FICTIONS ON FLOW: A COMPARATIVE ANALYSIS OF CANADIAN AND UNITED STATES TRANSBORDER DATA FLOW POLICY,

1970-1982

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Submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirements for the Degree of Master of Arts in the Graduate Program in Communications

> McGill University c November 1983

FICTIONS ON FLOW: TRANSBORDER DATA POLICY

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ABSTRACT

This thesis undertakes a comparative analysis of the telecommunications policy of Canada and the United States in the area of transborder data flow. The domain is paradigmatic of the way in which new computercommunication technologies were regulated and socially rationalized during the period 1970-1982. An historical interpretation is based on a critique of theoretical and methodological positions underlying traditional communications policy research.

A research position which treats policy as symbolic action, discursive practice, producer of uncertainty, and strategy is then forwarded in order to situate the structures and forms of transborder data flow policy within its specificity.

The first three chapters offer background information on national data flow policies and provide case histories for the comparative analysis in the fourth chapter. New classificatory schemes and options for policy action and inquiry are suggested in Chapters Four and Five. Ce mémoire entreprend une analyse comparative des politiques télécommunicationnelles canadienne et américaine dans le domaine du flux transfrontières de l'information. L'examen de ce domaine démontre comment les nouvelles technologies de communication informatisées furent réglementées et rationalisées dans la période 1970-1982. Il en est fait une interprétation historique fondée sur une critique des positions théorique et méthodologique qui sous-tendent la recherche traditionnelle en politique communicationnelle.

Le mémoire avance une position de recherche qui traite la politique comme action symbolique, pratique discusive, producteur d'incertitude et stratégie afin de spécifier les structures et les formes de la politique du flux transfrontières de l'information.

Les trois premiers chapitres délimitent les politiques nationales du flux de l'information et contiennent des études de cas pouvant appuyer l'analyse comparative entreprise dans le quatrième chapitre. Les chapitres quatre et cinq proposent des nomenclatures et des options nouvelles pour la prise de décision et la recherche en politique.

RESUME

ACKNOWLEDGEMENTS

Firstly, I would like to extend my gratitude to Prof. G.J. Robinson, McGill, for her great investment of time, interest and influence on my work; Dr. Peter Robinson of the O.E.C.D. and Canadian Department of Communications for his gracious assistance in the collection and interpretation of documents on data flow; / Dr. Rudolf Strobl for his friendship, inspiration, and advice; and Paul Attallah and Scott Zeilinger for their understanding.

Secondly, I would like to thank the following individuals for their assistance in the procurement of thesis materials: Dr. Ithiel deSola Pool, M.I.T.; Dr. Oswald H. Ganley, Harvard; Prof. A.L.C. deMestral, McGill Institute of Comparative Law; Prof. Rice, Communications Media Çenter, New York Law School; Rep. Glenn English, U.S. House of Representatives; Elizabeth Kriegler, Canadian Department of Communications; Arthur A. Bushkin, Telemation Associates; and James L. Gorman, U.S. Department of State.

I would also like to thank Carmen Ferrara-Wilson for the typing and preparation of the manuscript; and Zev, Corinne, and Adina B. for everything else. i

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. . . the politico-strategic term is an indication of how the military and the administration actually come to inscribe themselves both on a material soil and within forms of discourse . . It is indeed war, administration, the implantation of management of some form of power which are inscribed in such expressions.

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Michel Foucault, "Questions on Geography"

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CHAPTER ONE

INTRODUCTION: FLOW AND OVERFLOW

That which was unconscious truth, becomes, when interpreted and defined in an object, a part of the domain of knowledge, - a new weapon in the magazine of power.

Ralph Waldo Emerson, Nature (1836)¹

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During the 1970s, such terms as télématique/telematics, informatique/informatics, tele-informatics, and the information economy/revolution/society appeared in public policy documents of Western Europe and North Americá. These labels refer to the development, installation, and social rationalization of computer-communication technologies -especially the growth of international data networks allowing for the rapid storage, processing, and transfer of data across national boundaries by cable and satellite. The conduct of international trade in goods and financial services is increasingly dependent on these networks for a variety of services, including the handling of management information; foreign exchange and funds transfers; credit and billing information; scientific research; airline reservations; and trade documentation and authentication materials:

> . . . rapid data communication is now essential for conducting military operations, for transacting international commerce, for managing multinational businesses.²

The term 'Transborder Data Flow' technically refers to the "digitally encoded units of information in which the transfer, storage, or processing takes place in more than one national state."³ However, the general literature on transborder data flow deals with areas of international conflict and public policy issues of the "competing values, claims, and policies by which national governments and others balance the competing benefits of sharing and denying information."⁴

Thus, as Eric J. Novotny states, the literature on transborder data flow has examined the direction, access, use, and control of computer data flows rather than the problems of restricting the scope of meaning of the term 'Transborder Data Flow':

> The literature on transborder data flows contains discussions of widely varying problems, partly due to the fact that data flows are defined and categorized differently or not at all by various authors . . . There is substantial confusion as to the meaning and limitations of transborder data flows as they apply to computer and communication systems.⁵

The multidimensionality of 'Transborder Data Flow' as a dynamic policy term reflecting a broad range of meanings is also recognized by government policymakers and analysts such as Elizabeth Kriegler, Director-General of the Broadcasting and Social Policy Branch of the Canadian Department of Communications and Chair of the Inter-Departmental Task Force on Transborder Data Flow, who asserts that: "Nobody knows what Transborder Data Flow quite means. It means

something different to everyone who uses it."^b Likewise, Dr. Peter Robinson, Chairman of the Organization for Economic Cooperation and Development's Expert Group on Transborder Data Flow, and Special Advisor on the International Aspects of Informatics for the Canadian Department of Communications, maintains that:

> Transborder Data Flow is a string of words that is being more widely bandied about here in Canada and internationally. It is a label used to represent a range of complex and sensitive issues of public policy.⁷

Eddi Ploman, former Executive Director of the International Institute of Communications, London, and Vice Rector of the United Nations University of Tokyo, has also argued this viewpoint in an address before a Conference of the Canadian Council on International Law, dealing with international communication issues such as transborder data flow. He posited that both the demarcation of international communication policy as an academic field, and the international debate over data flow are formed by institutional actors imbricated in sets of particular 'epistemic' or cognitive communities, whose social power is based on the activity of producing meanings, knowledges, and languages on the subject of international communications and information policy.⁸

In <u>Copyright</u>: Intellectual Property in the Information Age (1980), Ploman and L. Clark Hamilton explain that:

By 'episteme', 'Foucault means a dominant way of looking at reality, a set of shared symbols and references, mutual expectations and predictability of intention. Epistemic communities may thus derive from the role of representing national public authorities at the international level or may be based on bureaucratic position, technical training, scientific outlook or shared disciplinary paradigms.⁹

Ploman and Hamilton examine the epistemic or cognitive communities in the communications field, focusing on strongly organized and expert governmental and non-governmental pressure groups working in such fields as copyright law. They also argue for comparative analyses of these epistemic communities in international communications.

Like the field of copyright, transborder data flow issues can be roughly categorized in terms of economic, legal, po^tlitical, and technical concerns produced by varying epistemic communities.

The economic issues pertaining to transborder data flow include problems of international trade in telecommunications and information goods and services; the role of data flows in the conduct of international business transactions; the operational status of international record carriers, data networks, and computer services bureaux; the effects of non-tariff and invisible trade barriers on the use of computer-communication technologies; effects of data flows on national economic independence -specifically in the areas of employment patterns and balance of payments problems; and the role of multinational corporations in the provision of international computer-

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communication goods and services.

Legal issues of data flow refer, inter alia, to problems of national sovereignty; the extra-territorial application of law; protection of personal privacy; access to stored personal data; data protection laws and bills; data copyright and the legal identification of information/. data as a commodity, tangible and/or intangible good or service, resource, and property; data ownership; and the development of a framework, or legal regime for criminal law prosecution of computer crime such as the interception of data.

Political issues in the transborder data flow debate include problems of national sovereignty, security, pride, and culture; and the establishment of international regulatory regimes governing the control, direction, use, and content of international data flows which could affect the conduct of trade in general, and markets for computercommunication goods and services, in particular.

Lastly, technical issues include difficulties of defining and categorising the actual physical flow of data and of monitoring the content of data; the development of technical standards for international computer-communication systems and equipment; and encryption and security measures for data protection.

Since 'Transborder Data Flow' has evolved as a policy term or label representing a broad range of meanings, the critical stance of this thesis is especially appropriate; research is aimed at the examination of the production of

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meanings of communication policy. Harold D. Lasswell recognized the need for such analyses over thirty years ago, when he stated that: "The key terms which are used in the policy sciences refer to meanings and contexts of meanings are interchangeable."¹⁰

Literature on transborder data flow is mostly limited to collections of governmental intergovernmental, and corporate positions on select economic, legal, and political issues in such compilations as the O.E.C.D. series on Information, Computer, Communication Policy (1977-1982)¹¹ the Intergovernmental Bureau for Informatics' <u>Transborder Data Flow Policies</u> (1981),¹² the American Federation of Information Societies' <u>Transborder Data Flow</u>: <u>Concerns in Privacy Protection and Free Flow of Information</u> (1979),¹³ and the Institute for Research on Public Policy's <u>Issues in Canadian/U.S. Transborder Computer Data Flows</u> (1979);¹⁴ and in computer-communication industry journals such as Datamation and Computerworld.

Two annotated biographies listing primary material on national bills and policies, and secondary material of journal articles and books which deal with select issues of transborder data flow have been compiled by Eric J. Novotny, who has published pioneering articles dealing specifically with the theoretical and methodological problems of studying transborder data flow through an international law and policy-oriented framework.¹⁵ In "Transborder Data Flows and International Law: A Framework for

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Policy-Oriented Inquiry" (1980), Novotny argues for the development of a methodology on policy aspects of transborder data flow capable of identifying and evaluating "the relative strengths of the participants, their varying control over the technologies of computers and communication, and their strategies for advancing their objectives."¹⁶ In this article, Novotny suggests the explication of the multifaceted meanings of 'Transborder Data Flow' and stresses the necessity for identifying the political interests (governmental and corporate actors) involved in policy debate, because: "The assertion of nacional power underscores all'activity in transborder data flow."¹⁷

Aside from Novotny's contributions, there are currently no works on transborder data flow within the academic context of communication policy research which examine the ? evolution of transborder data flow as a specific policy term referring to the regulation of computer-communication technologies during the 1970s. The definitional bounds of the term 'Transborder Data Flow' include other types of communication flow beside corporate data, types such as broadcasting signals and journalistic information sent through computers and satellites in digital format. Thus, the inclusion of transborder data flow in the field of communication studies can be justified by a theoretical continuation of the tradition of news flow research. However, the media aspects of transborder data flow have been neglected in most analyses of the subject, and the extension

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of the term to other media flows has been pursued only by a small number of authors, including G. Russell Pipe¹⁸ and Edmund Hogrebe.¹⁹

Debate on transborder data flow has emerged, rather, within U.S. and Canadian government agencies and corporations responsible for debate on international communication issues, and follows those discourses under the general rubric of 'information, computer, communication policy' which applies to regulatory regimes governing the development and operation of computer-communication technologies.

This thesis project is limited to the descriptive analysis of primary and secondary materials related to the evolution of transborder data flow as a communication policy object in Canada and the United States; from its first appearance in policy documents of 1970, until the present. The corpus 'government policy documents' includes official and non-official government policy statements; task force reports; press releases; memoranda and internal government reports discussing the formation and implementation of policy; statements from policymakers and government representatives appearing in non-governmental sources such as journals and reports of conference proceedings; and reports and transcripts of congressional and parliamentary committee hearings. These types of texts comprise the primary material in this thesis, with journal articles and other publications by non-governmental sources referring to government policy, comprising the secondary material of research.

The archival contribution of this project may be emphasized, since there is no previous compilation and historical analysis of Canadian and United States documents on transborder data flow. Neither are texts currently available which outline the history of regulatory structures, actors and stakes involved in the international control of computer-communication technologies during the 1970s. This paucity of material on the theoretical, methodological, and political problems of communication policy research; on the evolution of regulatory structures in the computer-communication arena; and on the analysis of transborder data flow as a communication policy term, forms a major rationale for the selection of thesis problematics.

Since the general task of this thesis is the search for general knowledge of communication policy processes regardless of particular nationalistic and administrative purposes, and because one cannot give a detailed analysis of all national transborder data flow policies within the scope of a masters thesis project, a comparative methodology was selected, utilizing Canada and the United States as countries for comparison.

The importance of the comparative method in policy analysis is suggested by Roland S. Homet in <u>Politics, Cul</u>-<u>tures and Communication</u> (1979), a comparative analysis of communication policy in the United States and Western Europe.²⁰ He claims that:

A comparative analysis of transborder data flow policy may allow us to examine whether communication policy objects are formed according to the same set of rules for the production, regulation, distribution, and circulation of meanings; 'or whether different institutional structures, regulatory philosophies, and economic constraints account for different national rules for the production of communication policy documents. Furthermore, the very term 'Transborder Data Flow' implies the international or comparative context for debate on communication policy. As will be shown throughout this thesis, consideration of transborder data flow issues in the United States and Canada cannot, for example, be divorced from this international and comparative framework, where transborder data flow evolved as a policy object reflecting a series of specific bilateral and multilateral issues between these two countries.

The selection of Canada and the United States as case studies for this comparative analysis was based on both theoretical and practical considerations. The central économic dominance of the United States in the international trade of communication goods and services, and the cultural and economic dependence of Canada as 'hinterland'

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or "periphery' has been recognized since the work of H.A. Innis. These different positions of Canada and the United States as importers and exporters of communication goods and services as well as contrasting geographic, linguistic, historic, and cultural factors contribute to major variations in communication regulatory philosophy and policy on transborder data flow.

In some cultural and economic respects -- specifically the heavy dependency on U.S. penetration of domestic communication markets, Canada shares more in common with Third World countries than with its North American counterpart. A comparative communication policy analysis of Canadian and United States documents may thus lead to insight's about the communication relationships between the U.S. and developing countries in particular, and about the processes and structures of international communication/regulation, in general.

The selection of Canada and the United States as case examples was also prompted by such practical considerations as the author's access to primary and secondary material, and contact with representatives of communication policy institutions in these two countries.

The time period 1970-1982 was chosen since the development of government regulatory agencies for computercommunication such as the Canadian Department of Communications and the U.S. Office of Telecommunications Policy, and the appearance of government policy documents on

computer-communication technology began in 1969-1970. Canadian and United States transborder data flow policy continues to evolve and change; however, temporal restrictions on thesis submission force the admittedly arbitrary 'cut-off point', or chronological end of analysis.

In summary, the problematics of undertaking communication policy research and of describing the international regulatory regimes of computer-communication policy are examined through the specific historical analysis and comparison of Canadian and United States transborder data flow policies. The selection of transborder data flow as the major topic was based on its multidimensional status as a policy label covering a wide range of economic, legal, political, and technical issues and reflecting an epistemological focus on the production of meaning. The limited scope of a masters thesis project dictated that research be targeted at a specific facet of communication policy. A major aim of this thesis is the amelioration of the poverty of communication policy research material on transborder data flow.

Chapters Two and Three of this work offer general background information on Canadian and United States transborder data flow policy. They provide the case histories for a comparative policy analysis in Chapter Four. In this chapter, the author also reviews an influential tradition of communication policy research, and raises theoretical and methodological questions of policy analysis.

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NOTES: CHAPTER ONE

¹ Ralph Waldo Emerson, "Nature," in <u>The Portable</u> <u>Emerson</u>, ed. Carl Bode, (New York: Viking Penguin Inc., 1981), p. 25.

² Eric J. Novotny, "Transborder Data Flows and International Law: A Framework for Policy-Oriented Inquiry," <u>Stanford Journal of International Law</u>, 16 (Summer 1980), p. 42.

³ ------, "Transborder Data Flow Regulation: Technical Issues of Legal Concern," <u>Computer Law Journal</u>: <u>International Journal of Computer, Communication and In-</u> formation Law, 3, No. 2 (Winter 1982), p. 107.

4 -----, "Transborder Data Flows and International Law," p. 144.

⁵ -----, "Transborder Data Flow Regulation," p. 106.

⁶ Elizabeth Kriegler, "Transborder Data Flows of Information, Data, and Broadcasting," Eleventh Annual Conference of the Canadian Council on International Law, Ottawa, 23 Oct. 1982.

⁷ Peter Robinson, "TBDF: The International Environment," Workshop on Microelectronics Information Technology and Canadian Society, Queens University, Kingston, 5-7 May, 1982.

⁸ Edward Ploman, "Overview of Legal and Institutional Solutions to Problems of International Communications -Multilateral and Bilateral Mechanisms," Eleventh Annual Conference of the Canadian Council on International Law, Ottawa, 21 Oct. 1982.

⁹ Edward Ploman and L. Clark Hamilton, <u>Copyright</u>: <u>Intellectual Property in the Information Age</u>, (London: Routledge and Kegan Paul, 1980), p. 211.

¹⁰ Harold D. Lasswell, "The Policy Orientation," in <u>The Policy Sciences: Recent Developments in Scope and</u> <u>Method</u>, ed. Daniel Lerner and Harold D. Lassell, (Stanford: Stanford University Press, 1951), p. 13.

¹¹ See O.E.C.D. Series on Information, Computer, Communications Policy (Paris: 1979-1982) in Bibliography.

12 <u>Transborder Data Flow Policies</u>: Papers Presented at the IBI Conference on Transborder Data Flow Policies, Rome, Italy, 23-27 June, 1980 (New York: UNIPUB, 1981).

¹³ <u>Transborder Data Flows: Concerns in Privacy</u> <u>Protection and Free Flow of Information</u>, ed. Dr. Rein Turn, (Washington: Report of the AFIPs Panel on Transborder Data Flow, 1979).

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¹⁴ W.E. Cundiff and Mado Reid, <u>Issues in Canadian/</u> <u>U.S. Transborder Computer Data Flow</u>, (Montreal: Institute For Research on Public Policy, 1979).

15 Novotny, "Transborder Data Flows and International Law." ¹⁶ Novotny, "Transborder Data Flows and International Law," p. 180.

¹⁷ Novotny, "Transborder Data Flow and International Law," p. 160.

¹⁸ G. Russell Pipe, "Transnational Data Flows," <u>Intermedia</u>, 7, No. 6 (Nov. 1979), pp. 12-16.

¹⁹ Edmund F.M. Hogrebe, "Digital Technology: The Potential for Alternative Communication," <u>Journal of Com</u>-<u>munication</u>, 31, No. 1 (Winter 1981), pp. 170-174.

²⁰ Roland S. Home't Jr., <u>Politics, Cultures and Com-</u> <u>munication: European vs. American Approaches to Communi-</u> <u>cations Policymaking</u>," (New York: Praeger Publishers and Aspen Institute for Humanistic Studies, 1979).

²¹ Homet, p. 4.

CHAPTER TWO

CANADIAN POLICY - CONCERNS OVER FLOW/ AN OVERFLOW OF CONCERNS

It has been called a threat to Canadian society. It has been called a threat to thousands of Canadian jobs. Some experts say it affects Canada's ability to control information about itself and its citizens. It is an issue touching on all these things: Canadian sovereignty, employment, and control. The issue is called 'transborder data flow.'

