members of the Christian faithful about specific candidates for episcopal office.

Inquires concerning potential bishops are conducted under what is known as *pontifical* or *papal secrecy*. Second only to the seal of confession, pontifical secrecy is the highest level of confidentiality encountered in the Catholic Church. The exact scope of this confidentiality, however, and the implications of assuming its obli-

gations, are perhaps not widely known outside professional ecclesiastical circles. Most clergy, religious, and lay persons, upon learning that their special assistance in an ecclesiastical matter is being requested, but that such cooperation will be subject to the strictures of pontifical secrecy, do not know where to turn for an explanation of that juridic institute. It is to address their questions that this essay is offered. We begin with a brief overview of the modern episcopal selection process.

Any member of the Christian faithful could, in virtue of the basic right to make known one's opinions on matters impacting the good of the Church (Canon 212 §3), offer suggestions concerning possible bishops, and individual bishops have the right to propose names directly to the Apostolic See regarding priests whom they consider worthy to become bishops (Canon 377 §2). In practice, however, most candidates for the episcopacy in the Roman Church are first identified by the assembled bishops of a given province (Canon 377 §2). Those names are eventually

forwarded to Rome where, generally, the Congregation for Bishops studies the needs of a given archdiocese and the pool of current or potential bishops available to serve those needs, in anticipation of making suggestions for a final selection by the pope.<sup>1</sup>

But, however the names of potential bishops are first brought to the attention of the Holy See, and whatever the factors to be weighed by Roman officials in recommending specific candidates, the main process for making inquiries concerning possible bishops and for compiling a dossier of their strengths and weaknesses is carried out by the papal legate for the territory in question (Canons 364, 4° and 377 §3). For the United States, that inquiry is conducted by the Apostolic Nuncio in Washington, D.C., now Archbishop Pietro Sambi. The nuncio's personal opinion (*votum*) regarding episcopal candidates carries considerable weight in the selection process, and it is as part of his investigation that members of the faithful are most likely to be asked to provide, in strictest confidence, information and opinions regarding a given candidate for episcopal orders (Canon 377 §3).

Common sense suggests the wisdom of carrying out inquiries regarding potential bishops discreetly, and current canon law commands that investigations regarding potential bishops be carried out secretly (Canon 377 §3, and 1972 Norms, art. 14). But in an age when anything smacking of secrecy in the Church tends to be viewed with suspicion, some explanation of this requirement might be helpful.

Part of the emphasis on secrecy simply arises, I suggest, from the wider legal culture in which the Holy See works, namely, the civil law tradition, wherein the process used to determine legally significant facts differs from that usually followed in common law nations such as the United States. In contrast to the common law, which glories in concentrated trials before juries as the "finder of facts," the civil law tradition uses extended administrative-judicial inquiries to discover and confirm vital information. The protracted investigations of the civil law, however, would be liable to contamination if the persons interviewed during these deliberate investigations were *not* placed under some obligation of confidentiality in regard to their testimony. What might strike some Americans, then, as an excessive emphasis on secrecy (a concept probably better understood as "confidentiality"), is actually a proven way to protect the integrity of fact-finding processes carried out by officials steeped in the civil law tradition. But, I suggest, more than just the civil law tradition supports the application

of canonical norms on papal secrecy to investigations of potential bishops.

The American canonist Monsignor John Renken, commenting on the episcopal selection process, explains the confidentiality requirements set out in Canon 377 thus: "Secrecy has many values: it permits a candid expression of opinions about the candidate, it respects his good name and reputation, it avoids the hurt which can come when expectations of appointment are not fulfilled, it bypasses publicity and lobbying for or against candidates, etc."<sup>2</sup> To be sure, arguments for a more "open" process to identify and assess potential bishops exist and historical examples of such approaches can be found. But the susceptibility of individual Churches to local pressures are a persistent concern, while the independence of the Holy See from most local pressure is a strong argument in favor of maintaining a Roman-centered, confidential inquiry process in regard to future bishops, especially where the inquiry process, as here, takes into careful consideration the views of qualified local observers.

Of course, when a member of the faithful is first requested to assist with what will turn out to be the process for assessing a potential candidate for episcopal office, these finer points of legal theory or Church history are not likely to be known, and the unlooked-for arrival of materials under "pontifical secrecy" can, at first sight, be rather startling. It is to that moment we now turn.

