

## AMENDING PARAGRAPH 5 OF RULE XXIX OF THE STANDING RULES OF THE SENATE (Senate - October 08, 1992)

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Mr. MITCHELL. Mr. President, I ask unanimous consent that the Senate proceed to the immediate consideration of Senate Resolution 363, a resolution submitted earlier today by myself and Senator **Dole** to amend paragraph 5 of rule XXIX of the Standing Rules of the Senate relating to confidential business and proceedings; that my floor statement relative to the conclusion of Mr. Peter Fleming's investigation of the unauthorized disclosures of Senate information, and the reasons for modifying rule XXIX, be inserted at this point in the **Record**; that the resolution be agreed to and the motion to reconsider laid upon the table.

The PRESIDING OFFICER. Without objection, it is so ordered.

The resolution (S. Res. 363) was agreed to, as follows:

### **S. Res. 363**

Whereas, it is the fundamental policy of the Senate to favor openness and public access to information;

Whereas, notwithstanding the Senate's policy of openness, committees, subcommittees, and offices of the Senate at times properly treat their business and proceedings as confidential in order to effectively perform their functions, and to protect the privacy and other interests of individuals and organizations who provide information or are the subject of inquiry;

Whereas, when it is determined that a committee, subcommittee, or office of the Senate should treat a proceeding or matter as confidential, a breach of that confidentiality is destructive of mutual trust and respect, reflects poorly on the institution, and may seriously harm the privacy and other interests of individuals and organizations;

Whereas, the Standing Rules of the Senate should explicitly prohibit the unauthorized disclosure of the confidential business and proceedings of the committees, subcommittees, and offices of the Senate: Now therefore be it

*Resolved*, That paragraph 5 of rule XXIX of the Standing Rules of the Senate is amended by--

(1) striking 'or officer' and inserting ', officer, or employee';

(2) inserting ', including the business and proceedings of the committees, subcommittees and offices of the Senate,' after 'proceedings of the Senate'; and

(3) inserting 'or employee' after 'if an officer'.

Mr. MITCHELL. Mr. President, as Senators will recall, on May 4, Peter Fleming, Jr., the Temporary Special Independent Counsel appointed pursuant to Senate Resolution 202 of this Congress, transmitted to the distinguished Republican Leader and to me a report of his findings concerning unauthorized disclosures of Senate information. Senator **Dole** and I wish to reiterate our appreciation to Mr. Fleming and his associates for undertaking this difficult assignment, and for performing it with skill and dedication.

In accordance with section 7 of Senate Resolution 202, Senator **Dole** and I promptly made the Counsel's report available to all Senators. The report was also made available to the public and has been printed as an official document of the Senate, Senate Document 102-20.

In addition to providing that the leaders shall make the report available to all Senators, section 7 of Senate Resolution 202 places further responsibilities on the majority and minority leaders. They are to make:

(1) a determination on referral to the appropriate law enforcement authority of any possible violations of Federal law;

(2) a determination on referring to the appropriate committee any disciplinary action that should be taken against any Senator, official, employee, or person engaged by contract or otherwise to perform services for the Senate, who may have violated any rule of the Senate or of any Senate committee;

(3) a determination on referring to the appropriate executive branch [official] any questions involving the conduct of any official or employee of the executive branch responsible for the unauthorized disclosure; and

(4) recommendations for any changes in Federal law or in Senate rules that should be made to prevent similar unauthorized disclosures in the future.

Items one through three, quoted above, raise the question whether, with respect to disclosures of information within the purview of Senate Resolution 202, the conduct of any individual should be the subject of further investigation by a law enforcement agency, or by either the Senate or any executive branch disciplinary body. After careful consideration of the report of the Special Independent Counsel, the distinguished Republican Leader and I share the view that it is unlikely that additional investigation would add appreciably to the knowledge obtained by Mr. Fleming in the course of his thorough inquiry. Accordingly, we have concluded that no further investigation for either criminal or disciplinary purposes is warranted.

However, concerning measures to prevent similar unauthorized disclosures in the future, we have concluded that action, in the form of a Senate rule amendment, would be beneficial. For that reason, at the conclusion of these remarks, I will send to the desk,

on behalf of myself and Senator **Dole**, a resolution to amend paragraph 5 of rule XXIX of the Standing Rules of the Senate on the disclosure of the confidential business and proceedings of the Senate.

Rule XXIX(5), which was initially adopted in 1844, now provides:

Any Senator or officer of the Senate who shall disclose the secret or confidential business or proceedings of the Senate shall be liable, if a Senator, to suffer expulsion from the body; and if an officer, to dismissal from the services of the Senate, and to punishment for contempt.

During the Special Independent Counsel's investigation the argument was made by some that no Senate rule prohibits the disclosure of confidential committee information to persons outside of the Senate. That argument was based in part on the fact that rule XXIX(5) refers to Senate proceedings, and not explicitly to committee proceedings.