Barbara Keddy $(1979)^{\perp}$

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Introduction

Canadian communication policy, in imitation of Janus, the two-faced God of Roman mythology, leads a double existence. According to one face, Canada is developing a comprehensive communication policy to govern its domestic and international affairs. As Dr. Oswald H. Ganley contends in <u>The United States-Canadian Communication and Information</u> <u>Resources Relationship and Its Possible Significance for</u> Worldwide Diplomacy (1981):

> Canada is probably exceptional in the world community in that it has been the first country to recognize the full range of connections among the various communications and information resources . . . Canada has been the first to see and to extensively study the importance of the phenomena to its political processes, its economic policies, and its cultural and legal thinking.²

However, the other face of Canadian communication policy has also been recognized by scholars. J.C. Michel Guité, in <u>Requiem for Rabbit Ears</u> (1977), a study on Canadian cable-tv policy for the Stanford Institute of Communication Research, posits that:

> The Canadian telecommunications policy machinery is not as immaculate and passionless as it may appear to be. It is not a staid ship of state sailing confidently before the winds of public interest carrying a cargo of hard data and expertise proceeding to some electronic babylon on the horizon. A more appropriate metaphor is a flotilla of small and large craft, without uniform charts or sextants, with no agreed upon destination.³

The authors of a 1980 C.D. Howe Institute study entitled: <u>Conflict over Communications Policy: A Study of</u> <u>Federal-Provincial Relations and Public Policy</u> follow Guité's position by illustrating the weaknesses of centralized federal regulation devised to respond to problems of transborder data flow and direct broadcast satellites.⁴

> Policy and administration within the federal government has been characterized by a continued fragmentation among different departments and agencies and by a lack of clear direction as to appropriate goals and instruments 5

The preceding descriptions of Canadian communication policy as comprehensive or fragmented, are dependent on evaluative criteria that determine what constitutes appropriate policy actions and mechanisms. The simple assignment of these labels of comprehensiveness or fragmentation to government strategies which cover a wide array of actions and non-actions and which reflect the various concerns and

stakes of governmental and non-governmental actors, may result in the production of over-simplified and reductionist analyses and recommendations. Canadian communication policy is analysed in this thesis through the use of a case study and comparative methodology. Thus, the history of Canadian data flow policy cannot be rendered totally intelligible when basic information and analysis, hypothesis and interpretation are discussed together. Indeed, there is not a history of transborder data flow policy available that would make such a wholly integrated narrative history possible or useful. This chapter is presented in order to assuage the basic lack of chronology of Canadian transborder data flow policy. Interpretation of events and the generation of hypotheses to account for and evaluate aspects of this history will thus be offered in the comparative analysis of Chapter Four, after the basic history of U.S. transborder data flow policy has been presented.

The history of Canadian transborder data flow policy can be viewed metaphorically as a love affair; it can be roughly divided into three distinct periods, or stages: 1) initial interest (1970-1973); 2) loss of interest (1973-1977); and 3) regained interest (1977-1982). Thus, data flow became a public policy issue at a certain conjuncture, was then mainly ignored, and finally re-emerged as an important issue for specific reasons which will be discussed later in this chapter and in Chapter Four. Through this

history, Canadian Government definitions and policies on transborder data flow showed three major preoccupations. The first is concerned with national sovereignty as expressed in demands for the territoriality of national jurisdication and economic and cultural self-sufficiency. A second thrust arises from the bilateral context in which transborder data flow issues were framed -specifically with the United States. A final preoccupation has been the creation of inter-departmental task forces and advisory committees which publish non-official reports on select aspects of U.S.-Canadian data flow. Thus the same issues and the way these issues were expressed -- remained constant across all three periods.

A plethora of reports published by the Canadian Department of Communications, including <u>Instant World</u> (1971),⁶ <u>Privacy and Computers</u> (1972),⁷ <u>Branching Out</u> (1972),⁸ <u>Computer/Communications Policy</u> (1973),⁹ <u>The</u> <u>Growth of Computer/Communications in Canada</u> (1978),¹⁰ and <u>Telecommunications in Canada</u> (1979),¹¹ have outlined the implications of Canadian dependency on U.S. manufacturing and service firms for the storage, processing, and transfer of computer data. These hypothetical implications for Canada include: loss of employment; erosion of Canadian industrial prowess; worsening of balance of payments problems; and loss of national pride, culture, and security -- all related under the rubric of threats to national sovereignty. Possible solutions to these problems of

Canada-U.S. data flow have been recommended and ignored since the early 1970s, and range from the imposition of protectionist measures to the encouragement of competition for Canadian industries through the reduction of high tariffs which limit the importation of cheap U.S. technologies.

A. Stage One: Initial Interest / 1970-1973

Problems of transborder data flow were first recognized by Canadian government policy officials in the early 1970s, when communication emerged as a "strategic and contentious issue of public policy."¹² The federal Department of Communications was established in 1969, with responsibilities for, inter alia, developing policy and advising the government on communication issues, promoting research and development, undertaking coordination and liaison activities with governmental and non-governmental bodies, and making appointments to relevant regulatory and advisory bodies.¹³

In its first year of existence, the Department of Communications organized a 'Telecommission Study,' dedicated to the analysis of broad issues of Canadian communication, rather than to the formulation of specific policies. This study set the model for all subsequent reports on transborder data flow -- policy analysis with little policy formulation. As Guité explains:

The Telecommission did not try to establish federal communication policies. What it did do was bring together, in a two feet high stack of booklets, the various positions of different groups of what these groups saw as ' critical issues.¹⁴

The Department provided a general overview of Canadian telecommunication issues in a pioneering series of reports from government agencies and interest groups, and in a general text entitled: Instant World (1971).¹⁵

In Chapter 15 of <u>Instant World</u>, "The Marriage of Computers and Communication," concern was raised over the planning of multi-service computer/communication systems in Canada and in the United States, which could result in the establishment of an exclusively North-South infrastructure for Canadian communication systems:

> Although Canada has an efficient and sophisticated east-west telecommunications system, the United States lead in the development of large computer utilities could result in a northsouth flow of business that could . . . prevent the establishment of an indigenous computer utility industry.¹⁶

The possible implications of the concentration of information on Canadian individuals, institutions, and transactions in foreign, i.e. United States data banks, according to this chapter, included: jeopardization of the economic viability of future Canadian computer/communication systems, abrogation of Canadian laws dealing with personal privacy and corporate operations, and reduction of possible benefits to be accrued from computeraided educational methods.¹⁷ The authors of the report, reciting themes that would be reiterated in every major computer-communication policy document to follow, posited that: "A telecommunications network that leads generally to computers and databanks in the United States is likely to lead to much information and instruction that is not particularly suited to Canadian needs."¹⁸

Fundamental legal problems of U.S.-Canadian data flow were first recognized by the Department of Communications in their Telecommission Study 3 (c), entitled: International Legal Problems Concerning the Transfer and Storage of Information (1971).¹⁹ The two categories of legal problem's addressed in this study included political problems of national sovereignty, security, and pride to be ameliorated through legal enactments of domestic law and international conventions; and 'classical' legal problems such as potential proprietary interests in data, possibilities of taxing data, and scenarios for the imposition of combines, antitrust, copyright laws, and import/ export controls to regulate the transborder transfer and storage of information.²⁰ The contribution of this report lies in its original exposure of these legal issues. However, little explication is offered to document the feasibility of solving the problems of transborder data flow and of applying specific Canadian laws and controls.

In <u>A Trans-Canada Computer/Communications Network</u> (1971), the Science Council of Canada argued the need for

a national computer-communication policy to prevent the problems of data flow and storage outlined in <u>Instant</u> <u>World</u> and the various Telecommission reports.²¹ The Council recommended the development of a trans-Canada computer-communications network in order to restrict predominantly north-south patterns of communication, such as a situation where data between Winnipeg and Toronto would flow through facilitites in Minneapolis and Chicago; and to prevent a scenario whereby "U.S. interests will provide modern facilities for us, even as they provide automobiles, academics, capital, entertainment, and school books."²²

The Science Council also detailed the major economic, cultural, and legal implications of north-south data flow and storage that were outlined in <u>Instant World</u>, suggesting that these trends included: a continual outflow of funds for network charges of a magnitude and growth rate out of Canadian control; very little control by Canadians of privacy and security standards and little opportunity for Canadian bodies to verify advertised standards of privacy and security; the possibility that once trans-Canada links have been established through the United States, cheaper data communication and processing services will be provided by U.S. corporations only; and the further possibility that information banks and computer-aided learning would migrate to the points of supply and computer services.²³

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In response to the early findings of the Telecommission and Science Council reports which predicted dire economic, political, and cultural effects arising from the confluence of computer-communication technologies (which would supposedly transform Canada into a 'postindustrial' and 'wired' society), the federal Government organized task forces on computer-communications and on computer and privacy, in October 1970.

The Task Force on Privacy and Computers, jointly established by the Department of Communications and the Department of Justice, explored the ramifications of computerized data banks on the protection of personal privacy. In a chapter on "International Considerations" of their 1972 report, Privacy and Computers, the Task Force examined the privacy aspects of extra-territorially stored information -- particularly data stored in the United States, and concluded that the principal problem in this area was not that of the privacy of Canadian persons or institutions being invaded, but rather, concerned the data processing and communication business that would be lost to Canada as a result of data flow.²⁴ In this regard, the report stated that: "In developing any international policies, the question of computers and privacy will probably have to be closely related to the total transborder flow of goods and services." 25

The Computer/Communications Task Force also published their findings on 'cross-border data flow' in 1972. The

purpose of this independent task force within the Department of Communications was "to speedily develop and recommend specific policies and institutions that will ensure the orderly, rational, and efficient growth of combined computer/communication systems in the public interest."²⁶ Chapter X of their two-volume general report, Branching Out dealt with issues surrounding the provision and use of data services in Canada -- issues stemming from Canada's proximity to the large industrial and technological markets in the United States. Problems of control over data flow, access to data banks, and potential loss of Canadian business were raised after a discussion on north-south data flow, i.e. flow resulting from the in-house operations of Canadian subsidiaries of U.S.-based companies and from user needs to access data banks and programs which were not available in Canada.²⁷ Policy recommendations to ameliorate these problems of data flow were predicated on the goals to maintain a Canadian presence in the North American trade of computer-communication goods and services, and are suggested after analyses of the motivating forces accounting for data flow, of the economic, legal, and social criteria for flow restriction, and of suitable policy approaches to problems of north-south, or 'crossborder' data flow. 28

The Task Force suggested that the major motivating force for the cross-border/north-south flow of data was

the economics of data processing and communication in the United States:

The economies and advantages of centralized data processing facilities are considered by companies . . and constraints on the location of data processing capability, which, attempt to keep the work in Canada are claimed to result in higher operating costs to all divisions of a company, including those in Canada.²⁹

The Task Force also expanded the general list of economic implications of north-south data flow outlined in earlier reports, and discussed the direct potential loss of business to Canadian data processing enterprises, reduced employment opportunities, inhibition of the build up of business volume, and preventions of economies of scales -engendered by the data flow.³⁰ The legal implications of data transfer and storage across national borders raised in Branching Out reiterate the text of Telecommission Study 3 (c), where issues of protection of personal privacy, copyright, liability, and bonding are given summary treatment.³¹ Finally, the social issues arising from data flow which are identified in the report are based on the premise that computer/communication technologies would be used for information retrieval, educational, and entertainment purposes.³² Because these technologies convey cultural values and attitudes, the Task Force argued that Canadian broadcasting, entertainment, and educational service industries could be threatened, and that therefore Canadian content in computer/communication channels must

be assured:

This aspect of the potential of computer/ communications in the distribution of information with cultural content to the general public must therefore be reflected in corresponding requirements to ensure that the user has sufficient choice of material including sufficient volume from Canadian sources.³³

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Thus, the Canadian-content rationale used in the federal regulation of Canadian broadcasting was introduced to the debate over control over the development of computer/ communication technologies and the attendant problems of data flow.

The Task Force on Computers and Communication recognized that policy approaches to the problem of cross-border data flow were constrained by the "practical difficulties inherent in attempting to restrict or limit the flow of data across international borders."³⁴ These difficulties included, for example, the rejection of traditional methods of international control of commodity transfers such as customs tariffs, taxation measures, quota provisions, export licenses, and anti-dumping controls because of problems of valuation -- i.e. computer data was defined as a commodity that is almost impossible to systematically value.³⁵ Furthermore, the precedent setting application of traditional tariff principles to the electronic transmission of information, possible reciprocal actions by foreign governments, and higher costs resulting from a smaller variety of producers and sources, argued against

the application of traditional commodity controls as a viable government strategy.³⁶ Rather than recommending the imposition of such restrictions on cross-border data flow, the Task Force suggested positive measures aimed at strengthening the availability and cost-effectiveness of Canadian computer/communication services:

> The Task Force contends that inhibitions of information flow between the U.S. and Canada would be, on the balance, economically, technically, and socially detrimental to Canada and that the Canadian computer/communications industry must therefore compete with the crossborder flow of U.S. information services.³⁷

In order for the Canadian computer-communication industries to compete and freely participate in the North American information flow market, the Task Force issued thirty-nine formal recommendations covering the entire field of computer-communications, including Recommendation 22, which stated:

> . . . policies in computer/communication should be oriented towards providing service availability and reducing costs in Canada in order to offset economic and technical incentives for meeting user needs through facilities outside Canada.³⁸

Ten specific federal actions to deal with problems of cross-border data flow were articulated in Chapter X of <u>Branching Out</u>, including: government financial and technical assistance in research and industrial* development; coordination in the gradual evolution of a coherent data communication network; participation in the development of
national and international standards; financial assistance on a case-by-case basis in the form of subsidies to users and suppliers; moral suasion directed towards encouraging Canadian subsidiaries of foreign companies to employ Canadian computer-communication services wherever possible; and review of customs tariffs for the importation of equipment not available from Canadian manufacturers.³⁹

B. Stage Two: Loss of Interest / 1973-1977

Federal interest in computer-communication policy and problems of cross-border data flow declined in the period 1973-1977, despite the existence of an Interdepartmental Committee and the work of such researchers as Gotlieb, Dalfen, and Katz. Indeed, no comprehensive Canadian computer-communication policies were designed, analyzed, and implemented. Twenty-four of the thirtynine specific policy recommendations of the 1972 <u>Branching Out</u> report were totally ignored.⁴⁰ This lack of interest in computer-communication issues may have been engendered by a growing realization that earlier government forecasts of a Canadian society totally dependent on computer-communication technology were inaccurate; the 1979 Clyne Committee explained that:

> . . . the immanence of 'the wired city' (meaning societies in which a great many needs of individuals -- ranging from information on demand to shopping and banking services would be

Provided through TV sets in the home) had been overemphasized . . In Canada, the sense of urgency generated by the Telecommission disappeared.⁴¹

After publication of Branching Out in 1972, the Minister of Communications invited interest groups to comment on the report, and sixty separate briefs were subsequently received by the Government. The federal government, after examining the Task Force recommendations. and public responses, issues a policy paper in 1973, en-Computer/Communications Policy: A Position Statetitled: ment by the Government of Canada, authored by the Minister of Communications, Gerard Pelletier. 42 This position paper was not intended to serve as a firm indicator of government policy in the computer-communication area, rather, the paper was to be used as a focus for discussion between federal and provincial governments and between the federal government and industry. 43 Pelletier prefaced his statements by asserting that they:

> . . . are not an expression of settled government policy. Rather, they represent the government's current perception of viable policies which could permit Canadians to obtain maximum benefit from computer-communication services.⁴⁴

Twenty-nine separate policy statements were included in the Pelletiér paper, under five categories of: General Polícies, Data Communication Policies, Industrial Development Policies, New Computer/Communication Systems and Applications, and Coordination of Computer/Communication

Activities in the Federal Government. Although no specific formulations on the subject of cross-border data flow were raised in this paper, the social and economic effects of such flow were raised as the motivation for the formulation of the computer/communication policy statements.⁴⁵

Computer-communication policies were required, according to Pelletier, because of: the rapidly growing. pervasiveness of computer-communications throughout the social and economic fabric of Canada; the need for an active federal role in helping to ensure the development of computer-communication for the benefit of Canadian society; the desirability of fostering a unified approach to the availability of computer-communication services through Canada within the Framework of the authority of federal and provincial governments; the need to encourage private innovation and initiative in the establishment of computer-communication goods and services; and because of the necessity for protecting and maintaining Canada's presence in the computer-communication industry in the face of a strong competition offered by the dominant position of U.S. technology and the continuing extension of U.S.-based services into Canada. 46 (My emphasis)

In order to ensure discussion and implementation of the policy actions espoused in the paper, the Minister of Communications recommended that the Department of Communications and the Department of Industry, Trade and

Commerce strengthen strategic planning capabilities in the computer/communications area.⁴⁷ He also promoted the establishment of an inter-departmental committee having broad policy and program coordination responsibilities under the auspices of the Department of Communication, since, he explained:

> As computer/communications are a key area of industrial and social activity, the complex situation in Canada requires a mechanism by which the various policies and policy alternatives are related to each other and analyzed with respect to their total impact, and from which the results of such analyses can be fed back to responsible policy bodies for interpretation.⁴⁸

An Interdepartmental Committee of Computer/Communications Program and Policy Coordination was thus established in 1973 to propose appropriate computer/communication policies.

