

## ABSTRACT

This dissertation seeks to answer the question, “How does the understanding and use of professional confidentiality — particularly its subset, privileged communications — affect the ministerial functionality of U.S. military chaplains?”

Within the U. S. military, communications made to doctors, lawyers, social workers, and psychotherapists are either unprotected or protected to severely limited degrees. Communications made to chaplains and their assistants, however, are protected absolutely, and thus military law affords penitents far greater protection than that offered by current state or other federal statutes. Because of this singular protection, the influence of uniformed religious professionals upon individual lives, and upon the readiness and mission of the unit to which they and penitents are assigned, cannot be overstated. Yet, while the moral value of clergy-penitent confidentiality is a given among chaplains and their assistants, its historical, ethical, and legal dimensions are ill-understood by them, by penitents, military lawyers, and commanding officers. In this lack of understanding lies potential trouble that might reduce confidentiality from a pastoral tool that provides critical support to a unit’s mission to a noble, but empty, ideal.

This study provides an analysis of the protections provided to confidential and privileged communications made to military chaplains and assistants in the course of their ministry. The analysis is done with a goal to (a) defining the nature — legal, ethical, and theological — of the constructs placed by a variety of professions upon the protection of these communications and (b) assigning to confidentiality and privileged communications an appropriate weight as critical ministry tools within the military.

Examination of this topic requires an understanding of the historical roots of the clergy-

penitent privilege as it developed, first, within Western European religious traditions and, second, its translation into the legal arena. Hand-in-hand with historical-theological concerns, which primarily address the spiritual potential inherent in pastoral silence, are psychologically-rooted ideas about the benefits and dangers in the areas of privacy, human development, and identity. This study will address a multitude of ethical questions regarding the use and abuse, cause and effect, understanding and ignorance of the clergy-penitent privilege within the U.S. military

Finally, this study addresses the ways in which the concepts of confidentiality and privileged communications affect both military function and ethical concerns for the human and common good within the military environment. This examination of confidentiality and privileged communications will enable individuals working in the disciplines of religion, ethics, and law to reflect on the significance of this tool in an increasingly legalized culture and society.

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SALVE REGINA UNIVERSITY

A DEAL WITH THE DEVIL?

THE CLERGY-PENITENT PRIVILEGE IN THE U.S. MILITARY

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PREVIEW

To my fellow chaplains, Religious Program Specialists, chaplains assistants,  
colleagues from all the military services,  
family, and friends  
who inspired this work and  
supported me as I toiled.

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## CHAPTER ONE:

### INTRODUCTION

This dissertation seeks to answer the question, “How does the understanding and use of professional confidentiality — particularly its subset, privileged communications — affect the ministerial functionality of U.S. military chaplains?” A critical examination of the issues surrounding this question will elucidate the realities, the myths, and the potential of this tool, which in this dissertation will be considered a technology in the sense of that word espoused by John K. Galbraith. Galbraith defined technology as “the systematic application of . . . organized knowledge to practical tasks” (Galbraith, 12). The organized knowledge in this case is that found in the U.S. legal code, with a particular focus on the Uniform Code of Military Justice (UCMJ), the code of law applicable to the U.S. military and its members. The practical tasks to which this organized knowledge is applied include the Constitutionally mandated protection of the right of religious freedom, as this applies to military members, and the duties of military chaplains, who are legally and ethically bound to protect this right, including the preservation of confidential communications whose content might be sought within a command or within a military courtroom.

This examination of confidentiality and privileged communications will enable scholars working in the disciplines of religion, ethics, and law to reflect on the meaning and significance of this tool as it has impact on their endeavors and perspectives in an increasingly legalized culture and society.

Each person must come to grips with the question of what it means to be human in an age of technology, particularly in the current times in which technologies pervade

all aspects of life. One means of exploring this question may be found in an examination of how subtly, yet powerfully, technologies influence private, personal spheres of existence. In so doing, insight may be gained into factors that influence even the most intimate relationships. One of these is the relationship between military chaplain and penitent, in which information is shared by the penitent with the chaplain with the intent of never having this information disclosed to another. This information may be of such spiritual, psychological, or legal import to the penitent that inadvertent or coerced exposure might have a deleterious effect upon that person's whole being.