We believe, as did the Special Independent Counsel, that rule XXIX(5) presently applies to disclosures of committee proceedings, which are, without question, Senate proceedings. We also concur that it would be beneficial to eliminate any ambiguity on this point. Although public access to committee proceedings is almost always favored, there are special occasions when other interests warrant the judgment of Senate committees that it is essential to maintain confidentiality. By providing that the phrase 'business or proceedings of the Senate' includes the business or proceedings of committees, our amendment would leave no doubt that the standing rules prescribe severe penalties for the unauthorized disclosure of the confidential business or proceedings of committees.

The events that gave rise to the Special Independent Counsel's investigation highlight why confidentiality may be important for committees. To begin with, firm promises of confidentiality may be necessary to protect individuals who have sensitive information to provide to the Senate but who do not wish their identities to be made public. Their willingness to provide information to the Senate may depend upon the ability of the Senate to keep its promises of confidentiality.

Second, fairness to individuals who are the subject of Senate inquiries often requires that a preliminary exploration of allegations, that might reflect adversely on these individuals, occur in closed session to assess their validity.

Third, candid discussions among Members depend upon a trust that is based, in part, on a willingness of all Members to abide by the practices of the Senate. Those practices place responsibility for certain decisions, such as the decision whether to release confidential information, in the hands of the Senate as a whole, or in committees of the Senate, rather than in individual Senators. The unilateral decision by a Member or employee to release confidential committee information is inconsistent with the Senate's practice of making such decisions openly and collectively. Arrogation of this responsibility by individuals can destroy mutual trust among Members and be harmful to

this institution.

In addition to amending rule XXIX(5) to explicitly apply to committees and subcommittees of the Senate, the resolution would amend the rule to specify that it applies to offices of the Senate. A number of offices of the Senate have obligations both under statutes and rules to maintain the confidentiality of certain classes of Senate information. The amendment would make clear that the rule applies to the Offices of the Secretary, Sergeant at Arms, Legislative Council, Legal Counsel, and Senate Fair Employment Practices, each of which has the responsibility for maintaining confidential Senate information. Finally, the resolution would amend rule XXIX(5) to make clear that it applies to employees of the Senate as well as to Members and officers of the Senate. Thus, as amended, rule XXIX(5) clearly applies to the business or proceedings of committees, subcommittees, and offices of the Senate, and to all Senate employees.

There should be no doubt that rule XXIX(5) broadly prohibits all unauthorized disclosures, including the unauthorized disclosure of the secret or confidential business or proceedings of the Senate. As used throughout rule XXIX, the words secret and confidential refer to all information the Senate treats as confidential, including information received in closed session, information obtained in the confidential phases of investigations, and classified national security information. This amendment to rule XXIX is in no way intended to modify or supersede the provisions of Senate Resolution 400 of the 94th Congress.

The Select Committee on Ethics--which has jurisdiction, under section 2(a) of the Senate Resolution 338 of the 88th Congress, as amended, over violations of Senate rules relating to the conduct of Members, officers, and employees of the Senate--would have jurisdiction to consider an allegation of a violation of rule XXIX(5). However, the jurisdiction of the Ethics Committee should be reserved for grave breaches of confidentiality that cannot be resolved by the committee or offices in which those breaches occur. Almost always, questions about leaks should be addressed first by Members or committees or offices themselves. As I stated during consideration of Senate Resolution 202, the most effective way to enforce the Senate's policy against leaks is for each Member to make clear that leaks by the Member's staff will not tolerate. In offering this resolution, it is our intention that the Ethics Committee exercise discretion in determining the appropriate allocation of responsibility between it and the committees or other entities of the Senate in which issues of unauthorized disclosure may arise.

Senate Resolution 202 was adopted to provide for a thorough and independent investigation of alleged disclosures of Senate information so that the Senate could resolve, if possible, the particular matters that occasioned it. While individual responsibility cannot be assigned for the disclosures that were investigated, we can commit ourselves to preventing future leaks of confidential Senate information by making clear to members of our own staffs that such conduct will not be tolerated and by removing any doubt that unauthorized disclosures, including the unauthorized

closure of the business or proceedings of committees and offices of the Senate, are prohibited by the rules of the Senate. To that end, on behalf of myself and the distinguished Republican leader, I send to the desk a resolution to amend paragraph five of rule XXIX of the Standing Rules of the Senate.

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Mr. **STEVENS**. Mr. President, I commend the distinguished majority and minority leaders for their resolution amending rule XXIX(5) of the Standing Rules of the Senate. I believe this is a useful clarification of the scope of rule XXIX(5).

I raised the question of the extent to which the rule XXIX(5) prohibition covers classified national security information and our Rules Committee staff discussed the matter with Senate legal counsel, the Office of Senate Security, the Intelligence Committee, the Defense Appropriations Subcommittee, Ethics Committee, and the majority staff at Rules Committee. We are in agreement that the words secret and confidential in Rules XXIX(5) clearly covers classified national security information.

I would also add that although the title of rule XXIX is, for historical reasons, executive sessions it should be clear to all Members that the scope of rule XXIX is currently far broader. When the Rules Committee, at some future time, takes up a package of technical corrections to the Standing Rules of the Senate, I will offer an amendment to the title of rule XXIX to reflect its broad scope.

I thank the leaders for their attention.

*END*

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