However, the most thoroughly researched work on computer/communications issues and problems of data flow during this period was not attempted by this Interdepartmental Committee, but by three Canadian lawyers working in various advisory capacities for the Canadian Government. In an influential article appearing in the <u>American</u> <u>Journal of International Law</u> (1974) entitled: "The Transborder Transfer of Information by Communications and Computer Systems . . .," Allan Gotlieb, Charles Dalfen, and Kenneth Katz outlined a Canadian perspective on the legal problems arising from U.S.-Canada data flow.⁴⁹ They focused ón three major legal concerns: issues of national and 'informational' sovereignty; implications of data flow for the territorial basis of national jurisdiction and regulatory law; and legal difficulties arising from application of domestic laws to control Canadian data transferred and stored by foreign interests.⁵⁰

Issues of national sovereignty develop, according to these authors, from a hypothesis that foreign control of the flow and storage of information in computer/communications systems will alter national decision-making, cultural identity, national security, and social policy, and will threaten:

> . . . the state's ability to obtain access to information central to its government decisionmaking process in such fields as corporate and consumer relations, health, and insurance; to its judicial and administrative processes, and to the rights of its citizens in relation to all of these.51

Possible effects of data flow and storage such as loss of political, economic, and cultural independence resulting from the extra-territorial exercise of power forces imposing an economic dependency (through control of the content and channels of computer/communication technologies) are included within the purview of problems of what Gotlieb, Dalfen, and Katz refer to as 'informational sovereignty.'⁵² However, the sovereignty of states, according to international law, "still refers to the legal powers it has to control national policies and to exercise jurisdiction over a specific tract or territory."⁵³ Problems of defin-

ing national sovereignty and of providing international protocols for the extra-territorial application of domestic laws thus became paramount in the realm of international communication law. As D. Smith stated in <u>Inter-</u> national Telecommunication Control 2 (1969):

> When the source of the telecommunication is beyond the boundaries of the state, problems of control arise that have yet to find an adequate solution in terms of international law. It becomes necessary to distinguish between the rights of the state to do what it pleases within its own territory and the claim of that state to legally object to an activity originating beyond its borders but which has an internal effect.⁵⁴

In response to these posited implications of crossborder data flow, Gotlieb, Dalfen, and Katz reviewed the possible economic measures available to states such as incentives to national network operators, and legal measures of a restrictive nature such as prohibition of the licensing of an operation and the registration and duplication of data, in order to stem the one-way flow of computer-communication goods and services from Canada to the United States. However, these authors argued against the imposition of restrictive measures, in favor of the drafting of a set of guiding principles to be embodied in bilateral and multilateral agreements on transborder data flow, because such agreements would minimize the negative aspects of data flow and maximize their economic advantages. 55 They asserted:

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. . . since . . . international data flow and foreign storage in North America are closely tied to the flow of goods and services, it seems that the better solution must necessarily take account of the international economic environment within which the data flow occurs.⁵⁶

C. Stage Three: Regained Interest / 1977-1982

The Interdepartmental Committee of Computer-Communications Program and Policy Coordination was disbanded in 1977, partially due to the low priority status accorded to transborder data flow and related computer-communication issues during the second stage, or the years 1973-1977. However, the re-introduction of computer-communication issues to the government policy agenda occurred in 1977, when the Department of Communications received inquiries from Canadian businessmen in regard to federal responses to the transfer of data processing activities from Canadian subsidiaries of U.S. companies to parent U.S. headquarters.⁵⁷ The principal economic implications of northsouth/cross-border data flow and storage raised in the Telecommission, Science Council, and Task Force reports were strongly reiterated in 1977 by the Canadian Minister of State for Science and Technology, J. Hugh Faulkner, who maintained that the:

> . . . rapid advances in computer and telecommunications technologies have combined to accentuate the problems of national control of national destinies. The importation of information services resulted in lost revenues

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of \$150 to \$300 million in 1976; further this practice has cost Canadians 30,000 to 40,000 jobs through either loss or lack of creation.⁵⁸

In his August 1977 address to the Congress of the International Federation for Information Processing Societies, meeting in Toronto, Faulkner outlined five major implications of transborder data flow -- implications which have been cited and recited in subsequent Canadian policy documents. These dangers included: the potential of growing dependence rather than interdependence; the loss of employment opportunities; an addition to balance of payments problems; the danger of loss of legitimate access to vital information; and the possibility that industrial and social developments will largely be governed by the decisions of interest groups residing in other countries.⁵⁹

The official government response to the Canadian industry queries on possible economic losses in computercommunication, was the 1978 Department of Communications publication of another report, called: <u>The Growth of</u> <u>Computer/Communications in Canada</u>, which was the first attempt by any national government to quantify the economic implications of transborder data flow.⁶⁰

The authors of this report projected losses by 1985 of more than 1.5 billion dollars and of more than 24,000 Canadian jobs due to the flow of processed data from the United States to Canada.⁶¹ The transfer of data processing and communication activities out of Canada and the parallel

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transfer of management and management support functions were also examined as part of the general quantitative analysis of the computer-communication industrial infrastructure in Canada.⁶² However, the study was conducted when the computer-communication Secretariat was disbanding, and the inadequacies of the data base as well as other methodological problems with the study were highlighted by the consulting firm of Price Waterhouse Associates in 1981, when they attempted to assess the economic implications of transborder data flow.⁶³

Canadian government computer-communication policy discussions in 1977-78 focused almost exclusively on the major issues of 'transborder data flow.' The appearance of 'transborder data flow' as the major Canadian policy term to categorize the problems of computer-communication was motivated by at least two factors. First, the implications of cross-border/north-south data flow and storage were recognized as integral problems of Canadian communication since the founding of the Department of Communications, and this issue reached full maturation when Canadian industries "expressed some apprehension on the economic implications of data flow. Second, increased international attention over the economic, social, and political uses and effects of computer-communication technology as an integral component of national development, had resulted in the establishment of study groups on 'informatics' and 'computer, communication, information

policy' within such international fora as the Organization for Economic Cooperation and Development, which organized a 1977, conference on 'Transborder Data Flows and the Protection of Personal Privacy' (the so-called Vienna Conference). Thus, domestic pressures for federal responses to economic implications of U.S.-Canadian data flow, and the increased international recognition of 'transborder data flow' as a major computer/communication policy issue facilitated the emergence of transborder data flow as the primary issue of Canadian Government computer/communication policy analysis. However, international concern over the implications of transborder data flow on the protection of personal information transferred in computer/communication networks was not echoed by the Canadian Government, which used the term 'transborder data flow' to signify the wide range of economic and political implications of a U.S.-dominated computer-communication market in North America -- implications united by the underlying concern over threats to Canadian sovereignty. Indeed, as stated earlier in this chapter, the Canadian Task Force on Privacy and Computers concluded in 1972 that economic -- not privacy issues -were paramount when analyzing the flow and storage of data about Canadian individuals and institutions.

Policy research on Canadian problems of transborder data flow was initiated in 1978, when the Institute for Research on Public Policy organized a conference on

'Issues of Canadian/U.S. Transborder Computer Data Flows, on September 6, 1978, in Montreal.⁶⁴ Representatives from the Canadian and U.S. governments and delegations of computer industry executives and academics participated in panel discussions on perceived problems of transborder data flow. The Institute for Research on Public Policy published the proceedings of this conference in 1979, with the stated goal of providing research to "help policy makers and the information processing community appreciate the various factors which must be considered in developing transborder data flow policies."⁶⁵

The Canadian Department of Communications was unofficially represented at this conference by Dr. Peter Robinson, a statistician who participated in the research undertaken to produce the 1972 Branching Out and 1978 The Growth of Computer/Communications in Canada reports. During November 1978, he made presentations on Canadian Government concerns on transborder data flow to an International Conference on Data Regulation, in New York, and he subsequently served as Canada's unofficial spokesman of transborder data flow at various international computer, science, and government conferences from 1979-1982, as well as co-authoring a report on National Policies and the Development of Automated Data Processing in 1979.66 Robinson's attempts to articulate Canadian problems in computer/communication were based on the findings of the earlier Canadian Government reports on computer/communi-

cations and on the need to recognize the salient issues of economic and cultural sovereignty over problems of privacy protection.⁶⁷ His experience as a professional statistician helped him to recognize and cogently argue the need for research and analysis in order to obtain valid quantitative estimates on the actual patterns of north-south data flow before taking firm policy actions in the area. He also understood the strategic importance of the issues of transborder data flow and acknowledged the necessity of formulating specific national policies for the rational development and regulation of Canadian computer/communications.⁶⁸

Dr. Robinson's unofficial arguments for specific policy actions based on research and analysis went unheeded as transborder data flow emerged as a highly volatile and misunderstood issue of public policy in 1978-79. The Toronto Sunday Star, for instance, reported the impending dangers of transborder data flow on July 8, 1979, stating that:

> The U.S.A. may soon own all our secrets -unless we start insisting that computerized information stay this side of the border. Super computers and international communications lines -- a pair of blinking, beeping modern marvels that are supposed to help everyone find the good life -- may be combining instead to sap Canada's secrets, its chance for progress, and even its abilities to make what industry we have behave, according to the worried computer experts in the business world and civil service.⁶⁹

Perhaps the most dramatic characterization of transborder data flow was presented in Telecommunications for Canada (1979), the report of the Clyne Committee on the Implications of Telecommunications for Canadian Sovereignty.⁷⁰ The Clyne Committee served as a policy advisory body only, thus its recommendations did not bear the stamp of official government policy. In the Clyne report, seven major implications of transborder data flow were documented and indicated an increasing Canadian reliance on U.S. computer-communication goods and services.⁷¹ The Committee, repeating already nine year-old statements from earlier reports and studies, concluded that the effects of transborder data flow inreduction of Canadian control over disruption cluded: of services and loss of Canadian power ensuring protection against invasions of personal privacy and computer crime; jeopardization of exercise of Canadian jurisdiction over companies operating in Canada which store and process data abroad; undermining of the Canadian telecommunication system by satellites which import data into Canada; entailment of the risk of publishing confidential information; erosion of cultural independence through imported videotext services; and facilitation of the extraterritorial application of U.S. laws.⁷² Based on the above-mentioned scenario, the Clyne Committee recommended that:

The government should act immediately to regulate transborder data flow to ensure that we do not lose control of information vital to the maintenance of national sovereignty.⁷³

Suggested courses of action embodied in Recommendation 24 of the Clyne Report included the launching of a national awareness campaign to expand Canadian expertise in the computer/communication (or 'informatics' area; promotion of education and training programs; and the establishment of requirements that data processing related to Canadian business operations be performed in Canada through possible revisions to the Canadian <u>Bank Act</u> and <u>Combines Investi-</u> <u>gation Act</u> which could prohibit the exportation of data for processing and storage in foreign countries.⁷⁴

Despite the dramatic demand for immediate transborder data flow regulation by the Clyne Committee in 1979, no transborder data flow regulations were formulated nor implemented by the Canadian Government. Official Canadian Government response to the Clyne Committee recommendations was the establishment of an Inter-Department Task Force on Transborder Data Flow two years later, in 1981.⁷⁵ This Task Force is designed to provide a mechanism for joint planning of federal program and policies and for coordina-, tion of interdepartmental research on areas of transborder data flow; and will advise the Government on transborder data flow policies by submitting a report to the Minister of Communication which is to be based on studies conducted by its three Working Groups on Economic, Sovereignty, and

International Aspects of transborder data flow.⁷⁶ Because of governmental recognition that transborder data flow policy transcends the limited jurisdicational areas covered by singly government agencies, members of the Task Force include representatives from the Departments of External Affairs; Consumer and Corporate Affairs; Finance; Industry, Trade, and Commerce; Justice; National Defense; and Communications, and from other gevernment agencies and organizations.⁷⁷

The continual formation of inter-departmental and advisory task forces and committees which issue nonofficial reports on problems of U.S.-Canadian data flow and storage thus characterizes Canadian policy action in the transborder data flow area. To some Canadian computer industry spokesmen, this government strategy may be one of 'analysis ad-infinitum.' Ian Sharp, President of I.P. Sharp & Associates, a Canadian-based multinational computer service bureau, for example, has complained about the high costs of computer/communication hardware in Canada and the resulting data flow problems in the Department of Communications' own magazine, <u>In Search</u>.⁷⁸ Mr. Sharp, referring to continuing government non-action, asserted:

> We've been attacking them on this for twenty years, but nothing has happened except continuous studies. The most we can hope for is another study.⁷⁹

A high-ranking official at the Department of Communication has explained his government's penchant for producing non-official task force reports as representing '2 by 4 tactics' which express Government concern over vital transborder data flow issues without bearing the responsibility for articulating formal Canadian policies on specific problem areas. 80 This reluctance to act on specific issues of transborder data flow -- actions such as the encouragement of Canadian competition in the computer/communications markets through reduction of high tariffs on hardware or changes in government procurement policies, or the imposition of restrictive measures to limit or stop U.S.-Canadian data flow, is based on the 'currency' of transborder data flow issues and on the lack of knowledge and understanding of the full effects of transborder data flow, according to this official.⁸¹ In an interview with the author of this thesis, he stated: "We know so little about transborder data flow, and it is premature for any government to come out with any dogmatic statements of policy."82

Because transborder data flow is primarily viewed by the Canadian Government as a policy term reflecting fundamental issues of bilateral trade with the United States and centering on notions of economic and cultural sovereignty, estimation of the consequences of Canadian transborder data flow policy actions and non-actions can only be forwarded after a review of United States transborder

data flow policies and responses to Canadian initiatives. Since provisions of trade legislation pertaining to the control of transborder data flows have not been used by the Canadian Government so far, such Canadian trade legislation will only be discussed in the final thesis chapter, where possible Canadian transborder data flow policy alternatives are enunciated.

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NOTES: CHAPTER TWO

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⁸¹ Same as no. '80.
⁸² Same as no. 80.

CHAPTER THREE

U.S. DATA FLOW POLICY - YAWNS FROM A GIANT?

. . . There is a clear and present world-wide trend toward economic war in the information industries. Competition and restriction affecting United States based enterprises are increasing. Our national security, which today rests on a strong economic base and on the capability to maintain leading surveillance technology, and clear growth paths in our strong suits of electronic systems and information systems are at stake.

John Diebold (1980)

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Introduction

If Canadian communication policy has been described as two-faced, then U.S. communication policy may be characterized by some as 'no-faced." Tedson J. Meyers, a Washington D.C.-based communication lawyer, for example, has articulated this perspective in a presentation entitled: <u>Transborder Data Flow:</u> The U.S. Non-Position (1982).² He argues that the United States has neither the tradition, tools, nor temperment to construct communication policy, and possesses no cohesive structures for policy formulation nor clear policies in specific areas such as transborder data flow.³ Because the United States speaks with no single voice or representation in this area, Meyers characterizes U.S. transborder data flow policy as 'yawns from a giant.'⁴ Other communication policy experts would disagree with Meyer's picture of the yawning giant, and would suggest, in fact, that the giant has stopped yawning and is flexing its limbs across the world. Herbert I. Schiller, for example, in <u>Who Knows: Information in the Age of the</u> <u>Fortune 500</u> (1981), contends that there is a coordinated U.S. government-industry strategy to promote U.S. commercial, military, and political hegemony through unrestricted transborder data flows.⁵ Perhaps there are elements of truth in both extreme representations of U.S. transborder data flow policy. The 'Yawning Giant' and the 'Active Giant' may indeed be the same creature.

The history of the development of U.S. transborder data flow policy is short, confused and full of contradictions. In spite of this, three different periods can be distinguished. These are: 1) Data Flow Policy as Reaction (1976-1979); 2) A Year of Heightened Sensitivity (1980); and 3) The March of Proposals (1981-1982). United States definitions and policies on transborder data flow during these periods may be summarized in the following fashion. Firstly, transborder data flow issues have been considered by U.S. governmental organs which are responsible for formulating and implementing international communication policy -- the Departments of State, Defense, and Commerce; the National Security Council; the U.S. Trade Representative; the Federal Communications Commission, as well as many congressional committees and subcommittees.

This administrative framework reflects the broad importance of international communication issues such as transborder data flow for major military, political, and economic interests of the U.S., but also suggests a haphazard history of organizational improvisation for international communication responsibilities. Both of these facets will be explored further in this chapter.

Secondly, transborder data flow issues are viewed exclusively within the multilateral context of the preservation of U.S. domination of international trade in computer-communication goods and services. This policy. perspective results from the fact that U.S. Government policy formulations and actions have been initiated and constrained by the interests of U.S. corporations which rely on unhindered and unmonitored international data flow for their economic viability. These corporate entities include: manufacturing service bureaus of major computer firms; software vendors; international record carriers; independent U.S. service bureaus which offer value-added/enhanced network services through leased transmission lines from foreign telecommunication authorities (P.T.T.s) and multinational corporations, especially in the banking, airline, and automobile manufacturing industries.

Because of the corporate connection, U.S. transborder data flow policies have been restricted to the negotiation of non-tariff barriers to trade in goods, services, and

invisibles; the harmonization of national data protection laws and technical standards for data transmission and security; and to the drafting of legislation for the imposition of reciprocity conditions on the trade of computercommunication goods and services in specific bilateral situations.

No single United States agency has historically maintained exclusive control and comprehensive responsibility for international communication policy. Rather, as Vincent Mosco argues in "Who Makes U.S. Government Policy in World Communications" (1979), policy-making has been divided between private corporations and U.S. government organs.⁶ In "Government Regulation of International Telecommunications" (1976), Frank P. Grad and Daniel C. Godlfarb analyse this distribution of authority and function for international communication among the various government agencies, and they conclude that the lack of a unified policy structure was not the result of planned allocation, but rather: "The assignment of functions in the past was in response to problems resulting from the particular technical or industrial development in the field."7

A detailed history of the varied federal mechanisms for international communication policy is offered in Thomas E. Will's <u>Telecommunication Structure and Manage-</u> <u>ment in the Executive Branch of Government</u> (1978).⁸ These federal responsibilities and mechanisms for international

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communication policy have shifted from President Truman's creations of the post of Telecommunications Advisor, to President Eisenhower's assignment of this post to the Office of Civil and Defense Mobilization, to President Kennedy's establishment of the position of Director of Telecommunications Management, to President Johnson's appointment of the Rostow Task Force on Communications, to President Nixon's founding of the Office of Telecommunication Policy, and finally to President Carter's creation of the National Telecommunications and Information Administration and the International Communication Agency.⁹

The constantly changing federal policy mechanisms for international communication is matched by the segmented congressional responsibilities in this area, where there are varied House and Senate committees and subcommittees with overlapping concerns. Future research may confirm whether the range of administrative responsibilities for international communication accrued haphazardly over time as new technologies developed and issues arose. The findings of this thesis on the mechanisms for transborder data flow policy would tend to support this generalization.

The lack of a unified international communication policy structure serves as the background for a consideration of the history of U.S. transborder data flow policies -- a history which will be conceived as a form of 'horse race' between different government agencies. Con-

gressional committees have even argued that the relevance of transborder data flow issues rests in the fact that U.S. handling of such issues indicates the supposedly dangerous fragmentation of government responsibility for international communication policy, which must be corrected by the creation of more government mechanisms, or in other words, by the addition of more horses to the policy field. As will be argued, most of the government organizations in the international communication and transborder data flow policy track have no clear idea of where the finish line is located, nor even of the means to arrive there.

A. Stage One: Data Flow Policy as Reaction (1976-1979)

Despite the work of State Department Advisory Groups and Bureaus, policy action from 1976-1979 was reactive, not active. The State Department and the National Telecommunications and Information Administration limited their transborder data flow policy functions to reacting to Council of Europe, U.N.E.S.C.O., Intergovernmental Bureau for Informatics, and O.E.C.D. initiatives in the computer-communication arena, rather than to developing specific policies or implementing broad strategies to counter tariff and non-tariff restrictions to the international trade of computer-communication goods and services. However, government awareness of transborder data flow issues was initiated by industry concerns precisely

on the effects of international data legislation on trade.