To date, little in-depth scholarly attention has been given to the subject of confidentiality and privileged communications as these pertain to military chaplains. While a handful of chaplains and lawyers have explored the impact of these communications upon legal proceedings, or upon chaplains and penitents, the focus has almost invariably been a particularized spotlight, usually focused on issues of abuse. No comprehensive study exists on the nature of confidentiality and privileged communications as technological tools — ethical and legal constructs afforded to military chaplains — that are critical to successful ministry in the military, nor the effect these tools may have, for good or ill, upon the ministry conducted by chaplains and their assistants. This study will fill a knowledge gap in the area of military ministry, with the conviction that ignorance of the realities of these tools — their use, abuse, and preservation — comprises one of the common and destructive problems within the military's chaplain corps.

### *Purpose*

Within the military, communications made to doctors, lawyers, social workers, and psychotherapists are either unprotected or protected to severely limited degrees. Without exception, for example, these professionals are required to report to the proper authorities any communications made to them in which a person verbalizes threats of future harm to another person or to government property. Only communications made to chaplains are protected absolutely (Cooper, 128), and in this military law affords penitents far greater protection than that currently offered in many current state or other federal statute (*Ibid*). While many state statutes, for example, closely define what comprises a privileged communication made to a clergy person (for example, is the communication an element of a formal act of religion? is it penitential?), military law extends the privilege to all communications made to chaplains and their assistants in their official capacity when the desire for confidentiality is intended by the penitent (*Isham*, 606). Because of the singular protection provided to communications made to chaplains and assistants, the influence of these uniformed religious professionals upon individual lives, and upon the readiness and mission of the unit to which they and the penitent are assigned, cannot be overstated. Too often, however, the lack of understanding of the privilege and the protection it provides — a lack of understanding sometimes shared by chaplains, assistants, penitents, military lawyers, and commanding officers — constitutes potential disasters of ethics, theology, law, and reputation.

This study provides an analysis of the protections provided to confidential and privileged communications made to military chaplains and assistants in the course of their ministry. The analysis is done with a goal to (a) defining the nature — legal,

ethical, and theological — of the constructs placed by a variety of professions upon the protection of these communications and (b) assigning to confidentiality and privileged communications appropriate weight as critical ministry tools within the military. In sum, the author hopes both to clarify and to provide guidance to chaplains, assistants, and military leaders concerning the nature and ethical use of pastoral confidentiality and privileged communications.

### *Background*

The military exists as a sociological total institution, a term coined by the sociologist Erving Goffman in his 1961 work, *Asylums* (discussed at length in Chapter 4). Within such an institution, leaders demand a continual flow of personal and professional information regarding members to function smoothly and maintain good order and discipline within their ranks. At the same time, the military allows critical information about these same members to be withheld from all other members by chaplains and assistants, whose pastoral actions within their protected silence paradoxically increase the functionality of the institution and, ultimately, assist in the accomplishment of the military missions.

The intrusions of the total institution begin as soon as a man or woman begins to fill out the paperwork necessary to enlist in one of the military services, and the intrusions do not cease throughout that person's military career. Recent military initiatives provide examples of these efforts to circumscribe or erode the privacy of those serving in the military, with no recourse offered to dissenting personnel other than discharge or prosecution under military law. In 1996, for example, all military members

were ordered to provide DNA samples for inclusion in their medical records (Ham, 1), and official statements from the Department of Defense (DOD) leadership declared that use of these samples would be restricted to identification of remains. In 2002, however, the DOD announced that these involuntarily collected DNA samples would, in fact, be shared with civilian police authorities as part of investigations into alleged criminal cases involving military personnel (*Ibid*). Initiatives such as this illustrate the panoptical qualities of the military services, institutions whose successful mission completion relies heavily (or so it is believed by institution leaders) on ever-increasing amounts of information about its members, their actions, and their words. It is in this institutional setting that a small island of privacy exists in the form and ministries of chaplains and their assistants.

By reason of deployments and high operational tempo, remote assignments around the world, and long duty hours, members of the military often lack access to civilian pastors, priests, rabbis, imams, and other religious leaders of their own faith tradition. The military chaplain must perforce serve as pastor and religious facilitator for all these military members and, oftentimes, their family members as well. Regardless of his or her faith group the chaplain works to meet the needs, or at the very least to provide a means of meeting the needs, of the many religious traditions represented within service ranks. In this unique role the chaplain becomes the focus of the expectations, often hazy and little understood, of military members regarding clergy confidentiality. These expectations become entangled with the chaplain's own expectations and beliefs, not only regarding matters religious or spiritual — for the chaplain serves, at least in part, as a representative of his or her religious faith group — but also those of the chaplain's non-

religious role as staff officer, an agent of the command. That misunderstandings and problems arise is, perhaps, inevitable.