Typically, a business-sized first class letter addressed to a specific individual will arrive marked "Personal" and/or "Confidential." A return address (3339 Massachusetts Ave., N.W., Washington, D.C. 20008-3610) will be visible, but a sender's name or office will probably not be apparent. Thus, unless one happens to recognize the address of the pontifical legation, one will not immediately know who sent the letter. Now the fact of having *received* such a letter is not a secret, pontifical or otherwise, and if one's practice is to have, say, an assistant opening one's mail, one need not worry about varying that practice on the off chance that the apostolic nuncio might someday send one a letter under pontifical secrecy!

Upon opening the outer mailing envelope, however, one will find inside a second, slightly smaller, sealed envelope. The subject matter of the inner envelope will not be identified, but it will be immediately obvious that access to the contents of the inner envelope is strictly conditioned. The inner envelope will again identify the intended recipient, but a bold-print designation such as "Strictly Personal and Confidential" will appear near the intended recipient's name. Only the named

recipient of such a letter should open it.

More specifically, a block of text on the face of the inner envelope will declare that the contents of the second envelope have been delivered under “Pontifical Secret.” The text will plainly state that it is “absolutely forbidden” to discuss the contents (of the inner envelope) with “any one at any time,” and that a violation of this confidentiality is “a grave matter and an ecclesiastical crime with a severe penalty that can be removed only by the Holy See.” The inner envelope is designed to, and undoubtedly will, arrest the attention of a faithful Catholic, and it is then that questions about pontifical secrecy are likely to surface.

Now, although prudence might militate against disclosing *that* one has received a letter under pontifical secrecy, it is not, strictly speaking, canonically illegal to communicate this fact. Prior to opening the inner envelope, one is free, say, to seek advice from a canonist as to the scope of pontifical secrecy or to bring to a spiritual director concerns about expressing one’s opinions on what promises to be a weighty ecclesiastical matter. But, precisely because one is not yet bound by the confidentiality obligations of pontifical secrecy, there is no need to frame such questions hypothetically, and probably little point in doing so, since the very uncommonness of such questions will suggest that they are of practical, not merely speculative, concern. In short, one may prudently disclose the fact of having received a communication under pontifical secret, and may ask questions about that juridic institute, without fear of having violated pontifical secrecy itself. But, beyond any doubt, opening the inner envelope triggers the obligations of pontifical secrecy.

(Note: the recipient of a letter marked by pontifical secrecy may decline to open it, in which case it should be returned to the pontifical legate as discussed below. But, lest scrupulosity or humility deter a recipient from responding to such communications, he or she should recall that the very receipt of such a letter strongly suggests that one’s opinion on an important matter is valued and is being sought for the good of the Church. Catholics have, I suggest, a religious obligation to assist the Church when she directly asks for such aid.)

The current canon law on pontifical secrecy is found in the instruction *Secreta continere* issued by the papal Secretariat of State (4 February 1974) and promulgated in *Acta Apostolicae Sedis* 66 (1974): 89-92.<sup>3</sup> The introductory paragraphs of the instruction provide a sound Scriptural and Traditional *précis* on the legitimate place of secrecy in the Church and underscore the impor-

tance of strict confidentiality for, among other things, encouraging trustworthy service to the People of God. While most of the instruction *Secreta* deals with matters conducted by or within the Roman Curia and embassies of the Holy See, a few points therein pertain directly to the investigation of candidates for the episcopal office.

Article I, n. 7, of the instruction *Secreta* notes that pontifical secrecy covers investigations relative to the nomination of bishops. Even though this provision more directly applies to the dicasterial officials investigating potential bishops, it nevertheless reinforces the idea that the assessment of potential bishops is a serious matter in the life of the Church and that it is to be conducted in strict confidence. Moreover, Article I, n. 10 of the instruction authorizes pontifical legates, such as apostolic nuncios, to place matters under the protection of pontifical secrecy, and the communications we are discussing here are from pontifical legates.

Regarding those bound by pontifical secrecy, Article II, n. 3 makes the perhaps obvious point that “all those on whom the observance of papal secrecy is imposed in special cases” are obliged to honor that obligation. It is self-evident that the named recipients of letters tendered under pontifical secrecy are, upon their opening of such letters, bound to observe said secrecy. As for who else might be bound to pontifical secrecy in regard to these letters, see below.

Article III, n. 1 of the instruction *Secreta* explicates what is only briefly, but clearly, stated on the face of the inner envelope, namely, that one under the obligation of pontifical secrecy is *always* under an obligation to keep it. Of its nature, this obligation of strict confidentiality does not vary depending on circumstances, nor does it fade over time. Nothing, not even the death of the cleric in question, frees an individual to disclose to others that he or she had been consulted on the possibility of elevating a given priest to the episcopacy or assigning him to a specific office.