Problems of international computer-communication suchas transborder data flow were not formally recognized by any U.S. governmental agency until December 6, 1976, when an Interagency Task Force on Information, Computer, and Communication Policy was called into being by the Deputy Assistant Secretary for Advanced and Applied Technology of the State Department.¹⁰ The purpose of this Task Force. which was composed of eleven representatives from the Departments of State, Commerce, and other federal agencies, was to provide guidance on U.S. participation in a new structure of the Organization for Economic Cooperation and Development, entitled: "The Working Party on Information, Computers, and Communication Policy."¹¹ At their December 6, 1976 meeting, the Interagency Task Force discussed possible approaches to the O.E.C.D. Working Group, and also formally recognized the area of transborder data flow, realizing but not acting upon the obvious conclusion that "With respect to Transborder Data Flow issues, the question of markets was emerging as the more critical issue than privacy."¹²

The Task Force met for a second time on January 12, 1977 with new representation from the Federal Communications Commission and the Office of Management and Budget, to plan proper U.S. diplomatic responses to growing legislative restraints to the international flow of data, (as embodied in various European national data protection and

privacy laws and a Council of Europe decision to create an international convention concerning privacy in transborder data flows).¹³ Proposals to open channels for private industry participation in the Interagency Task Force and to complete work on defining issues and available U.S. options, were also reviewed at this meeting.¹⁴

The primary issues paper for setting U.S. transborder data flow policy in reaction to O.E.C.D. and Council of Europe initiatives, was drafted for the Interagency Task Force in 1977 by Morris Crawford of the State Department's Bureau of Oceans and International Scientific Affairs.¹⁵ In <u>U.S. Interests in International Data Flows</u>, Crawford initially reviewed the economic interests in the international computer-communication trade sector, and disparaged Canadian and European transborder data flow concerns as 'fears,' 'notions,' and 'anxieties' arising from "watching American companies carrying off the lion's share of the rich data processing market."¹⁶

The U.S. interests in international data flows to be safeguarded in O.E.C.D., Council of Europe, and other international fora, according to Crawford included: 1) protection of personal privacy of U.S. citizens; 2) harmonization of data protection laws in order to avoid a proliferation of contradictory laws posing nuisances and substantial disincentives for multinational corporations; and in order to minimize potential problems that U.S. firms could suffer under data protection laws; 3) restriction

of non-tariff barriers that could prevent or hinder the operations of U.S. firms in foreign markets; and 4) protection of the free international flow of data.¹⁷ Crawford suggested several courses of action to promote these interests, including the negotiation of regulatory standards for the international operation of automated data processing installations, and the development of appropriate multilateral, bilateral, and unilateral actions depending on particular issues and controversies.¹⁸

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The Interagency Task Force on Information, Computers, and Communication Policy met nine times in 1977 to review privacy protection legislation and to plan U.S. representation on the O.E.C.D. Working Party and in its planned 1977 Symposium on Transborder Data Flow.¹⁹

In May 1977, the Task Force recommended that the State Department's Advisory Committee on Transnational Enterprises consider data flow issues, through the establishment of a special working group.²⁰ This group was indeed formed eight months later, in January 1978 under the designation 'Advisory Group on International Data Flows of the State Department Búsiness Advisory Committee on Transnational Enterprises.²¹ An Interagency Task Force with assigned responsibilities for reviewing and developing U.S. positions on privacy protection and international data flows was also created by the National Security Council in September 1977.²²

Since 1976, U.S. corporate executives had argued for specific government policies on international trade aspects of transborder data flow, such as the removal of non-tariff barriers to the international trade of computer-communication goods and services. Representatives from I.B.M., for example, had maintained that:

> . . . trade in information goods and services should be integrated into the overall U.S. strategy for international trade and investment policy. More and more . . . the growth of international trade has been heavily dependent on the free flow of information (which) is necessary not only to communicate worldwide engineering design, manufacturing, and customer requirements, but also to move financial and operation information among our various organizations.²³

The establishment of the Business Advisory Working Group on International Data Flows (chaired by the Head of a major computer manufacturing and service firm) and the stated Interagency policy position to protect corporate interest in the international flow of data resulted in the almost exclusive placement of transborder data flow policy issues and actions within the domain of international trade.

Indeed, from 1977-1980, a litany of barriers to U.S. trade in computer-communication goods and services was recited by corporate representatives. These barriers included tariffs and discriminatory pricing; inconsistent technical standards; monitoring of information; restrictions and denials of market entry; and national concerns over privacy, sovereignty, cultural erosion, technology

transfer, and extra-territorial application of laws. Lawyers working in the computer-communication area such as John Eger, also added telecommunication tariffs, standards, and protocols; informatics strategies; and national responses to computer vulnerability to the growing list of barriers to trade of U.S. computer-communication goods and services. 24 However, corporate representatives and analysts did not specify exactly what particular barriers could mean to a company's operation, nor which barriers engendered more harmful effects than others. The list of barriers continued to grow during this period but evidence of effects and a hierarchization of potential and actual effects were not forthcoming during this period. The loud 'alarm' of barriers was raised but little intelligence was garnered to ascertain the strength or even existence of the enemy.

Despite the work of the various Advisory Groups on transborder data flow, State Department control over policy development and coordination in the international computer-communication arena was limited, although the Department was given primary responsibility for foreign policy issues in telecommunication and international computer-communication issues under a Presidential Task Order in 1977.²⁵ The State Department treated the range of transborder data flow issues as separate concerns to be addressed by such widely separated units as its Bureaus for International Affairs, Economic and Business

Affairs, Legal Advisors Office, and Policy Planning Staff.²⁶ These bureaus maintained varied responsibilities for transborder data flow, reported to different authorities, and represented the United States in international fora with little coordination of activity.²⁷

For example, a staff-level interagency working group was organized within the Bureaus of Economic and Business Affairs to react to international data flow issues arising in the O.E.C.D. and in the Intergovernmental Bureau for Informatics.²⁸ A separate working group was organized within the Bureau of International Organizations to react to information/communication issues discussed in the U.N. and U.N.E.S.C.O.²⁹ Negative implications of the scattered responsibilities for transborder data flow policy became evident when the State Department was directed to report to Congress on international information and communication In its January 1979 report, International Communiissues. cation Policy, the State Department indicated that the Interagency Task Force on Transborder Data Flow would identify existing and potential restraints on data flow, assess the impact of these constraints on U.S. corporate and national interests, and prepare specific transborder data flow policy recommendations by June 1979, in a special report.³⁰ That report was never filed.³¹

B. Stage Two: A Year of Heightened Sensitivity (1980)

The first U.S. congressional hearing on transborder data flow problems were organized in March 1980 because of the increasing impatience of corporate executives and government representatives.³² They conducted a public relations campaign to alert government policymakers to the problems of data flow as reflected in the growing list of barriers to trade and in Canadian, Western European, and inter-governmental policy papers on privacy. sovereignty, and trade dimensions of data flow.³³ Congressman Richardson Preyer's Subcommittee on Government Information and Individual Rights of the House of Representatives Committee on Government Operations met in March 1980 to uncover the nature of transborder data flow issues and explore how the U.S. Government was organized for policy determination, regulation, and action in interna-. tional communication affairs.³⁴

Corporate officers such as Robert Walker of Continental Illinois Bank, Philip Onstad of Control Data Corporation, John Rankine of I.B.M., Harry Freeman of American Express and other representatives of multinational financial organizations and computer manufacturing and service firms argued in these congressional hearing for a coordinated government effort, spearheaded by the U.S. Trade Representative, in two major areas. First, they promoted the construction of effective regulations and negotiating
bodies to counter international data communication restrictions. Second, they recommended that the government organize mechanisms for the formulation and implementation of broad communication and information policies. Transborder data flow policy, according to these corporate representatives, was mandated by crucial international trade demands. Philip C. Onstad, Director of Telecommunication Policies for Control Data Corporation testified on March 10, 1980, that:

> International telecommunications services are the pipeline through which information necessary to international trade in products and services flow. Control of international telecommunications services, is, therefore control of international trade in products and services. Accordingly, it is essential for the United States for this lifeline which underlies international trade to be handled in an effective, efficient, and coordinated manner. Establishment of overall policy for international communications and information flow, negotiations of basic ground rules for services, and implementation and enforcement of U.S. international telecommunications and information flow policy should be placed within one entity in the U.S. government.35

Robert Walker, a Vice-President of Continental Illinois Bank of Chicago concurred with Onstad's recommendation, asserting that:

> . . . any regulation, legislation, tariff, or tax which could inhibit the free flow of data will seriously affect not only U.S. banking and business abroad, but will stunt the continuing development and maturation of international trade. 36

Public Officials such as William Colby, former Director of the Central Intelligence Agency, stressed the importance of the international flow of all types of information for national security.³⁷ He also cited Swedish, Japanese, and Canadian worries about transborder data flow (as embodied in documents such as the Clyne Report) to alert the subcommittee that the "principles and concepts of the free international flow of information are on the defense in all parts of the globe."³⁸

More congressional hearings on international data flow were held in 1981 and dealt with the same list of trade barriers and recommendations for reorganization of government responsibilities for international communication at the 1980 hearings. The same governmental representatives and corporate officials spoke at different congressional committee hearings. Geza Feketekuty, the then Assistant U.S. Trade Representative for Policy Development, for example, presented the trade problems of U.S. firms in computer-communication markets at April 1981 hearing on 'Telecommunications and Information Products and Services on International Trade' before the House Subcommittee on Telecommunications, Consumer Protection, and Finance of the Committee on Energy and Commerce. 39 He reiterated the traditional categories of trade barriers, claiming that the international trade problems mainly fell in the areas of regulation of transborder data flows, restrictions on the use of foreign data processing faci-

lities, regulation of services, and the establishment of discriminatory standards, rates, and regulations for communication services.⁴⁰

Feketekuty also submitted written testimony to the committee which originated in a survey of major computercommunication industry executives on perceived trade problems of international data flow.⁴¹ In a country-bycountry computer print-out of potential and actual trade problems, Feketekuty listed more than thirty-five barriers to the international trade of computer-communication goods and services according to U.S. firms.⁴² Again, the quest for quantification was apparent -- actual implications of specific barriers were given cursory treatment, and one could not determine from the list which barriers were most harmful to corporate operation and why. The following major trade restraints were identified in Feketekuty's list: network controls; technical standards imposed on hardware; access to regional networks; policies which require general and financial data processing functions to be performed within a country; discriminatory gavernment procurement subsidies and support of domestic computer-communication hardware and services; import controls and excessive tariffs on computer-communication hardware; telecommunication rates and rate increases based on considerations other than cost; value-added taxes on information; restrictions on commercial visas limiting the ability of firms to market and maintain their services; lack of

patent and copyright protection; import duties on automates systems; restrictive foreign exchange regulations; discrimination in customs valuation between computer-data processing services transmitted through telecommunication networks or transferred physically; and discriminatory licensing restrictions.⁴³

In spite of the wide range of barriers to U.S. trade in computer-communication goods and services compiled by corporate, legal, and trade experts, House committee reports such as International Information Flow: Forging a New Framework (1980), 44 and reports for bills such as H.R. 1957 - the International Communications Reorganization Act of 1981⁴⁵ concluded that the U.S. Government had no coordinated general and/or specific policies regarding barriers to data flow and that regulatory authority to develop policy was divided among and within government agencies such as the National Telecommunications and Information Administration, the Federal Communications Commission, and the Departments of State, Treasury, and Commerce.⁴⁶ Thus, transborder data flow policy was considrered to be fragmented, confused, and non-existent. 47 The authors of the H.R. 1957 report concluded that:

> The United States Government simply has not done the job. Although we spend millions in total on the development of international communication and information policy, we get little return on the investment. The sum of all this is that the United States Government has yet to undertake the planning, setting of priorities, development of policy, and real coordination of effort to get the job done.⁴⁸

The authors concluded that barriers to the international flow of data "injure the ability of all businesses and individuals to engage in international communications and commerce," and could damage the economic, social, and political interest of all nations, especially the interests of the United States.⁴⁹ A 1980 revision to the Canadian <u>Bank Act</u> was misconstrued as a clear and present danger to U.S. economic interests through application of supposedly crippling limitations to the operation of U.S. financial enterprises and data processing service providers which support Canadian banking activities.⁵⁰ The actual ramifications of this Canadian Act will be explored later in this thesis.

The Committee on Government Operations proposed that the only effective responses to the international trade problems did not originate from the State Department, but, rather, from the senior levels of the International Trade Administration within the Department of Commerce.⁵¹ The Commerce Department's National Telecommunications and Information Administration appeared to be 'lost in the shuffle' as a government source acknowledged that "The Defense Department doesn't accept its leadership domestically, the State Department doesn't accept it internationally, and the F.C.C. does its own thing and pays no attention."⁵²

C. Stage Three: The March of Proposals (1981-1982)

After years of governmental disorganization at handling international communication issues, bills such as <u>H.R. 1957</u> and <u>S. 891</u> were forwarded in 1981 to establish a cabinet-level interagency committee which would policy coordination within the government and between the government and the private sector.⁵³ The authority of this committee to formulate and implement international communication policy was to be conferred through the transfer of functions for final authority and presidential advisory responsibilities from the State Department, Commerce Department, and the International Communications Agency.⁵⁴

The scope of the Committee's responsibility and authority, based on the transferred power, were to include: "concern for the full range of problems arising from the worldwide reconsideration of international communication policies and the flow of information," -- problems such as restrictions on advertising, television broadcasting, satellite communications, and difficulties arising from the growth of data communications and data processing for record-keeping.⁵⁵ Exclusive authority for planning and carrying out international communication policy was vested in the Committee by Section 4(b) of <u>H.R. 1957</u>, which stipulated that:

> . . No federal agency may issue any policy statement, engage in any consultation, establish any policy, or implement any policy change re-

The Committee was to be composed of the Secretaries of Commerce, State, and Defense; the Chairman of the F.C.C.; the Director of the Office of Management and Budget; and the U.S. Trade Representative.⁵⁷ The designation of this latter official as chairman of the Committee was based on recognition of the Office of the U.S. Trade Representative

as the:

. . . only agency which has recognized the limits of its responsibilities and expertise in international communications and information policy. Unlike other agencies, it has neither asserted nor sought control of the policymaking process. Equally important, the U.S.T.R. has done the best job of meeting its responsibilities.⁵⁸

The legislative reforms of international communication policy mechanisms are still under consideration in the Congress. Whether the sweeping administrative changes embodied in bills such as <u>H.R. 1957</u> are acted upon and whether a cabinet-level Interagency International Communication Policy Committee is formed or not, the recent legislative activity indicates a growing dissatisfaction with the previous governmental handling or non-handling of international communication issues such as transborder data flow, within such organs as the State Department and the National Telecommunications and Information Administration. The activity also points to a governmental attempt to confine all problems of international communication within the conceptual province and administrative authority of those agencies responsible for international trade, such as the International Trade Agency and the U.S. Trade Representative's Office.

The importance of international communication issues such as transborder data flow for U.S. commercial, military, and political interests was also raised by the State Department's Acting Coordinator for International Communications and Information Policy, William C. Salmon, in a policy paper which was drafted in August 1981 and submitted to the House Government Information and Individual Rights Subcommittee.⁵⁹ The text of the paper stressed the need for maintaining transborder data flows due to both commercial interests and national defense reasons. Accordingly, Salmon stated that:

> Effective communications and information resources are of fundamental importance to strong U.S. military capabilities, for deterrence and defense, arms control and peacekeeping efforts, and contribute greatly to international peace and security.⁶⁰

Salmon presented seven major aims for U.S. international communication policy including the expansion of the free international flow of information principle to cover not only messages but communication delivery systems such as computer-communication networks.⁶¹ Secondly, he argued for increasing the economic benefits of communication and information technologies by broadening opportunities for competition, and investment, and by responding to protectionist practices of other nations in the international trade of computer-communication goods and services.⁶² Ensuring the flexibility and continuity of communication and information required to maintain national defense and international peace and security was the third major policy goal.⁶³ Finally, the maintenance of equitable access for users of the radio frequency spectrum and orbital position; enlargement of the communications and information capabilities of developing countries; stimulation of continuing advances in communications technologies; and improvement of the basis for policy development and implementation were given high priority as central goals of U.S. international communication policy.⁶⁴

International communication policy activity in the transborder data flow arena has mainly centered on the second objective of Salmon's paper, that is, addressing the international trade aspects of data flow. U.S. policy action on transborder data flow has not resulted from any radical administrative solution as advocated in as yet unpassed congressional legislation. Rather, current U.S. efforts are aimed at the negotiation of barriers to trade in services/invisibles in bilateral agreements with governments to resolve trade problems faced by major U.S. corporations; and in multilateral settings such as the O.E.C.D. and the G.A.T.T. where documentation and analysis of barriers to international trade in services such as problems of market access, comprise a major agenda of U.S.

activity.

In the first congressional hearings on transborder data flow, corporate representatives had argued that U.S. transborder data flow policy should be focused on preventing barriers to international data flow, and be placed under the authority of the U.S. Trade Representative's Office. In April 1981, Geza Feketekuty, the Assistant U.S. Trade Representative for Policy Development, had stated before a congressional subcommittee that the focus of international discussions on these trade barriers should rest on "the facilitation of data flows essential to international economic relations and to the development of mutually beneficial trade in goods and services" through O.E.C.D.-style multilateral negotiations on regulatory codes for international trade of computer-communication goods and services, (codes based on the right to import services and on agreements covering rates and taxes).⁶⁵

The Office of the U.S. Trade Representative has been recognized by congressional committees and policy experts as the major U.S. government agency providing in-depth analyses and policy strategies on transborder data flow. The emerging responsibilities of this office for transborder flow and trade in services problems suggest that the major U.S. policy perspective on transborder data flow will be aimed at the exclusive negotiation of barriers to the international trade of computer-communication goods

and services and the application of reciprocity legislation governing trade in these areas.

U.S. Trade Ambassador Brock has labeled trade in services as the "frontier of the expansion of U.S. export sales."⁶⁶ Though general estimates and figures on the gross value of world trade in services (\$650 billion in 1980) and the contribution of trade in services to U.S. economic growth and activity (65% of the U.S. Gross National Product) are based on scarce data and conceptual precision as to what exactly constitutes 'trade in services,' computer-communication services were included in the U.S. Trade Representative's industry-by-industry inventory of strategic trade in services sectors.⁶⁷ But just as definitional problems make the regulation of international communication issues such as transborder data flow so problematic and contentious, the phrase 'trade in services' is equally difficult.

In <u>Invisible Barriers to Invisible Trade</u> (1975), Brian Griffiths of the Trade Policy Research Center, London, attempted to define trade in services in terms of 'invisible trade barriers' which apply to trade in services, financial transfers, and flows of income earned on exports.