The dual roles occupied by the chaplain require clarification. The chaplain is wholly clergy, owing allegiance to a faith group and its rules and standards. The chaplain is also wholly officer, owing allegiance to a secular institution that pays the chaplain's salary, prescribes the uniform worn each day, dictates the regulations that govern many aspects of life, and assigns the duties a chaplain may and may not perform (Hutcheson, 19). The two roles have very different responsibilities and goals, all of which must be satisfied. The potential for conflict is ever present, and the conflict often involves confidential information that the chaplain possesses about the lives of service members. The degree to which the benefits and complexities of confidentiality and privileged communications are understood by chaplains, assistants, individual penitents, commanders, and other military personnel directly affects the chaplain's ability to provide effective ministry that enhances the lives of service members and also contributes to unit readiness and mission success.

### *Method*

This study is qualitative in nature. By its nature the examination and interpretation of issues of secrecy, privacy, and confidentiality requires a grasp of human phenomena that defies quantification. Close examination will be made of the available literature to include law, ethics, and theology. In addition, this study will assume an inductive approach, including specific observations based on the experiences of the author, colleagues, and other individual cases to give a rich, in-depth understanding of the

ways in which confidentiality and privileged communications affect the human spirit of those who serve in the U.S. military.

In addition, the scope of this study embraces a holistic approach, one that embraces a variety of academic disciplines. A serious examination of this topic requires an understanding of the historical roots of the clergy-penitent privilege as it developed within, first, religious traditions, most notably that of the Roman Catholic Church. The theological concerns that impelled the early church fathers to debate and contemplate the potentialities of clerical silence, and its effect on believers, constitute an important element of this dissertation. Secondly, the translation of this silence from church rule to legal privilege constitutes a fascinating development in church-state matters as practically applied. Third, and hand-in-hand with the theological concerns, which primarily address the spiritual possibilities inherent in such silence, are those psychologically-rooted ideas about the benefits and dangers of privacy and human development and identity. Finally, this study will address a multitude of ethical questions regarding the use and abuse, cause and effect, understanding and ignorance of the clergy-penitent privilege within the U.S. military and its unique legal code. Of particular concern will be the increasing intersection of this soft technology with the hard technologies upon which the military institution relies for communications around the world. This is an area that has been little studied, but one that demands scholarly attention as the scope of communications technologies challenge the traditional one-on-one relationships between military chaplains and service members.

Finally, this study will build an argument that addresses the ways in which the concept of confidentiality and privileged communications affect both military function



and ethical concerns for the individual and common good within the military environment. Again, this is an arena that remains little discussed in professional literature. In today's violent world, in which constant and abrading psychological demands are made upon military men and women, it is the author's contention that this specialized technology, this private and potentially healing communication between chaplain and military member, constitutes a significant element that contributes to the military institution's ability to function effectively as well as the formation and maintenance of spiritually fit, emotionally healthy soldiers, sailors, Marines, airmen, or coastguardsmen.

Exposition of this study requires a thorough examination of what literature exists regarding clergy confidentiality and privileged communications. Following this introduction, Chapter Two contains a review of the literature pertinent to the topics of confidentiality and privileged communications, the theological and legal sources for these communications, the institution of the military chaplain, and the interaction of the military chaplain's ministry and confidential communications. Plentiful, but by no means abundant, literature exists that focuses on clergy-penitent privileged communications within the civilian legal system, and by far the richest source of information on the clergy-penitent privilege exists within law journals. Here the privilege and its status are the subjects of occasional lawyerly speculation and debate. Most often this attention comes as the result of a scandal, a legal decision, or a cultural shift that portends changes to the privilege as it exists within individual state statutes and federal codes. In 1990, for example, the Supreme Court decided the contentious case of *Employment Division v. Smith*, denying two Native Americans protection against state prosecution pursued as a

result of what the two claimed was religiously-mandated use of peyote in a religious celebration. Following the *Smith* decision, legal scholars began to speculate about the impact this refusal of religious accommodation might have in many areas of the law. Similarly, the scandals regarding clergy abuse of children that erupted in the United States during the late 1990s and early 2000s prompted a number of scholars to reexamine the privilege, as it existed in state statutes, and conjecture about the advisability of boundaries for the privilege. In addition to these and other related works, attention will be given to historically-focused articles that outline the development of confidential information commonly referred to as privileged; this examination will focus on the standpoint of clergy and those dedicated to service within what are commonly called the helping professions, such as doctors, psychotherapists, social workers, and lawyers.