The only way one can be released from the obligation to maintain pontifical secrecy regarding one’s consultation in the assessment of a potential bishop is to seek release from the pope himself or from the Secretariat of State. The circumstances that might prompt such a request are difficult to imagine; those that would justify a release are almost inconceivable. Traditional moral theology regarding the technical scope of official and entrusted secrets would provide some insights into the kinds of factors that could point toward freeing one from the obligation of secrecy, but such analysis would need to be undertaken by well-qualified and objective

persons, and not by the individual in question.

The penalties for violating papal confidentiality intimated on the face of the inner envelope are not specified there or in the instruction *Secreta*, undoubtedly because a “one size fits all” approach to sanctions for violating papal confidentiality would be inappropriate given the range of matters that could be protected by pontifical secrecy and the circumstances under which violations might occur. Instead, Article II, n. 2 simply states that “penalties in keeping with the gravity of the delict or of the harm done” can be visited upon those breaching papal secrecy. Sanctions may include expiatory penalties such as loss of ecclesiastical office and/or censures such as excommunication.<sup>4</sup>

Upon opening the inner envelope, the nature of the inquiry will be explained, the name of the episcopal candidate disclosed, and a schedule of questions likely provided to guide one’s reporting. These materials are self-explanatory, but I would add that canon law itself offers some insights regarding the characteristics that the Church values in bishops:

Canon 378. §1. In regard to the suitability of a candidate for the episcopacy, it is required that he be: 1° outstanding in solid faith, good morals, piety, zeal for souls, wisdom, prudence, and human virtues, and endowed with other qualities which make him suitable to fulfill the office in question; 2° of good reputation; 3° at least thirty-five years old; 4° ordained to the presbyterate for at least five years; 5° in possession of a doctorate or at least a licentiate in sacred scripture, theology, or canon law from an institute of higher studies approved by the Apostolic See, or at least truly expert in the same disciplines.

Between the above canon and any questionnaire or specific questions provided by the nuncio, one will have a good sense of the kinds of information and opinions that are most helpful to those Church authorities charged with evaluating potential bishops. It bears underscoring, however, that this inquiry phase of the selection process, while very important, remains *informational* in nature, and not decision-making (Canon 378 § 2). In other words, one’s praise or endorsement of a priest does not mean that he will be elevated to the episcopate or assigned to a specific office, any more than one’s criticism of a candidate means that he will be rejected. Instead, one is simply being asked to provide, as objectively as possible, the kind of insights about a candidate that the papal nuncio, the Congregation for Bishops, and eventually the Roman Pontiff will need to make an informed decision.

One will be asked to provide responses within a brief but reasonable period of time and to return also the explanatory letter (containing the name of the potential bishop) and the questionnaire used (if one was provided). Keeping paper or electronic copies of any of the above is prohibited and places one in the proximate occasion of violating pontifical secrecy.

To send their reply, respondents should use a dependable means of transport such as a private commercial carrier or public postal services requiring signature for receipt. An individual who elected *not* to open a letter received under pontifical secrecy should also, as a matter of prudence, return the unopened inner envelope to the nuncio (at the address given on the outer envelope) via a secure method. I recommend against simply destroying the unopened envelope, if only because this leaves the recipient without evidence that he or she did not incur the obligation of pontifical secrecy.

If, by accident or design, a third party learns of the contents of a pontifically protected inquiry (especially the name of the episcopal candidate) and/or if he or she learns the opinions of the one consulted, such a person is, according to Article II, n. 4 of the instruction *Secreta*, subject to the same strict obligation of confidentiality. For this reason, recipients of confidential inquiries should take care not to leave these materials where they can be noticed by third parties, and they should not entrust the preparation of their replies to others.

Besides a signature verifying the receipt of one’s replies at the apostolic legation, one should not expect any further acknowledgement of one’s responses. Instead, simply be assured that “your Father who sees in secret will reward you” (Mt 6:18).

The investigation and appointment of future bishops in the Church is one of the heaviest burdens that falls on the Roman Pontiff, and to perform that task well, he needs input from qualified observers. Individuals invited to participate in the episcopal inquiry process should recognize that, by accepting the obligations of papal secrecy and by replying forthrightly to the legate’s questions, they will enable the Roman Pontiff to benefit by the perspectives of those who are in a good position to know the candidate(s) in question.

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