> . . . transactions in invisibles record the imports and exports of services between a particular country and the rest of the world; interest, profit, and divident receipts and payments connected with direct, portfolio, and other foreign investments and unilateral transfer payments.⁶⁸

Researchers in the U.S. Export Competitiveness Project of the Center for Strategic Studies at Georgetown University, have argued that analysis of the U.S. and international trade in services sectors have been inhibited by a "lack of readily available comprehensive data on the service sector and even a lack of consensus on the definition of the service sector itself."⁶⁹ These researchers attempt to define trade in services negatively: "The service sector broadly consists of those private sector industries not engaging in primary production activities."⁷⁰ They include financial, insurance, transportation, communication, education, health, and engineering industries within its scope.⁷¹

Although definitional problems of 'trade in services/ invisibles' abound, the U.S. Trade Representative's Trade Policy Committee approved a work program in 1981 which incorporated strategies for removal of barriers to trade in services/invisibles through inclusion of services in a review of export disincentives.⁷² Research on domestic legislative provisions for establishing reciprocity in services, and preparation of a set of rules, procedures, and regulations governing trade in services for multilateral fora were also planned.⁷³ Moreover, the U.S. Trade Representative recognized the international trade of computer-communication goods and services as an integral element of U.S. economic growth. According to this Office:

Technological advances in communications and data processing make these related industries one of the most dynamic and growing sectors of our economy and the source of the most significant increases in production over the next few years . . Our competitive strength in these industries has made export of telecommunication and data processing goods and services an increasingly important source of export earnings.⁷⁴

More importantly, major legislative proposals on reciprocity in international trade that are currently under congressional review will be able to markedly affect U.S. international communication and transborder data flow policies if they are passed into law. These legislative proposals include the international trade provisions of <u>S. 898, H.R. 5155</u>, and <u>H.R. 4177</u> (revision of the 1934 <u>Communications Act</u>); and such trade bills as the <u>Trade in</u> <u>Services Act</u> (S.2058); <u>Service Industries Commerce Development Act pf 1982</u> (H.R. 5519); <u>Reciprocal Trade and Investment Act of 1982</u> (S.2094); and the <u>Reciprocity in Trade</u>, <u>Services, and Investment Act of 1982</u> (S.2071).⁷⁵

The international trade provisions of the revisions to the 1934 <u>Communication Act</u> establish a policy of reciprocity for telecommunication equipment and services. For 'example, the stated purpose of H.R. 4177 is:

> To amend the Communications Act of 1934 to authorize the Federal Communications Commission to regulate the entry of foreign telecommunication carriers into domestic United States telecommunication markets under terms which are reciprocal with terms under which United States telecommunication carriers are permitted entry into the foreign markets involved.⁷⁶

Although such amendments were introduced to give the Federal Communications Commission specified authority to take action on trade issues of international computercommunication which they hitherto ignored or responded to in contradictory actions, problems of ambiguity such as a lack of definition for the phrase 'related service' in telecommunications may hinder application of such provisions.⁷⁷ Since the language of <u>H.R. 4177</u> does not specifically mention data processing or other information services, the bill may not be interpreted as giving the Federal Communications Commission authority to implement reciprocity provisions directly on foreign suppliers of computer-communication goods and services.⁷⁸

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The proposed international trade acts (<u>H.R. 5519</u>, <u>S. 2094</u>, and <u>S. 2071</u>) establish concepts of 'reciprocal market access' based on 'fair competition for goods, services, and investments' as cardinal principles of U.S. trade law and policy.⁷⁹ They also extend the authority of the President and the U.S. trade representative on individual foreign unfair trade practices by strengthening Section 301 of the Trade Act of 1974.⁸⁰

The <u>Trade in Services Act</u> (S.2058), for example, permits government regulatory agencies to consider U.S. access to foreign markets when establishing policies on the entry of foreign corporations into U.S. markets.⁸¹ The Act specifically restricts barriers to the international trade of computer-communication goods and services,

. . . explicitly reverses the U.S. policy of opposition to any economic barriers to the free flow of information. To the extent that this position becomes administration policy . . it will be harder for the U.S. to oppose economic barrier to the free flow of information imposed by other countries.⁸³

Although congressional and State Department officials expressed a desire to expand the notion of the 'free international flow of information' to cover all types of data, the inclusion of transborder data flow issues almost exclusively within the domain of international trade policy has alarmed policy experts.⁸⁴ According to Bushkin. international communication issues such as transborder data flow are fundamentally different and more complicated than those areas regulated by agreements on the exchange of goods or agricultural products.⁸⁵ Hé argues that information is not a simple resource nor commodity, and that one cannot make distinctions between those types of information having economic versus cultural significance nor can one enforce these distinctions.⁸⁶ Thus. he advised:

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We must not, in the name of fairness in trade, put ourselves in the position of inadvertantly substituting the negotiated concept of the fair flow of information for the fundamental principle of the free flow of information.⁸⁷

In conclusion, there are many unanswered questions on U.S. transborder data flow policy. Is United States transborder data flow policy a 'yawn from a'giant? What are the consequences of U.S. policy action and non-action in the transborder data flow policy arena, and how does U.S. policy affect Canadian policy and vice-versa? Why did U.S. transborder data flow policy evolve as it did, and what are the salient aspects and events of this evolution? Lastly, is there a contradiction inherent in the U.S. Government strategy of promoting both free flow of information and fair trade principles? The possible answers to these questions will be discussed in the next two chapters.

John Diebold, "Transborder Data Flows Raise Need for National Policy," <u>Hearings: International Data Flow</u>, 96th Cong., 2nd Sess., H. Dept., (Washington, D.C.: GPO, 1980), p. 157.

² Tedson J. Meyers, "Transborder Data Flows: The U.S. Non-Position," Eleventh Annual Conference, Canadian Council on International Law, Ottawa, 22 Oct. 1982.

³ Meyers, "Transborder Data Flows."

⁴ Meyers, "Transborder Data Flows."

⁵ Herbert I. Schiller, <u>Who Knows: Information in</u> the Age of the Fortune 500, (Norwood: Ablex Publishing Corp., 1981).

⁶ Vincent Mosco, "Who Makes U.S. Government Policy in World Communications?" <u>Journal of Communication</u>, 29, No. 1, (Winter 1979) p. 158.

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CHAPTER FOUR

POLICIES ON POLICY: THE PRODUCTION OF UNCERTAINTY

Whether we refer to overt or covert agencies of diplomatic, military, economic, or ideological intelligence, we are the servants of the C.I.A., the armed forces, the foreign trade and development agencies, the broadcasting services

Harold D. Lasmvell (1972)⁴

Introduction

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The multidimensionality, or opacity of 'transborder data flow' as a dynamic policy term reflecting a broad range of meaning, has been illustrated in the previous two chapters, where a short history of transborder data flow policies was offered. However, a definition of 'policy' has not yet been elucidated. This definition, in fact, becomes a central concern of this thesis, and it is necessary for a systematic analysis and evaluation of transborder data flow policy. Indeed, analyses of government communication policies are predicated on explicit and/or occulted definitions of the referent 'policy,' and of the proper methods for obtaining the appropriate knowledge of policy. In other words, a history of transborder data flow policy and an evaluation of this history can only be fully explicated when a definition of, or approach to policy is forwarded. The approach to defining communication and transborder data flow policy in this thesis is based on a critique of how policy players themselves define, discuss, describe, and delimit the field of inquiry. Thus, the determining power of definition is not in the hands of the researcher alone, but is derived from policy discourse. The use of pre-given definitions of policy may have the effect of obscuring aspects of policy not included, under the intended scope of meaning.

This chapter is devoted to a discussion of the major theoretical and methodological positions underlying traditional communication policy research, followed by the delineation of an alternate perspective for analysing communication policy. A comparative analysis of Canadian and United States transborder data flow policy is then used to illustrate the applications of such a policy perspective. It will then be argued that approaches which attempt to categorize policy according to a limited set of criteria such as 'fragmentation' and 'comprehensivenes's' fail to treat policy with necessary specificity.

A. The Legacy of Lasswell

The major theoretical, methodological, and political positions underlying traditional communication policy research were promulgated during the formation of the academic discipline of the 'Policy Sciences' in the early 1950s. This discipline, in fact, developed from the work of communication researchers, and by political scientists and sociologists who later conducted communication research. The major text or manifesto of the Policy Sciences,

entitled: <u>The Policy Sciences: Recent Developments in</u> <u>Scope and Method</u> (1951), was edited by Daniel Lerner and Harold D. Lasswell, and includes essays by Herbert Hyman, Paul F. Lazardsfeld, Robert K. Merton, and Ithiel deSola Pool, all major theorists and researchers in the second phase of communication studies.²

The emergence of 'Policy Sciences' as a distinct academic discipline and of communication policy research as a worthy subject of inquiry can be traced through the pioneering work of Harold D. Lasswell. His original writings on the Policy Sciences and on communication policy research form a predominant approach to analyzing communication policy. Lasswell's model of communication policy research may be characterized by the following pertinent features. First, an administrative, military, and economic rationale explains the need for policy research. According to Lasswell, the Policy Sciences developed in the context of the continuing crises of national security and the urgencies of national defense. ³ Thus, $\frac{1}{2}$ his 1951 essay, "The Policy Orientation," must be situated within the Korean and Cold War environment of the 1950s. The need for the new discipline focused on "the most efficient use of the manpower, 'facilities, and resources of the American people" in order to deal with the "problems of utilizing our intellectual resources with the wisest economy."4 Lasswell claimed that the intelligence functions of policy research were uppermost because of military

applications:

We may need to know the harbor installations at Casablanca, or the attitudes of a population of Pacific Inslanders to the Japanese, or the maximum range of a fixed artillery piece.⁵

Secondly, the theoretical and practical dominance of the administrative-intelligence functions of policy was simultaneously matched by a neglect for the theoretical and methodological difficulties of studying policy. Moreover, the aim of providing administrative research without consideration of higher order values was vested in the professionalization of the communication policy researcher as an objective and value free scientist, serving as technician or engineer who is capable of providing:

> . . . truthful and accurate evidence with which problems encountered can be better understood, new strategies can be designed, policy decisions can be well founded, and ultimately, problems can be solved.⁶

Thus, Lasswell claimed that policy scientists should not give their "Private ratiocinations about the higher abstractions from which . . . values are derived."⁷ Finally, Lasswell viewed policy as the rational process of research and decision-making, or the determination and implementation of select means to accomplish clearlydetermined ends. Indeed, the major concern of the Policy Science approach was "improving the rationality of the flow of decision."⁸

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Political scientists continuing to work in what Lasswell originally defined as the Policy Sciences in 1951, employ an operational definition, whereby policy analysis refers to:

. . . the systematic identification of the causes and consequences of public policy, the year of scientific standards of measurement. . .

The field of study is granted scientific legitimacy, and policy analysis takes the form of an experiment, where public policy may serve as the 'dependent variable,' and social, economic, and technical determinants of these policies are 'independent variables.'¹⁰

Martin C.J. Elton of University College, London, exemplifies the tradition of communication researchers such as Lasswell, deSola Pool,¹¹ and H. Edward English,¹² when he defines policy as "an essential means of managing uncertainty," which expresses "an intention by policy makers to adopt certain measures in order to achieve higher-order ends."¹³ In "Government Telecommunications Research and Policy Development (1976)," Elton identifies three contributions of policy research: the discovery of possible needs for new policy; the improvement of understanding of how telecommunications may be better used to serve society; and the analysis of policy problems.¹⁴ The communication policy researcher in this model, then, is an administrative troubleshooter or engineer offering "continuous monitoring in order to provide an early warn-

ing" for policy development, transformation, and implementation.¹⁵ Thus, Elton asserts that:

> The role of the researcher is not so much to answer questions... as it is to spot and investigate possible problems and to provide efficient means by which others may answer such questions.¹⁶

The status of communication policy research as a. science following the Lasswellian model is not so assured, however. Yehezkel Dror, a prominent policy scientist himself, has argued that policy studies suffer from "stubborn problems inherent in their nature and subject matter."¹⁷ These stubborn problems center on epistemological difficulties of explaining the complex processes of policy and the inability to forecast future actions and effects; and on difficulties stemming from time scarcity, lack of 'access to data on high-level decision making, the probabilistic and arbitrary features of many policy phenomena, the value sensitivity of recommendations, and finally, "the lack of bridges between descriptive-explanation and prescriptive study."¹⁸

B. Comparative Analysis

A'major problem with the Lasswellian model is, that in the case of transborder data flow, at least, it is . not very useful for analyzing policy. By treating policy as the rational management of uncertainty and the fulfillment of stated goals, it excludes a whole range of actions which seem not to further policy but to serve other purposes such as the production of uncertainty (as shown in the repeated publication of unofficial Canadian policy documents) or the stimulation of government awareness of the inadequacies of present administrative structures (as shown in U.S. legislative proposals to reorganize international communication policy mechanisms). Canadian and U.S. policy in the transborder data flow area can best be characterized as various strategies, tactics of action and non-action, rather than the rational application of particular means to fulfill certain ends, by policy agencies. Clearly, a different approach than Lasswell's is needed for policy analysis here.

The two case histories suggest the necessity for developing a general approach which will provide general knowledge of policy processes independent of particular applications of particular policies for particular social and political interests. Such an approach does not aim at discovering better methods for implementing certain policy actions, but is concerned with the attempt to

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frame general questions about policy. Thus, this chapter is geared toward examining meta-theoretical aspects of policy analysis rather than the development of a methodology which is to be rigorously applied.

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The traditional methods of policy analysis rest on an assumption that there is such an object as 'policy.' The approach in this theses, rather, pays attention to the signifying dimension of the range of phenomena generally categorized as 'transborder data flow policy.' Taking its cue from Middle and Late Middle English vernacular, where the term 'policy' denotes a device, contrivance, trick, strategem, and "any course of action adopted as adventitious or expedient,"¹⁹ all forms of action, whether rational or irrational will be investigated. Such an approach helps to identify and evaluate both strategies of action and non-action and what they may signify, rather than only what ends they may achieve. 'Defining the "context" of a debate is perhaps the most important means for gaining ascendancy.

Moreover, the approach to policy in this thesis attempts to meet the rhetoric of power and administration involved in transborder data flow policy debate on its own semantic ground -- by treating the actions and nonactions under study in military terms of strategy and tactic. The technologies of data flow -- computer communication networks, were developed because of military applications in the 1950s, and the importance of these

networks for national defense and control purposes has been readily admitted by policymakers. Transborder data flow policy rhetoric is replete with militaristic tropes, such as <u>barriers</u> to the flow of information and economic <u>war</u>; and even Lasswell's rationale for conducting policy research was administrative and militaryoriented. Thus, an orientation incorporating notions of strategy and tactics may locate manifestions of power and signifying practice in their specificity.

The construction of a classification scheme for describing the symbolic significance of these strategies and tactics is suggested from the work of both Kenneth Burke, and ironically, Harold D. Lasswell. Lasswell's famous 'pentad' asked basic questions of the message which can also be applied to the study of policy. Burke's subdivision of communicative behaviorism in The Grammar of Motives (1963), serves as an example that new categories could describe each aspect of the pentad for a systematic analysis of the policy process. The five general categories used to structure inquiry in this chapter: policy origins; players; aims and vehicles; format; and consequences correspond to 'who, says what, to whom, in which channel, with what effects.' The utility of the new policy categories will be shown in the comparative analysis. It will be argued that Canadian and U.S. transborder data flow policies differ in terms of four categories, but are remarkably similar in policy

format.

a) Policy origin: the socio-bureaucratic context

Questions of policy origin center on when transborder data flow issues came to fore in the respective countries. A basic history of the origins of transborder data flow policy was thus offered in Chapters Two and Three of this thesis. It was noted that transborder data flow issues were first considered by the Canadian Government in 1970, after the founding of the Federal Department of Communications. Concerns for the future effects of computer-communication industries operating in Canada were grouped under the labels of 'cross-border' and 'north-south' data flow in a series of pioneering studies on computer-communication technology and Canadian social, political, and economic interests. Issues of 'international data flow' first attracted the attention of U.S. policy players in 1976-77, in response to initiatives by Western European countries to control the flow of U.S. computer-communication data for reasons of privacy protection, security, and economy. Thus, the consideration of transborder data flow policy issues in the United States did not stem from major U.S. examination of long range international communication goals, but, rather, was only brought about in reaction to policy initiatives of other nations (including Canada), in such multilateral policy fora as the Organization for

Economic Cooperation and Development, Intergovernmental Bureau for Informatics, and the United Nations.

It may be significant that transborder data flow issues achieved a measure of Canadian government attention at two certain junctures. Transborder data flow issues were first raised in the early 1970s under the rubric of rhetoric on 'the wired society,' 'the global village, ' and other futurological scenarios articulated in such publications as Instant World. Between 1973 and 1977, little Canadian Government attention was paid to transborder data flow issues. Later Canadian studies such as the Clyne Report have suggested that transborder data flow issues decreased in importance during these years because the futurological scenarios of the 'wired society' failed to materialize. Computer-communication policy issues emerged again on the government agenda in 1977 -- precisely at that time 'when new rhetoric on the 'information economy, revolution, and society' entered international policy vocabulary. While the prevalence of such rhetoric may not have caused the major reorientation of Canadian Government awareness, as will be argued in a review of policy format, the widespread use of futurological policy rhetoric may have contributed to the way data flow issues were structured and interpreted by Canadian policy players.

Although the Canadian Government had been aware of transborder data flow issues in the early 1970s and had

published documents such as Branching Out and Privacy and Computers outlining their relevance, the United States ignored such Canadian and Western European documents during the 1970s and only reacted to increased international debate on data flow when issues were presented formally in 1976-77 Working Groups of the O.E.C.D. Computer-communication policy only attracted attention in the United States when U.S. trade in computer-communication goods and services was considered threatened. Foreign concerns över transborder data flow issues as well as strategies for maintaining and even expanding U.S. trade were ignored by the U.S. Government during the years 19.70-1977. The possible dangers to U.S. trade remained unforeseen until U.S. corporations alerted and urged the U.S. Government to consider transborder data flow issues.

b) Policy players: the seen and the unseen

This leads to a consideration of the major players in the transborder data flow policy arena -- the major governmental, corporate, and public representatives with stakes in policy. Canadian transborder data flow policy has been formulated and discussed within many unofficial inter-departmental task forces and advisory committees under the guidance of one federal agency -- the Department of Communications; while U.S. policy has developed within and among competing governmental agencies and depart-
ments responsible for international communication issues.

The exclusive placement of transborder data flow issues within the Department of Communications reflected strong historical trends for the centralization of control of Canadian communication matters within the federal government, to stem the provincial control over communication resources in the late 1960s, and the challenge of Quebec in the areas of satellite and cable. Quebec) originated a Department of Communications before the federal one, and in effect precipitated the development of the federal agency. The first major task of the federal Department of Communications was to buttress its newly granted authority by undertaking studies of the wide array of long and short-term communication issues affecting Canada; transborder data flow problems were . thus identified as part of this ambitious consideration of computer-communication issues in the 1970 Telecommission studies. The much later awareness of transborder data flow issues by the U.S. Government reflected the historical lack of centralized and unified international communication policy administrative structures, with the resulting lack of commitment of monetary, managerial, and research resources to the long-term appraisal of U.S. domestic and foreign policy goals with respect to computercommunication technology. Corporate players assumed a more important role in motivating U.S. awareness of these issues than government players.

U.S. corporate players with stakes in the international trade of computer-communication goods and services spurred governmental consideration of transborder data flow issues in 1976. Corporate representatives attended international policy conferences, headed State Department committees on data flow, and pressed for congressional hearings throughout the late 1970s. It is no surprise, then, why U.S. transborder data flow policy was so exclusively concerned with promoting corporate interests and reducing barriers to international trade.

Although the Canadian Government originally treated data flow (issues as part of a wider strategy of expanding federal control of Canadian communication matters, the re-examination of transborder data flow in 1977 was engendered by corporate inquiries about government responses to U.S.-Canada data flow. Canadian manufacturing and service industries have generally been unhappy with the level of their government's actions in transborder data flow policy.²⁰ Although the Department of Communications outlined major long-term programs for assisting Canadian corporations in assuming a larger presence in the North American computer-communication markets, few of these programs were ever implemented and major proposals remain Further research may indicate whether this is ignored. related to the relative unimportance of the Department of Communications on the Canadian governmental-hierarchy.