Little scholarly literature exists regarding confidentiality and privileged communications as these pertain specifically to military chaplains. While meager in number, some of these articles are written by military chaplains and lawyers who address the subject of clergy-penitent confidentiality and privilege with insider insight not possible for legal scholars unfamiliar with the peculiarities of the UCMJ, the court cases adjudicated by military courts, and the diverse and often remote environments in which military personnel operate. These will be examined, as will other military policies, directives, and instructions pertinent to the subject.

Other non-legal materials, to the extent these exist and address clergy confidentiality and privileged communications, balance the predominating legal focus. Theological reflections on the desirability and usage of confidentiality within clergy-penitent relationships will inform the discussion within this dissertation. A number of

Christian faith groups, for example, historically have placed importance upon the preservation of confidences shared with clergy, and several possess strict rules and ethical guidelines regarding the use and abuse of confidentiality. While other religious traditions may not boast such specific direction regarding confidentiality, most have established theological and ethical guidelines by which their clerical representatives are expected to operate within their ministries, regardless of that ministry's setting. A sampling of these will be presented throughout this document, to include reference to works by several writers who have attempted to encapsulate these different approaches and emphases.

Other writers have preferred to examine clergy confidentiality in light of past and current cultural realities within which clergy operate. These ethicists, philosophers, and psychologists offer valuable insights into the subject of confidential communications and how these affect the giver and receiver, as well as the potential impact upon society as a whole. Many of these authors focus on one or more of what must be considered the foundational constructs of confidentiality and, thus, privileged communications: secrets and privacy. Chaplains, like their civilian counterparts, have long held positions of special trust in the lives of their congregants and in the psyche of society with regard to information kept secret and protected. With chaplains, many believe, one may safely entrust one's secrets, and with chaplains one shares a sacred and unshakable bond of trust grounded in centuries of tradition, canon law, and military law. That, after more than 200 years of military ministry, chaplains continue to possess a service-wide reputation for preserving confidential communications and for being safe havens within increasingly intrusive military institutions, may well be the result of far greater success than failure, or

may be attributable to the constant influx of new military members and new chaplains protected by as yet unvarnished idealism.

Chapter Three introduces historical data to form an overview of the evolution of concepts of confidentiality, privacy, and privileged communications. The overview begins with a study of the early Christian origins of the notion — later the canon rule — of clergy confidentiality. The evolution of this confidentiality, to include the permutations that followed the Protestant Reformation, contributed to the eventual development of an ethical and legal recognition of personal privacy, a relatively modern concept that forms the basis of the legal concept of privileged communications.

Chapter Four continues the historical review, this time focused upon the development of chaplaincy as an intrinsic part of the military institution. The chapter reviews the unique legal tool that is the clergy-penitent privilege within the military. The UCMJ, which provides the legal framework and rules that govern all military personnel, offers to penitents a unique level of protection when these individuals choose to share information with chaplains and chaplains' assistants (Cooper, 136). It is, in fact, an absolute protection that serves as a source of benefits and problems among military members touched by its bounds (*Isham*, 608). The benefits are evidenced in the care chaplains are able to offer penitents within a sanctuary of silence buttressed by theological, ethical, and legal protections. The problems arise from several sources (which will be discussed at greater length within Chapter Four): First, commanders and other leaders within the military often express concern that their authority, their unit members, and their unit mission may be adversely affected by a lack of pertinent information, information harbored by the penitent and the chaplain. They assume, as do

many unfamiliar with the training and education afforded chaplains and their assistants, that silence on the part of these religious professionals equates to inaction; the neck hairs of commanding officers stand at attention when these men and women consider the potentially deadly secrets shared with chaplains to which they — leaders given ultimate responsibility for all those under their command — are not privy. Second, penitents may possess little understanding of the boundaries of these private communications, resulting in misunderstandings that may have undesirable, even harmful, effects upon these vulnerable individuals. A penitent may allow a chaplain to share a limited portion of the confidential information, believing that others with whom the chaplain shares the information also possess and will honor the same absolute degree of confidentiality. When this proves to be untrue, a sense of betrayal and disillusionment may well result, and the professional reputation of the chaplain (or assistant) may suffer irrevocable harm among military personnel. Third, despite the education and training afforded them in military schools, chaplains and their assistants may possess, at best, only hazy notions of the complexities and boundaries of professional confidentiality and privileged communications. These two ministerial tools — one based on theological, ethical, and psychological constructs and the other possessing a legal basis — require intellectual investment on the part of users. When chaplains are faced with confidential communications whose content they find either too trivial to warrant thoughtful care or so horrific as to inspire an emotional, rather than an ethical, response from the chaplain, this intellectual investment, or lack thereof, plays a crucial role. Chaplains are also hampered by confusion as to whether they are required to honor faith group rules above the military codes of conduct and law. The Covenant and Code of Ethics, published in