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Two groups of policy players in both Canada and the United States have paid little attention to transborder data flow issues. The silence of these two sectors may also account for the lack of specific programs and actions other than the creation of task-forces with their unofficial publications, in Canada, and the drafting of trade protection and government reorganization legislation in the United States.

Top governmental leaders in Canada and the United States have not participated in discussion or formation of transborder data flow policy. The Minister of Communications in Canada will only release transborder data flow policy statements late in 1983 after receiving recommendations from the latest Inter-departmental Task Force. Other Canadian ministers and the Prime Minister have not treated transborder data flow issues. In the United States, transborder data flow policy has been the province of State Department, Commerce, and International Trade officials, but has not attracted the attention of the higher echelons of the executive branch -- e.g. the President and his advisors. This is one major reason why . such legislative proposals as H.R. 1957 attempt to bring international communication issues under strong executive branch leadership.

The other non-participant in transborder data flow policy deliberations in both countries, is the public sector. The role of the general public in the discussion

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and formulation of transborder data flow policy has been non-existent. There has been little national news coverage which would bring such issues under public scrutiny, primarily because transborder data flow policy has been restricted to issues of corporate economics and international trade, and because top leaders in Canada and the United States have not identified transborder data flow policy as a major national concern.

Without executive leadership and public participation in policy debates on the supposedly critical issues of the social development, applications, and effects of new communication technologies on national economy, , security, privacy, and sovereignty, policy decisions are left primarily in the hands of middle-level bureaucrats of the Canadian and U.S. Governments. This limited distribution of corporate and governmental players in transborder data flow policy debate has not resulted, as Schiller and others have claimed, from a conspiracy of government and industry implementing a grand operational design to promote U.S. hegemony throughout the world.²¹ The case studies show instead, that the range of issues grouped under the label of 'transborder data flow' emerged within the confines of governmental departments and intergovernmental organizations such as the O.E.C.D., which are populated by government bureaucrats and corporate representatives.

This lack of top-level and public participation in both Canadian and U.S. discussions leaves transborder data flow policy in the hands of professional government policy players who do not have the power, resources, nor abilities (thus far) to actually implement the programs and strategies for transborder data flow which they have developed. Without a top-level government commitment in terms of financial and managerial resources, programs espoused in such reports as Branching Out and William Salmon's draft paper on International Communication Policy, could not possibly be acted upon. No matter how long Canadian bureaucrats at the Department of Communications and former Science Ministers swear about the deleterious effects of transborder data flow (as they have been doing since 1970), no actual programs to assuage these problems can be implemented unless the public, national media, and top government leaders devote attention to the issues. A serious and comprehensive international communication policy in the United States could not possibly be developed while different governmental organizations claim responsibilities in this area. Without the participation of the silent sectors, middlelevel bureaucrats in the U.S. can only offer short-term reactions to counter specific problems of bilateral and multilateral trade. Canadian officials are left producing uncertainty as to true Canadian policy by intentionally or unintentionally stalling the release of policy

(through unofficial documents which reiterate the same problems and solutions over and over again). Thus, the type of players in the transborder data flow policy arena can have marked effects on how and what kind of policies are discussed and implemented -- on policy aims and vehicles.

c) <u>Policy aims and vehicles: the international economic</u> connection

The explicit aims of Canadian and United States transborder data flow policies reflect the status of each country in respect to bilateral and multilateral trade. In contrast to most Western European nations which identified the major data flow problems as the protection of personal privacy and national security, Canada and the United States have recognized domestic economic and international trade issues to be paramount when determining the range of transborder data flow policy. Yet, while both countries delimit data flow policy within the domain of trade, each country maintains very different aims in this area -- aims which can be detected from the labels which Canada and the U.S. use to discuss data flow.

Canadian policy documents have traditionally used the phrases 'cross-border' and 'north-south' data flow, to express the Canadian identification of transborder data flow policy within the bounds of bilateral trade problems with the United States. Canada and the U.S. are major

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trading partners, and more U.S. goods and services are exported to Canada than to any other country (and the reverse situation is also true for Canadian exports in U.S. markets with the exception of Great Britain).²²

Traditional Canadian sensitivities over pervasive United States cultural spill-over and sovereignty starting with broadcasting and magazine debates comprise the dominant theme in Canadian policy documents into which the transborder data flow issues are fitted. The context of the argument is thus well established and has existed for fifty years, since the Aird Commission of 1928. Canadian attention on transborder data flow has almost exclusively focused on the implications of U.S.-Canadian trade of computer-communication goods; and services. Thus, unofficial policy documents were produced to show the U.S. Government Canadian worries over this trade, while simultaneously awakening higher echelon Canadian policymakers to the need for committing more money and manpower to the satisfactory resolution of these trade issues in The primary vehicl/e, then, for the purcommunication. suance of Canadian transborder data flow policy aims is the unofficial policy document -- the analyses, research reports, policy statement's, and task force studies which are circulated within Canada and to the U.S. and other The explicit aim of Canadian transborder data countries. flow policy, reiterated continually through the vehicle of the unofficial document, is to minimize the possible

negative effects of U.S. trade in computer-communication goods and services with Canada.

However, the audience for these documents are not Canadian corporations or the public, but the United States Government and top Canadian leaders. Because of the limited powers of the Canadian Government policy players, the implicit aim of Canadian transborder data flow policy articulated through the policy vehicle (the unofficial document), is to alert government leaders of the important trade issues and to make the U.S. policy players unsure, or uncertain as to true Canadian policy; thus possibly reducing potential U.S. investment in computer-communication trade with Canada and leaving time for Canadian leaders to finally act with specific programs to counter U.S. marketing intentions. The U.S. Trade Representative's Office then, may be correct in viewing such Canadian policy in the name of non-policy as a potential non-tariff barrier and disincentive to United States trade.

The United States Government, since 1976, has primarily treated 'international data flow' issues of international, especially Western European challenges to U.S. corporate domination of the international trade of computer-communication goods and services. Canadian apprehensions are ignored or recognized only when unofficial documents such as the Clyne Report can be used as examples of the multilateral dangers to U.S. information flow.

Thus, the specific bilateral trade problems between the United States and Canada are ignored by the U.S. Government, though it uses such documents to illustrate the broad international dangers posed to U.S. trade interests.

The primary U.S. policy aim in the transborder data flow policy area is the protection of U.S. corporate, political, and military interests through unhindered and 'unmonitored international data flow. The protection of the dominant position of U.S. corporations in the international trade of computer-communication goods and services was promoted through the vehicles of legislation on reciprocity in trade and on reorganization of policy structures for international communication. Other policy vehicles included the multilateral negotiation of tariff and non-tariff barriers, congressional hearings and reports, and departmental studies and policy statements on international communication; but these vehicles assume lesser status in reflecting the major U.S. policy interests.

Unlike Canadian policy documents which originate mainly from one central government department, U.S. policy positions and statements are scattered in a variety of papers from officials of different departments and divisions within departments. Because there is no comprehensive transborder data flow policy plan emanating from one U.S. agency that is charged with responsibilities for international communication, various strategies and tactics are pursued in the name of furthering U.S. trans-

border data flow interests. Congressional subcommittees have attempted to correct this situation by placing international communication aims and vehicles in the hands of one executive committee, thus reducing the number of policy players on the field; but, so far, the U.S. Trade Representative's Office seems to be promoting its international trade strategies more effectively than any other governmental policy player. One can then argue that trade legislation, negotiations, and work programs will be the major vehicles for the pursuance of U.S. aims in international data flow during the next few years.

d) <u>Policy format: the implications of ambiguity on</u> <u>strategy</u>

Canadian and United States transborder data flow policies have differed in terms of policy origins, players, aims and vehicles, but show remarkable similarities in policy format. Policy format deals with the question of how policy is constructed and expressed; it describes the assumptions of arguments used in constructing policy strategies. Canadian and U.S. transborder data flow policy formats exhibit at least five basic characteristics: administrative self-reflexiveness; conceptual imprecision; quantitative ignorance; a functionalist approach to technology; and a rhetoric of scientific causality. These subcategories were constructed by the author; their for-

mulation was suggested by the work of Dr. Marike Finlay-Pelinski in <u>Technologies of Technology</u> (1983).²³ She advances a typology of discursive procedures for analyzing texts on new communication technology which can also be applied to documents on transborder data flow policy.²⁴

There is a tendency in U.S. and Canadian transborder data flow policy documents for the authors to examine governmental organization for policy development and implementation, as a significant part of the content. . Canadian policy documents thus examine previous policies and suggest new committees, task forces, and government advisory bodies to formulate transborder data flow strategy. U.S. documents such as congressional reports, focus on the improvement of international communication policy mechanisms as a major aspect of transborder data flow policy.

Of course one may hypothesize that all effective policy statements must include a discussion of previous administrative structures in order to plan appropriate future strategies and mechanisms. Nonetheless, in the case of Canadian transborder datą flow policy, these effective policy-making bodies capable of implementing specific programs to counter harmful effects of data flow, never materialized; similar administrative mechanisms of task forces and committees have convened from 1970 until the present. In the United States, recommendations for

administrative change embodied in policy statements, congressional reports, and legislation such as <u>H.R. 1957</u>, have yet to be enacted.

The case studies seem to indicate that self-reflexiveness of Canadian and U.S. transborder data flow policy documents serves as a convenient substitute for action, rather than as a preliminary step for future action. By analyzing previous administrative structures and recommending future ones, the current policy agencies may be able to ignore present policy dangers, demands, and potentials. This may be described as a broad strategy of procrastination on the governmental level; if governmental departments and agencies have little final authority, resources, nor public clamor behind their policy initiatives and responses, then a safe route to absolve responsibility for action is to analyze the past and predict the future without having to admit current administrative impotence.

Canadian and United States policy documents also exhibit a lack of conceptual precision as to what exactly constitutes the meaning of the terms <u>communication</u>, <u>infor-</u><u>mation</u>, and <u>data</u>; these words are presented without definition or theoretical justification. What are the differences in meaning between communication and information and are there attendant distinctions between information versus communication policy? These questions are usually ignored in transborder data flow policy documents. This conceptual imprecision has marked implications, especially for the U.S. Government, which has consistently made no distinctions based on the content of information flow, i.e. between the various types of data flowing in international computer-communication systems. Concepts of information as a private economic good (commodity), resource, and public good and the many different types of data (corporate, financial, medical, journalistic, trade documentation, scientific, etc.) are confused by U.S. efforts at promoting the general free flow of information. As Robinson has stated in reference to multilateral definitions of data flow, discussions often appear to assume that we are dealing with a homogeneous amalgam, and this has delayed any meaningful approach to dealing with the issues.

While the United States seeks to protect its trade of computer-communication goods and services through reciprocity legislation which, at least implies a de facto identification of information and particular types of data as economic goods, it also ironically seeks to deny the economic importance of information by lumping all types of data and concepts of information in an expanded but all too general phrase of the 'free flow of information.'

'Western European nations, such as France are starting to realize the commodity nature of certain types of data, and French legal experts such as Alain Madec have

developed intricate data taxing schemes which recognize the importance of certain types of information, while leaving cultural, educational, and scientific data free from similar quantitative restrictions.²⁵ As will be argued in the last chapter of this thesis, U.S. interest may possibly best be served if the policy players would recognize distinctions between types of data and concepts of information, in order to insure a fair application of international and national controls and restrictions that could be applied to a not so 'free flow of information' in the future. Two more features of policy format are closely associated with the lack of conceptual precision -- quantitative ignorance, and a functionalist approach to technology.

There have been no accurate estimates as to the actual amounts of data flowing through transborder computercommunication systems in North America and Western Europe. The Canadian Government has been at the forefront of developing methodological tools for the analysis of transborder data flows; the 1978 study, <u>The Growth of Computer/</u> <u>Communications in Canada</u> is one such example. However, as Price Waterhouse Associates discovered when reviewing previous Canadian studies, there are few valid and reliable estimates of the actual quantitative amount of data, and of accompanying trade in computer-communication goods, services and jobs in terms of aggregate losses (in dollars) for the Canadian economy.²⁶ Moreover, when the

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Canadian and U.S. Governments identify the trade in international computer-communication goods and services as a strategic area for stimulating economic growth, they base their economic forecasting on a questionable body of evidence. A report on informatics developments in six countries pointed out that there is:

> . . . a lack of authoritative and comparable statistical measures relating to the use of computers and to other manifestations of the information revolution. There is no shortage of numbers they purport to give some of the required information, but they usually represent fragmented attempts and cover a very limited segment of activities . . . Better and more comparable information than is now available is essential to an adequate assessment of computing effects on national economies and the world economy.²⁷

Thus, Canadian and United States transborder data flow policy has been based on conceptual imprecision and on a concomitant lack of quantitative evidence to base or support arguments on the positive and negative effects of computer-communication goods and services in national economies. Consequently, U.S. and Canadian policy players have relied on catch-phrases such as the 'information society, revolution, economy;' 'informatics,' and 'trade in services' which are more nebuluous than 'transborder data flow' as terms indicating any degree of clear and specified limitation of meaning and usage. These terms are, in fact, closely associated with a functionalist approach to technology which favors those policy players

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in search of profit through developing new communication technologies, and players interested in regulating the social distribution of these technologies. The functionalist approach to technology, in the case of transborder data flow; assumes that new technologies of computer-communication must be developed and rationality used despite possible negative effects on domestic and foreign interests -- because the hardware exists and will inevitably be used. Harold Mendelsohn has argued in "Delusions of Technology" (1979), that:

> All too often dialogues regarding utilization of new communication technology focus solely on the hardware and not on its consequences. Because control over the various means of communication available in a society is a reflection of enormous power, it is not surprising that new technologies are considered to be totally functional from the perspective of those who develop and control their use.²⁸

Although the Canadian Government discussed implications of the operations of computer-communication networks on national sovereignty, economy, and security, instead of questioning the uses and control of such technology, it contended in such reports as <u>Branching Out</u> that Canadian corporations must develop and exploit such technologies. These technologies of communication seem to be covered by what Sahin has called a 'metaphysical cloak,' which assumes that the future has already been ordained and that these technologies inevitably figure greatly in this planned future.²⁹

Furthermore, the phrases 'informatics,' 'information revolution,' etc., like early futurological revelations of the 'electronic world' and 'wired society' lack large bodies of evidence supporting the wide-ranging predictions on the specific uses of communication technologies in the ordained future. Nevertheless, these catch-phrases have been invoked, almost mystically, in policy documents such as the Clyne Report and U.S. Trade Representative statements in order to rationalize government advocacy of the future development of certain communication technologies for the stimulation of national economic growth. The emphasis on the future in policy documents suggests that the policy player can predict, know, and control the future during the present -- especially the future desirability, distribution, and domination of certain kinds of communication technology in future information societies, revolutions, and economies. That there is little evidence (despite the pleas of inevitability) to support these futurological claims nor even evidence that policy players have adequately dealt with problems arising from previous applications of communication technology (such as possible effects of transborder data flow), indicates that perhaps the future is not so ordained as policy players would like to believe.

Although, as argued earlier, the future is a safe place for government bureaucrats to ground their responsibilities, U.S. and Canadian long-term social, political, and economic stakes in the development, usage, and con-

trol of communication technologies may not be served by such a focus.

Despite the lack of conceptual precision and quantitative evidence, and the reliance on futurological catchphrases and categories, U.S. and Canadian policy players have depended on a rhetoric of scientific causality to frame problems of transborder data flow. In other words, government policymakers assume that there are clearlydefined policy problems and the government need only reorganize itself or plan specific actions to ameliorate the problems. In Canada, this cause-effect model is evident in the description of transborder data flow problems in such documents as the Clyne Report. According to Canadian policy players, transborder data flow between the U.S. and Canada has caused negative effects such as loss of employment, threats to national jurisdiction, The fact that little empirically verifiable evietc. dence is offered to substantiate these assumptions is of little immediate consequence. Canadian policy players have chosen to dramatize major communication and trade problems with the United States by utilizing a basic cause and effect model for representing transborder data flow. If there are clear and present dangerous effects caused by transborder data flow, then increased monetary and managerial resources should logically be expended to correct the negative effects. This follows the Lasswellian policy model, where the government policy player can

apply appropriate solutions to the negative effects of basic problems. U.S. policy players also utilize the rhetoric of scientific causality in a scenario whereby there are foreign countries causing negative effects for strategic U.S. economic, political, and military interests through barriers to trade in goods and services; these basic problems are then to be answered by specific trade tactics of reciprocity legislation and bilateral and/or multilateral negotiation.

Unfortunately, the use of the causal model for defining transborder data flow problems, limits the type of policy strategies -- actions and non-actions which can be utilized by governments and other policy players. The causal model favors one specific mode of action --Once a problem has been caused, according to reaction. this model, the policy player can then formulate responses to minimize or maximize certain effects. Similarly, once a certain communication technology exists (cause), the policy player can only hope to then guide its positive and/or negative effects according to national interests. Most importantly, in framing all transborder data flow issues through the cause and effect rhetoric, there is a tendency by government and other players to reduce the myriad national concerns and international stakes in the arena of computer-communication, to one or a limited set of causes.

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For example, former Central Intelligence Agency head William Colby and others, have grouped all'non-U.S. transborder data flow concerns as groundless 'fears' and threats to United States interests; i.e. threats to international trade of computer-communication goods and According to Colby's perspective, foreign arservices. guments on international communication based on national sovereignty, privacy, security, and economy claims are unimportant and unfounded. ³⁰ The only issues of relevance for the United States in the transborder data flow policy area thus stem from the negative effects of trade disincentives and restrictions posed by other nations in pursuit of their national communication goals and interests. This form of ethnocentrism may result in dangerous long-term trade problems for the United States if genuine foreign apprehensions and distinctions between types of data and concepts of information are ignored. Thus, the use of a rhetoric of scientific causality with its tendency for producing reactive models of policy action coupled with the ambiguous meaning of "information flow" could result in major consequences for Canadian and U.S. national interests.

e) Consequences of policy: increased confusion

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After analyzing policy origins, players, aims and vehicles, and format, based on the comparative studies, it is possible to acquire a coherent picture of the consequences of national transborder data flow policies. If the stated aims of policy are compared with the policy strategies actually implemented, certain conclusions on the consequences of national policies can be drawn.

Canadian transborder data flow players have produced pioneering economic and political studies on computercommunication technology. They have also produced endless studies and statements which have repeated the same arguments on the posited effects of U.S.-Canadian data flow. However, the Canadian Government has not acted upon the majority of its own recommendations to stimulate Canadian industry to assume a competitive position in the North American trade of computer-communication goods and services. The case studies in this thesis further indicate that one indirect and unanticipated result of policy is that the Canadian Government has also given the U.S. ammunition for its own policy strategies by issuing non-official policy statements and papers reflecting Canadian concern over transborder data flow issues. While the release of these documents may serve as an internal bureaucratic stalling tactic until further resources are expended by the Canadian Government to gain the necessary conceptual and quantitative foundation for official

pronouncements of policy and top-level awareness of____ these problems; the unofficial policy document also gives foreign (i.e. United States) policy players a not truly (representative indication of actual Canadian policy. For example, the U.S. Trade Representative's Office prepared internal analyses on Canadian statements on telecommunications policy and transborder data flow, and are in the process of "linking these official and unofficial statements to specific actions taken by the Canadian Government." ³¹ The Office claims that it is clear that "the Canadian actions represent an overtly protectionist policy in this area."³² Canadian policy players have articulated a series of Canadian sensitivities over possible effects of data flow. That such effects exist or that there are simple causes for these effects remain important questions that have yet to be answered.