1995 by the National Conference on Ministry to the Armed Forces, was created to offer a simple statement that, it was hoped, would provide lucid guidelines for all military chaplains. The failure, however, of most endorsing agents to distribute the Code to their chaplains might be considered an attempt, however unintentional, to drown the baby at birth; the failure of most chaplains who *did* receive the Code to read it, study it, and ponder its implications may, at best, be attributed to a belief that these individuals already understood all they needed to conduct effective ministry. Fourth, the conflict felt by many chaplains between their faith group rules regarding professional confidentiality and the codes, rules, and regulations espoused by endorsing agents and the military may have an impact on how well they conduct their ministry. Fifth, chaplains possess, by virtue of the military legal rule regarding clergy-penitent privilege, reasonably clear guidelines (subject to the problems already discussed) regarding those confidential communications that become the focus of judicial proceedings; these are absolutely protected from disclosure without the express permission of the penitent. The chaplain services of the U.S. Army, U.S. Air Force, and U. S. Navy have crafted such guidance in the form of policy; these, however, are not uniform in their delineations of what is protected from revelation. The Army, for example, requires its chaplains to disclose communications that contain admissions of abuse of minors, spouses, and elders. The Air Force and Navy chaplain services do not require such disclosure and, in fact, forbid this. The lack of a uniform policy on professional confidentiality *other* than privileged communications may not only contribute to the confusion of individual military chaplains, but may also, in the future, endanger the survival of the military's absolute rule regarding privileged communications, a possibility that will be examined in this chapter.

Chapter Five looks at the history of the clergy-penitent privilege within U.S. military law and provides a review and analysis of those legal cases, adjudicated within the military, that have focused on chaplains and privileged communications. The decisions made in many of these cases have shaped the privilege and affected both the rights of military members and the ministries of chaplains.

This dissertation concludes by examining challenges that can and will strongly affect military ministry. Chapter Six discusses current training and educational efforts sponsored by the chaplain corps and considers the possibility of establishing yet more effective training, throughout the rank structure, on the value and use of confidential and privileged information, training that emphasizes not only a clear intellectual understanding of the facets of professional confidentiality and privileged communications, but that offers practical solutions for chaplains who face the need to provide help while maintaining the secrets that belong to penitents and ensuring the safety of innocents. Also discussed will be the possibility of establishing similar training for incoming Judge Advocate General officers as well as all students attending Prospective Commanding Officer and Prospective Executive Officer courses. Current policy and doctrinal issues will also be examined. Recent events in the Global War on Terrorism — most notably the detention of so-called enemy combatants in the U.S. Navy base at Guantanamo Bay, Cuba — have raised to an international level the scope of chaplain professional confidentiality and privileged communications. The author proposes that both policy and doctrine within the purview of the military regarding the value and use of privilege and confidentiality must be strengthened. In addition, the author will recommend that the chaplain services work together to produce a Department

of Defense (DOD)-level policy regarding professional confidentiality that sets forth clearly the prophetic qualities, absolute nature, and desirability of the preservation of confidences shared with chaplains.

Confidentiality possesses a beauty and power that can both inspire and heal. It holds a deservedly high place of value in the lives and work of all chaplains, fiercely defended against threats from inside and outside the military. Yet seldom is confidentiality discussed in depth by chaplains, either with one another or with commanders, lawyers, and those men and women who may, one day, seek out a chaplain to share private information about themselves. Stories are often swapped between chaplains about the strangest, funniest, or most grotesque cases they have encountered, and sometimes these stories include accounts — always proudly related — of how the chaplain had to fight with one senior officer or another to preserve the confidentiality of a military person. The moral value of confidentiality is a given among chaplains and their assistants, but it is a given that is not well understood among chaplains or beyond their ranks, among those whom chaplains serve. And because it is not understood, it stands in danger of losing its power and becoming little more than a noble ideal and an empty symbol. This too-long neglected subject deserves a fresh infusion of investigative activity on the part of all chaplains, that they may better emulate the God who does not compel or coerce the secrets of men and women, who does not betray, but who respects all persons and gives to them the right of self-determination.

It is hoped by the author that this dissertation will inspire future research and discussion of professional confidentiality as it applies to ministry within the military services. It is further hoped that this dissertation offers an intelligible and useful source