United States transborder data flow policy can be summarized in one word -- reactive. Policy evolved in reaction to perceived dangers to U.S. corporate, military, and political interests posed by foreign data protection and privacy laws and guidelines; and by tariff and nontariff barriers and disincentives to the flow of U.S. computer-communication goods and services. This assessment was supported by Kenneth Leeson, Economist and Director of the Program on International Services at the National Telecommunications and Information Administration, while he spoke at a Massachussetts Institute of Technology

transborder data flow seminar in 1982. He claimed that "policy has not been in front of technology," and stated that he did not know what a comprehensive communication and information policy in the data flow area would consist of, other than:

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. . . reacting to events as they occur, making sure that there is widespread awareness in government of what issues are at stake, and providing a forum for public and private officials to sound off about the problems at hand.³³

By not devoting sufficient long-range planning and resources to further the supposedly crucial U.S. national interests in international communication policy, then the United States is left with a limited set of options -responding to and not anticipating foreign actions, nonactions, strategies, and tactics. These options are increasingly being devoted to the escalation of international trade protectionism rather than to the development of legal, political, and economic regimes through negotiation, to avert international trade conflict. By reacting to Canadian and Western European allies without understanding basic data flow concerns of these countries, and by drafting reciprocity legislation (or encouraging the "I'll set up trade barriers if you set up trade barriers" approach), the U.S. loses opportunities to maximize its social, political, and economic interests through better trade relations with allies. The U.S. Government may thus also be unable to prevent more controls and taxation of data if it

does not negotiate to limit such restrictions to specific types of data.

This study suggests that perhaps the major economic implications of international data flow for the U.S. have lessened or were over dramatically presented since 1976. despite governmental and corporate concern over trade restrictions and barriers. Such a scenario is corroborated by Richard Mills of Citicorp, who is Chairman of the Telecommunications Committee of the U.S. Chamber of Commerce and Chairman of the Telecommunications Working Group of the Commission on Computing, Telecommunications, and Information Policy of the International Chamber of Commerce. Mr. Mills contends that the private sector has actually . experienced few difficulties in maintaining international data flows, and thus U.S. industry is "a bit sleepy" about paying attention to "policy issues looming on the distant horizon."³⁴ Furthermore, he stated that his corporation did not encounter problems with its international data flows and that, in fact, most countries did not encounter day-to-day problems moving data around in computer-communication networks.³⁵ Mills argues that "business proceeds" despite the presence of faint political rumblings, and that his European colleagues feel that transborder data flow is an "interesting academic exercise," but nothing more.³⁶

Have U.S. policy players, including certain financial, manufacturing, and service corporations overreacted then

to foreign policy initiatives in computer-communication? If U.S. data flow policy consists of international trade strategies articulated on the basis of the policy format identified in this chapter, then whether Mr. Mills' assessment is correct or not, U.S. transborder data flow policy could harm, rather than protect and further U.S. national interests.

If present policy trends continue, then Canadian transborder data flow policy will probably be geared toward the continual refinement of quantitative measures and conceptual frameworks for the analysis of major problems of U.S.-Canadian data flow. The Minister of Communications is supposed to receive policy recommendations from the Interdepartmental Task Force on Transborder Data Flow, late in 1983 or 1984, but if and when actually 'official' Canadian transborder data flow strategies are endorsed, they must be perceived of as sufficiently important to shift high-level governmental and public attention from other more traditional topics on the national agenda.

A totally antagonistic relationship between Canada and the United States over transborder data flow issues is unlikely, however, because: 1) the bilateral trade is too vital, and any major trade restriction could have broad repercussions on all levels of trade; 2) there are no indications that the Canadian Government will reverse past trends and articulate official transborder data flow policies with actual resources committed to their implemen-

tation; and 3) the U.S. Government historically has chosen to ignore Canadian ruminations on data' flow. A totally friendly relationship between the two countries over transborder data flow is also unlikely, primarily because the U.S. is not listening to the fundamental Canadian sensitivities to problems of bilateral trade, national sovereignty, and cultural independence which are highlighted, ad nauseum, in Canadian communication policy documents, especially those dealing with transborder data flow problems. A more middle-range relationship is envisioned, whereby Canada and the United States negotiate over specific bilateral trade issues such as the satellite relaying of data; ³⁷ but where the major policy aims of each country are presented in the same policy vehicles, authored by the same policy players, who rely on the same format to produce expected and unexpected consequences.

NOTES: CHAPTER FOUR

¹ Harold D. Lasswell, "Communications Research and Public Policy," in <u>Harold D. Lasswell: On Political Socio-</u> <u>logy</u>, ed. Dwane Marvick, (Chicago: University of Chicago Press, 1977), p. 269.

² See Daniel Lerner and Harold D. Lasswell, eds., <u>The Policy Sciences: Recent Developments in Scope and</u> <u>Method</u>, (Stanford: Stanford University Press, 1951), pp. 3-4.

³ Harold D. Lasswell, "The Policy Orientation," in <u>The Policy Sciences: Recent Developments</u> in <u>Scope and</u> <u>Method</u>, ed. Daniel Lerner and Harold D. Lasswell, (Stanford University Press, 1951), pp. 3-4.

⁴ Lasswell, "The Policy Orientation," p. 3.

⁵ Lasswell. "The Policy Orientation," pp. 3-4.

⁶ Cees J. Hamelink, "New Structure of International Communications: the Role of Research," Paper for the XII Assembly and Scientific Conference of the International Association for Mass Communication Research, Caracas, Venezuela, 25-29 August 1980, p. 4.

⁷ Lasswell, "The Policy Orientation," p. 12.

⁸ Lasswell, "The Policy Orientation," p. 12.

⁹ Thomas R. Dye, <u>Policy Analysis: What Govermments</u> Do, Why They Do It, And What Difference It Makes, '(Univer-

sity of Alabama Press, 1976), p. 1.

¹⁰ Dye, p. 6.

¹¹ Itniel deSola Pool., "The Rise of Communication Policy Research," <u>Journal of Communication</u>, 24, No. 2, (1974), 39.

¹² H. Edward English, "Canadian Telecommunications: Problems and Policies," in <u>Telecommunications For Canada</u>: <u>An Interface of Business and Government</u>, ed. H. Edward English, (Toronto, Metheun, 1977), p. 5.

¹³ Martin C. J. Elton, "Government Telecommunications Research and Policy Development," in <u>Refocusing Government</u> <u>Communications Policy</u>, (Washington: Aspen Institute for Humanistic Studies, series on Communication, 1976), p. 19.

¹⁴ Elton, p. 20.
¹⁵ Elton, p. 20.

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¹⁶ Elton, p. 20.

¹⁷ Yehezkel Dror, "Some Features of a Meta-Model for Policy Studies," in <u>Problems of Theory in Policy Analysis</u>, ed., Phillip M. Gress, (Lexington: Lexington Books, 1976), p. 5.

¹⁸ Dror, p. 5.

¹⁹ Oxford Universal Dictionary on Historical Principles, 3rd Ed., (Oxford: Clarendon Press, 1955), p. 15336.

²⁰ See Barbara Keddy, "Transborder Data Flows: An Uncertain Threat," In Search, 6, No. 4, (Fall 1979), 12.

²¹ See, for example, Herbert I. Schiller, "Transnational Business, the Free Flow of Information, and the Question of Regulation," in <u>Telecommunications Policy and</u> <u>the Citizen: Public Interest Perspectives on the Communi-</u> <u>cations Act Rewrite</u> ed., Timothy R. Haight, (N.Y.: Praeger Special Studies, 1979), pp. 95-105.

²² See Oswald H. Ganley, <u>The United States-Canadian</u> <u>Communications and Information Resources Relationship and</u> <u>its Possible Significance for Worldwide Diplomacy</u>, (Harvard: Publication No. P-80-2, Program in Information Resources Policy), p. 12.

²³ Marike Finlay-Pelinski, <u>Technologies of Technology</u>: <u>A Critique of Procedures of Power and Social Control in</u> <u>Discourses on New Communications Technology</u>, (Montreal, McGill Working Papers in Communications, 1983).

^{2·4} Finlay-Pelinski, pp. 9-10.

²⁵ Alain M. Madec, <u>Economic and Legal Aspects of Trans</u>border Data Flows, in OECD DOC, DST I/ICCP/80 26, (1980).

²⁶ Canada, DOC & Price Waterhouse Associates, A Review of the Economic Implications of Canadian Transborder Data Flows - A Study to Analyse the Current and Projected Extent of Transborder Data Flows Into and Out of Canada and the Economic Implications of these Flows, (Toronto: DOC File No. 531-3-7-2, 3.28-DCA, February 1981). ²⁷ P. Robinson and C.A. Shackelton, "National Policies and the Development of Automated Data Processing," in Data for Development, (Marseille, n.p. 1979) n. pag.

²⁸ Harold Mendelsohn, "Delusions of Technology," <u>Journal</u> of Communication, 29, No. 3, (Summer 1979), p. 141.

²⁹ Haluk Sahin, "Ideology of Television: Theoretical Framework and a Case Study," in <u>Media, Culture and Society</u>, 1 (1979), pp. 161-169.

30 William Colby, as quoted in Crawford, "House Hearings," p. 3.

31 "Additional Questions for USTR," in <u>International</u> <u>Telecommunications and Information Policy</u>, 97th Cong., 1st and 2nd sess., H. Rept., (Washington, D.C.: GPO, 1982), p. 70.

³² "Additional Questions for USTR," p. 70.

³³ Kenneth Leeson, as quoted in "Seminar-Transborder Data Flows," M.I.T. Research Program on Communications Policy, 11 February 1982, p. 14.

³⁴ Richard Mills, as quoted in above, p. 4.

³⁵ Richard Mills, p. 4-7.

³⁶ Richard Mills, p. 7.

³⁷ Canada, Department of Communications, <u>Canada and</u> <u>the United States Communications Satellites to be Used</u> for Transborder Services, (News Release, August 26, 1982).

CHAPTER FIVE

CONCLUSIONS: THE EBB & FLOW OF RESEARCH

. . . we learn to prefer imperfect theories and sentences which contain glimpses of truth, to digested systems which have no one valuable suggestion.

Ralph Waldo Emerson, Nature (1836)¹

Introduction

A basic attempt at understanding the complexities of communication policy analysis in general, and transborder data flow policy, in particular, was offered in the previous chapter to emphasize the inadequacy of generalizations and labels which reduce the specific facts of policy origins, players, aims and vehicles, format, and consequences to one homogeneous evaluation of whether particular policies are correct or incorrect, one-faced or two-faced, and comprehensive or fragmented.

If this thesis were based on the traditional Lasswellian program, then one would expect a list of recommendations for more effective Canadian and U.S. transborder data flow policies to be given now. Answers to the hypothetical question: "Does Canada, for example, have effective transborder data flow policies, and, if not, what would be effective policies?" -- are based on definitions of transborder data flow, policy, and what is to be considered 'effective' policy. National definitions of trans-

border data flow were reviewed in Chapters Two and Three. Problems of analyzing policy were presented in Chapter Four. It was found that questions of policy effectiveness are related to the relative position of the policy player in regard to aims, values, and interests. If, for example, the owner of a Canadian computer-communication firm is losing Canadian data processing business to U.S. corporations, he/she may likely assert that Canadian transborder data flow policy has been nothing more than 'analysis ad infinitum.' A Canadian Government official, however, aware of the limited financial and managerial resources for such policy, may conclude that the publication of pioneering studies was, as Voltaire would say, "the best of all possible worlds."

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Questions of policy effectiveness in historical analysis (the evaluation of the effectiveness of previous policy) and forecasting (the recommendation of more effective future policies) may not be entirely relevant for this thesis because of three major difficulties. First, as stated earlier, this project is geared towards the consideration of metatheoretical questions of transborder data flow policy and not towards the production of solutions to specific policy problems for policy players. Second, the inclusion of such recommendations for 'effective policy' would seem to suggest that the author is a value-free social scientist who, more specifically, posesses the appropriate knowledge and values to determine and

advocate what best serves general national interests and aims. (These assumptions seem to rely on a certain form of utopianism, and may be put into question.) Though such epistemological problems on the role of the researcher deserve great exposition in any revision of Lasswell's approach to policy analysis, due to spatial constraints, this thesis is limited to general discussion of issues of policy analysis and not to the complete elaboration of a revised Lasswellian program. Finally, recommendations for future policies restrict the reader's scope of action to a binary choice of accepting or rejecting the researcher's conclusions, and consequently, may restrict rather than expand the range of research avenues.

Thus, rather than recommending specific strategies for restructuring policy players, aims and vehicles, and consequences, this ^chapter reviews possible options for Canadian and United States policy action, and poses a series of questions that are relevant for analysis of transborder data flow policy. It will then be argued that the consideration of problems of Canadian and U.S. policy format is paramount for future policy action and research. One fruitful line of inquiry could examine the production of meanings on transborder data flow -- specifically, political, economic, and technical definitions emerging in international legal regimes on transborder data flow.

A. Canadian Policy Options

Due to the pace of technological and competitive changes in the international computer-communication trade sector, the Canadian Government may desire to control the transborder flow of data to its own advantages and according to perceived national interests of maximizing short and long-term economic gains. Recourse to legislative measures for controlling Canadian-U.S. data flow has been non-existent in the past. However, regulation of transborder data flows through existing federal laws such as the <u>Bank and Banking Law Revision Act of 1980</u>² and the <u>Combines Investigation Act</u>³ is a potentially viable government strategy, albeit the probability of the Canadian Government imposing such legislative measures may remain minimal.

Section 157 of the <u>Bank and Banking Law Revision Act</u> of <u>1980</u> requires that banks maintain records of customer transactions and must maintain and process information related to the preparation of these records, in Canada.⁴ If records are stored or processed outside Canada, a bank must provide the Government Inspector with copies of the records and data processing; and the Inspector can, on his own initiative or through the advice of a Government minister, decide that future processing is not in the national interest.⁵ He can then direct the bank to process further information and data relating to such copies and extract in Canada.⁶ However, no U.S. banks are cur-

rently experiencing difficulties with this provision, and bank executives recognize the necessity for examiners to have access to all relevant information to implement. their supervisory responsibilities.⁷ Moreover, according to the Assistant Secretary for International Affairs of the U.S. Treasury, the U.S. banking community has been assured by Canadian authorities that these regulations do not, in fact, interfere with the management and flow of financial data on bank operations.⁸

Under sections 9(1) and 17(1) of the <u>Combines Inves</u>-<u>tigation Act</u>,⁹ the Director of Investigations, under authority from the Restrictive Trade Practices Commission, can order foreign nationals and legal persons outside Canada to provide corporate data, thus reducing the competitiveness of U.S. industries by forcing them to establigh and maintain duplicate sets of data for operations occurring in Canada.¹⁰ However, proposed legislation such as the <u>Foreign Proceedings and Judgement Act</u> may prohibit similar U.S. action requiring like Canadian data from Canadian real and legal persons.¹¹ Section 3(10) of this proposed act establishes the following situation where the Canadian Government can prohibit the production and disclosure of such Canadian records:

> Where, in the opinion of the Attorney General of Canada, a foreign tribunal is exercising or is proposing or likely to exercise jurisdiction or powers of a kind or in a manner that will adversely affect Canadian interests in relation to international trade or commerce involving business carried out while in Canada.¹²

Implementation of such statutory provisions may, in fact, contravene important elements of non-legally binding letters of understanding of 1969 and 1979 which amend the Informal Antitrust Notification and Consultation Procedure of 1959 (the Fulton-Rodgers Understanding) between Canada and the United States.¹³ Such provisions would nullify passages as:

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. . . each side will notify the other when it becomes aware that its anti-trust proceedings or investigations I) affect the significant national interests of the other or II) require seeking information located in the territory of the other . . . each party will refrain from pursuing anti-trust proceedings or blocking access to information until there has been an opportunity to consult and consider the other party's national interest concerns.¹⁴

Canadian regulations of trade in computer-communication goods and services between the U.S. and Canada may also take the form of the imposition of export and import controls. Section 3 of the <u>Export and Import Permits</u> <u>Act</u> establishes an "Export Control List of Goods" limiting the export of certain goods unless a permit is obtained from the Canadian Government.¹⁵ Computer-communication data may qualify as a controlled good under this list if data is defined as either a strategic good or resource. If data is a strategic good posing implications for national security (as the Clyne Committee suggests) then it may be placed in a group of the Export Controls List of Goods which restricts the exportation of advanced technological goods that pose a national security threat.
Moreover, export permits for certain single and multichannel communication transmission equipment and data modems including data communication equipment employing digital inputs and outputs for transmission, are <u>already</u> placed in Group 3 of the Export Control List dealing with "General Purposes Industrial Machinery and Electronic Devices."¹⁶ Even without a determination of computer-communication data as a strategic good the Canadian Government has already set the precedent for imposing export controls on transborder data flow trade by placing certain data transmission equipment on the Export Control List of Goods.

Furthermore, Communication researchers such as Herbert Dordick, Cees J. Hamelink, Anthony Oettinger and others have argued that information is a national resources, and that the collection and transfer of data in computercommunication networks constitutes a manufacturing process.¹⁷ Section 3 (1a) of the Export and Import Permits <u>Act</u> allows the placement of any article for export on the Export Control List of Goods:

> . . . to ensure that any action taken to promote the further processing in Canada of a national resources that is produced in Canada is not rendered ineffective by reason of the unrestricted exportation of that national resource.¹⁸

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Thus, the exportation of data conceived as a national resource (especially remote-sensing data on national mineral resources) could conceivably be restricted under this act.

U.S. computer-communication goods and services (hardware, software, physical networks, and actual bits of data) could be made subject to an increasing variety of import controls such as taxes and higher tariffs . through such legislation as the <u>Customs Tariff Act¹⁹</u> and valuation procedures of the <u>Customs Act</u>.²⁰ For example, Section 8(1) and (3) of this latter Act allows the imposition of surtaxes by the Minister of Finance on goods of any kind when:

> . . . the growth, produce, or manufacture of any country are being imported into Canada under conditions as to cause or threaten serious injury to Canadian producers on like or directly competitive products.²¹

However, already high Canadian tariffs and a 12% federal surtax on imported computer-communication equipment make Canadian data processing 20-25% more expensive than U.S. services -- leading to better economies of scale for computer-communication industries in the United States and actually accelerating Canadian competitive losses in this sector, according to certain estimates.²² Thus, the imposition of import controls may actually lead to a decline in the Canadian share of trade and may create more problems of transborder data flow than it could solve.

The consequences of previous policy action and the possible effects of untried legislative options have been reviewed. Whether or not previous or future strategies are identified by policy players, these players are left

with a set of basic questions which will have ramifications on future Canadian policy whether they are acknowledged or ignored. Discussions in this thesis have treated the status quo of Canadian policy and are raised in order to show that policy is not inevitable, natural, and intractable. Policy rather, reflects a social construction or bricolage of policy players, aims and vehicles, and format.

In the future, pressure exerted on the Canadian Government by domestic commercial and legal challenges of computer-communication, by economic constraints supporting trade liberalization or protectionist measures; by foreign unilateral actions such as the introduction of reciprocity legislation; and by developments in emerging international legal regimes governing trade in computercommunication goods and services, may force the Canadian Government to articulate specific national transborder data flow strategies.

B. United States Policy Options

United States legislative options in the transborder data flow policy area center on emerging reciprocity proposals as reviewed in Chapter Three. However, statutory provisions which apply to individual, private, commercial, and currency transactions could be applied to the restriction of data flow into the United States by foreign sources as an added reciprocity measure. As David A. Irwin and

Lawrence Povitch of the Federal Communications Commission have argued:

. . . while no specific U.S. legislation relates directly to the question of transborder data flows, scientific and technological information, and monetary, financial, commercial, and similar proprietary information flows are protected.²³

In general, foreign and domestic communication transmissions are regulated by the <u>Communications Act of 1934</u> where the Federal Communications Commission is given responsibility to regulate common carriers providing domestic and foreign communications, and is charged with the promotion of safe, rapid, and efficient national and worldwide communication service under exclusive authority to issue rules and carry out its functions.²⁴

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Domestic data flows can be regulated through such statutes as the <u>Privacy Act of 1974</u>²⁵ which is designed to protect individual privacy of files pertaining to personal individuals in federal computer-communication systems; however, information in non-federal data banks and information on foreign nationals in federal data banks are not protected under this Act.²⁶ The <u>Fair Credit Reporting Act²⁷ and Fair Credit Billing Act²⁸ regulate the maintenance and disclosure of credit reports on individuals and can control the domestic computer data flows of these types of information.²⁹</u>

U.S. laws affecting international data flows include the Bank Secrets Act³⁰ which stipulates conditions for the

collection of mandatory data on the transfer of money into and out of the U.S. for use of government agencies in criminal and investigatory proceedings;³¹ and the <u>Currency and Foreign Transactions Reporting Act</u>³² which requires reports on the export of certain monetary instruments.³³ Finally, the <u>Munitions Control Act</u>,³⁴ <u>Export Regulation Act</u>,³⁵ and <u>Toxic Substances Control Act</u>³⁶ authorize executive branch control of the importation and exportation of technical data.³⁷

United States transborder data flow policy may be subjected to the same set of questions asked of Canadian policy. In general, should U.S. transborder data flow policy continue to be organized under its present policy players, aims and vehicles, format, with the attendant consequences? Specifically, which U.S. Government department or agency should have primary responsibilities in international communication, or does the present disorganized and decentralized state of affairs enhance U.S. national interests and policy aims. As Morris Crawford of the State Department forcefully asked:

> Does the magnitude of U.S. commercial interests which may be imperiled in international data communications restrictions justify a significantly enhanced information and communications budget and bureaucracy? . . What government steps should be taken to maintain or improve the U.S. competitive position in international markets for information goods and services?³⁸

These questions have not been treated by government policy players and if previous governmental non-action serves as

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a precedent, then there is nothing to immediately suggest that the Government will face such issues in any other format besides the self-reflexive substitute for action embodied in policy documents.

Finally, there are presently no bases of quantitative information, the theoretical and methodological expertise, and critical schema that would allow for systematic understanding of the varied technical, economic, political, and social issues involved in international debate over data flow? Is a format of quantitative ignorance, conceptual imprecision, a functionalist approach to technology, and a model of scientific causality a proper foundation for considered policy appraisal and development? If the many international concerns in the computer-communication trade area are reduced to a question of whether there are sufficient restrictions to U.S. corporate dominance to warrant increased expenditures for U.S. international communication policy, can the United States be in a position to anticipate long-range threats and opportunities in the international computer-communication arena?

Can there be effective U.S. policies in international communication when the Government has not offered explicit definitions of the terms 'communication' and 'information?' Definitions of information in the policy phrase "the free international flow of information" would seem to include all types of data and trade in goods and services. While theorists such as Herbert Schiller have pointed out that

the free flow principle is a chimerical device for the promotion of U.S. economic hegemony,³⁹ policymakers and analysts themselves such as William Salmon and Arthur Bushkin now corroborate Schiller's argument by making a distinction between the 'free flow of information' and the 'fair flow of information.' The free flow principle thus means the free U.S. domination of trade in computercommunication goods and services and not the free participation of other nations in communication trade and exchange. This distinction between free and fair trade lies at the crux of international data flow issues. Peter Robinson has explained that the concept of the free flow of information evolved in regard to information as a public good; he states, however:

> If this label is extended to data and information as an economic good, then it endorses a totally free trade in an economic resource of rapidly increasing importance. After many years of experience in international trade in tangible goods, total free trade in the area has not yet been achieved. Is it then reasonable to expect a total free trade in these intangibles at the outset . . . 40

Is the United States committed to fairness in trade or unfairness, and are long-term U.S. trade interests served by such a situation where unfairness and structural imbalances in the world trade system are accepted or given as the status quo? Is the flow of scientific, cultural, and corporate information hindered by such an approach?

Dr. Oswald Ganley, in "International Data Flows: Shall We have International Cooperation," a presentation at the University of Washington (Seattle) Conference on Communications, in 1977, asked questions of U.S. data flow policy which are vital today. Ganley, recognizing that nations were pressing for international control over all types of data, asked how the United States should establish "mutually acceptable international rules on data and information flows."⁴¹ He inquired:

> What specific American interests--economic, commercial, moral, human rights, national security--are at stake? . . Is there a need for a broad and comprehensive regime of law? . . Is it in our interest to seek aggressively an international rule of law that will provide stable conditions for industry? What is the appropriate balance between freedom of flows of information and other basic human rights . . . 42

He also asked how rapid and effective technology transfer to developing countries be devised to meet their needs. These questions have yet to be answered by United States policy players.

C. Policy Format: Research Possibilities

According to the case studies in this thesis, Canadian and United States transborder data flow policy players, origins, aims and vehicles were dissimilar. However, U.S. and Canadian data flow policy formats were found to be identical. Quantitative ignorance, administrative selfreflexiveness, a functionalist approach to technology,

conceptual imprecision, and a rhetoric of scientific causality structured both Canadian and U.S. policy argu-What possible reasons could account for the simiments. lar traits? One could argue that U.S. and Canadian communication policy are similar in all or most components -but this is clearly not the case. One can also argue that there is something inherent in the subject matter of transborder data flow that requires national governments to formulate arguments in certain structured patterns. However, transborder data flow does not exist as an independent object residing in the realm of forms or ideals. Rather, transborder data flow is a policy term used by various national governments and policy players to define a wide array of problems and actions. Given such an assumption, and also given the fact that Canada and the U.S. maintain conflicting aims and definitions, why then do the two national governments rely on the same format to articulate their different goals?

The reason for this may be that transborder data flow emerged as a policy term in government departments such as the Department of Communications and in governmental organizations such as the O.E.C.D. and U.N.E.S.C.O. Without a readily available background of quantitative information on the computer-communication trade sector nor conceptual and analytical expertise on the social, political, legal, and technical aspects of data flow, U.S. and Canadian policy players were left to formulate their policy

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strategies based on the same format. Although more quantitative information has been collected since the early 1970s and the potential for empirical research and theoretical assistance from communication scholars and consultants exists, it may not be advantageous for policy players to rely on such quantitative information and conceptual precision. If it is discovered and acknowledged, for example, that the effects of U.S. trade in computer-communication goods and services on Canadian sovereignty do not exist, then those Canadian policy players who forecasted 4 grave dangers of data flow may be accused of an administrative form of muckraking or Canadian 'crying wolf.' If, on the other hand, the posited effects of transborder data flow are corroborated by evidence, then those same officials may be accused of not responding to the dangers.

Despite calls for future research on data flow issues by both the U.S. and Canadian Governments, little encouragement or increased expenditures follow the call for research. In the case of the Canadian Government, research on data flow such as the work being conducted by the Interdepartmental Task Force, follows a long tradition of analysis ad-infinitum which was discussed earlier in this thesis. Reasons for the popularity of a functionalist approach to technology and a rhetoric of scientific causality were discussed in Chapter Four.

Because debate on transborder data flow is the province of middle-level governmental and corporate representa-

tion at intergovernmental conferences; because, as Eddy Ploman argues, these policy players share a common episteme (shared values, aspirations, and vocabulary), national governments and other policy players will rely on similar ways to structure argumentation and explanation of transborder data flow. Thus, despite varying national origins, definitions, and aims and vehicles, the homogeneous level of policy format assumes important status in policy analysis and action.

Recommendations for restructuring policy players and reformulating policy aims and vehicles may not be viable if the crucial area of policy format is not addressed. It is at the international organizational level where problems of data flow came into prominence, and it is at this level where new definitions and approaches to bilateral and multilateral computer-communication issues are formed; where meanings are constructed, and where international and national controls on flow are codified and legitimized.

Thus, research could be geared toward examining emerging international legal regimes -- regimes which will consider different national concerns and interests in data flow; and harmonize various national data protection laws, telecommunication rates and charges, technical standards, and trade documentation regulations. Important problems of legal definition in the data flow area are already beginning to emerge; as Dr. Peter Robinson asks:

. . . can data be sold, purchased or traded? Do we need a new concept of trade? Is it possible to make a clear legal distinction between data and information as public good and as private property? Are data and information in some degree a commodity? What parallels can be drawn between trade in information and trade in tangible goods? What are the differences and what legal implications arise from them?43

Robinson has delineated the practical problems of applying tariffs and rules of customs valuation to the traffic of data as a commodity -- including difficulties of harmonizing national approaches; instead, he suggests that "it may be better to develop a legal system that would deal with use and misuse of data and information."⁴⁴

However, since national legislation on transborder data flow already imposed by countries such as the United States implies at least a de facto recognition of the trade/commodity status of data and information, then recommendations to first solve problems of international computer crime seem secondary. In fact, the legal solution of such problems as the use and misuse of computercommunication technologies requires international agreement on definitions of data and information, and conformity of varying national laws and policies of trade issues of data flow. The importance of such broad aims in the data flow regulatory arena is conveyed by Justice M.B. Kirby of the Austrailian Law Reform Commission, when he states that:

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It has been suggested that movement of goods from country to country was hampered at the time of the first industrial revolution, diminishing the potential for spreading the benefits of technology, by narrowly conceived national interests which resulted in municipal laws which destroyed the simplicity and uniformith of maritime and commercial law and gave rise to sharp conflicts of law: concern has been raised that we should not make the same mistake twice.⁴⁵

Gotlieb, Dalfen, and Katz suggest that bilateral and multilateral agreements in the data flow area be formulated so as to protect the interests of both states and individuals.⁴⁶ These agreements:

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. . . would be related to the maximum possible degree to economic needs and realities and for this reason might tend to commend themselves over unilateral action which in some cases, could be disruptive or produce reprisals.⁴⁷

They recommend that the agreements should minimize jurisdictional conflicts, regulatory disparities, and legal ' disabilities resulting from the transborder flow and storage of data.⁴⁸

The construction of legal frameworks for defining transborder data flow issues in multilateral fora such as the G.A.T.T. and the O.E.C.D. could possibly lead to the development of binding and non-binding guidelines on various types of data flow -- guidelines similar to those which cover the protection of personal privacy in computercommunication systems.⁴⁹ While multilateral legal conventions on international trade aspects of data flow are considered, bilateral agreements might offset specific trade problems calling for unilateral actions such as the imposition of protectionist and reciprocity legislation.

The United States, instead of relying on its traditional policy format with the attendant consequences of simply reacting to international controls, could take an active role in international deliberations to define and regulate trade issues of data flow. The Canadian Government could likewise attempt to help establish guidelines relating to the control, taxation, or restrictions of data transmission relating to privacy, security, and certain economic and cultural types of information. Moreover, bilateral problems of computer-communication between the U.S. and Canada could be raised in multilateral fora in order to serve as an example of their current scenario whereby U.S. corporations are dominant in the international computer-communication trade and where other nations would like to develop such trade. They way in which the bilateral trade conflicts between Canada and the United States are resolved or not resolved may serve as an indication of how the U.S. will balance its adherence to both free flow and fair trade principles on the international level. Future Canadian action or non-action may also offer a model to other countries trying to establish computer-communication infrastructures both domestically and internationally.

NOTES: CHAPTER FIVE

¹ Ralph Waldo Emerson, "Nature," in <u>The Portable</u> <u>Emerson</u>, ed. Carl Bode, (New York: Viking Penguin Inc., 1981), p. 46.

² Canada, <u>Combines Investigation Act</u>, R.S.C. 1970, c. 23; and <u>Restrictive Trade Practices Commission Roles</u>, C.R.C. Vol. IV, C. 4416.

³ Canada, <u>Bank and Banking Law Revision Act of 1980</u>, 5.0 C. Ch. 40, Sec. 157.

⁴ Canada, Bank and Banking, p. 143.

⁵ Canada, Bank and Banking, p. 154.

⁶ Canada, Bank and Banking, p. 154.

⁷ Statements of Marc E. Leland, Asst. Sec. of the U.S. Dept. of Treasury, Dept. for International Affairs, submitted to the House Government Information and Individual Rights Subcommittee of the Committee on Government Operations, 9 December 1981.

⁸ Leland.

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⁹ Canada, <u>Combines Investigation Act</u>, R.S.C. 1970, c. 23, Sec. 9C1 & 7Cl).

¹⁰ Oswald H. Ganley and Gladys D. Ganley, <u>To Inform</u> or to Control: The New Communication Networks, (New York: McGraw Hill, 1982), p. 164. Bill C-41, Foreign Proceedings and Judgement Act, 32nd Parliament, 1st sess., 1980.

¹² Bill, C-14, Section 3(C1).

¹³ See, A.L.C. deMestral, J.G. Castel, Q.C., and W.C. Graham, Q.C., <u>International Business Transactions</u> and Economic Relations: Cases, Notes and Materials on the Law as it Applies to Canada, Vol. IV, Ch. XV, pp. 30-34.

¹⁴ deMestral, Castel, and Graham, p. 34.

¹⁵ Export and Import Permits Act, R.S.C. 1970, C.-E17, Section 3; as amended R.S.C. 1970 (2nd supp.) c.32, S.O.C. 1974, c.9, SS 1,2.3.

¹⁶ Export and Import Permits Act, C.R.C. C.601, pp. 4042-3.

¹⁷ See, for example: Herbert S. Dordick, <u>Economics</u> of <u>Specialization in Transborder Data Flows</u>, Draft paper, Annenburg School of Communications, University of Southern California, March 1980; Cees J. Hamelink, <u>International</u> <u>Finance and the Information Industry: op Relations Between</u> <u>Transnational Banking and Transborder Data Flows</u>, paper presented for the panel on Transnational Data Systems at the Conference on World Communications: Decisions for the 80s, Philadelphia, Penn., 12-14 May 1980. Work of the Harvard University Program on Information Resources such as: A.G. Oettinger, D. Berman, and W.H. Read, <u>High and</u> Low Politics: Information Resources for the 80s, (Cambridge: Ballinger Press, 1977).

- ¹⁹ <u>Customs Tariff Act</u>, R.S.C. 1970, C.41 as amended.
 ²⁰ Customs Tariff Act, R.S.C. 1970. C.40.
- <u>Cuscoms faith Acc</u>, R.S.C. 1970. C.40.
- ²¹ Customs Tariff Act, R.S.C. 1970, C.41, n. pag.
- ²² Ganley and Ganley, 1982, p. 154.

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²³ David A. Irwin and Lawrence Povitch, "Existing U.S. Laws Affecting International Data Flows," in <u>Selected</u> <u>Papers: International Policy Implications of Computers and</u> <u>Advanced Telecommunications in Information Systems</u>, ed. Morris Crawford, U.S. Dept. of State Bureau, 1979), pp. 73-77.

²⁴ See Sections 303Cr) and 605f <u>Communications Act</u> of 1934, (47 U.S. C.151-606).

²⁵ Privacy Act of 1974, (5 U.S. C.552a).

 26 See Ganley and Ganley, p. 153.

²⁷ Fair Credit Reporting Act, (15 U.S. C.1681).

²⁸ Fair Credit Billing Act, (15 U.S.C. 1631, 1637, 1666, 1669).

²⁹ Irwin and Povitch, pp. 34-75.

³⁰ <u>Bank Secrets Act</u>, (12 U.S.C. 1730d, 1829b, 1951-1959).

³¹ Irwin and Povitch, p. 75.

³² <u>Currency and Foreign Transactions Reporting Act</u>, (31 U.S.C.). ³³ Irwin and Povitch, pp. 75-76.

³⁴ Munitions Control Act, (22 U.S.C. 1934).

³⁵ Export Regulation Act, (50 U.S.C. App. 2401-2413).

³⁶ Toxic Substances Control Act, (15 U.S.C. 2601-2629).
³⁷ Irwin and Povitch, p. 76.

³⁸ Morris H. Crawford, "House Hearings on Transborder Data Flows: A Reflection," (n.p.: n.p.n.d.) n. pag.

³⁹ Herbert I. Schiller, <u>Communication and Cultural</u> <u>Domination</u>, (New York: International Arts and Sciences Press), 1976.

40 Peter Robinson, "Transborder Data Flow: A Canadian Perspective," (n.p.: n.p.n.d.) n. pag.

⁴¹ Oswald H. Ganley, "International Data Flows: Shall We Have International Cooperation," in <u>Selected Papers</u>: <u>International Policy Implications of Computers and Advanced</u> <u>Telecommunications In Information Systems</u>, ed. Morris H. Crawford, Dept. of State: Bureau of Oceans and International Environmental and Scientific Affairs, 1979), pp. 100-110.

42 Ganley, "International Data Flows," pp. 100-110.

⁴³ Peter Robinson, "Giving Legal Title to Data," in Transnational Data Report, 5, No. 3 (April/May 1982), p. 154.

44 Robinson, "Giving Legal Title," p. 154.

4⁵ Mr. Justice M.B. Kirby, "Legal Aspects of Information Technology," a presentation to the lst meeting of the

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new O.E.D.C. Committee on ICC Policy, September 1982, p. 26.

46 Gotlieb, Dalfen and Katz, p. 252.

47 Gotlieb, Dalfen and Katz, p. 253.

48 Gotlieb, Dalfen and Katz, p. 253.

⁴⁹ Organization for Economic Cooperation and Development, Directorate for Science, Technology and Industry, Working Party on Informatics, Computer and Communication Policy, <u>Draft Guidelines Concerning the Protection of</u> <u>Privacy and Transborder Data Flows of Personal Data</u>, (Paris: 22 June 1979); and Council of Europe, <u>Draft Convention for</u> <u>the Protection of Individuals with Regard to Automatic</u> <u>Processing of Personal Data</u>," (Strasbourg: Committee of Experts on Data Protection, 24 May 1975)².

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