

# ORCON CREEP

Network governance and  
the right to information

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## Hart/Rudman Commission

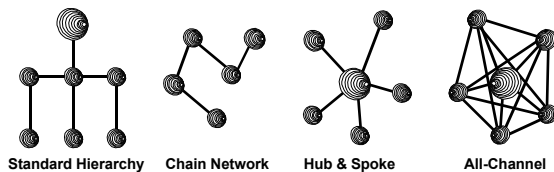
- February 2001
- "direct attack on American soil" likely
- Vulnerability increased by failure to share information
  - Among friendly governments
  - Among border control agencies
  - To protect critical infrastructure
  - Among emergency responders

## Congressional Joint Inquiry

- December 2002
- "Information was not sufficiently shared"
- Agencies "did not bring together and fully appreciate a range of information that could have greatly enhanced chances of uncovering and preventing Bin Ladin's plan"

## Remedy: networks

- Al Qaeda's advantage
- "Fight networks with networks"
- Build "all-channel" networks of agencies



From Arquilla and Ronfeldt, *Networks and Netwars* (RAND 2001). Diagram by Nort Fowler (2002).

## Network governance

- Pre-dates 9/11
- Formulation and execution of policy by actors not organized in hierarchy
- Locally:
  - Law enforcement agencies
  - Social services agencies
- Internationally:
  - Trade policy through WTO
  - Economic policy through IMF

## The ORCON rule

- ORiginator CONTROL
- Originating agency has control over release of shared information to third parties
- Absolute discretion
- Evolves from diplomatic norms; reinforced in
  - Intergovernmental agreements
  - Domestic laws, such as FOI laws

## Proposition #1:

As agencies connect to form "all-channel networks", an increasing proportion of information held by agencies will be affected by the ORCON rule.

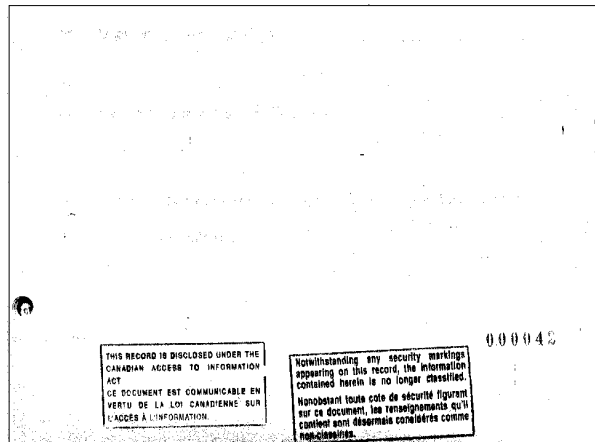
## ORCON & homeland security

- Sensitive homeland security info (SHSI)
  - "under control of federal agency"
  - Exempt from FOI laws
  - Non-disclosure agreements
- Critical infrastructure info (CII)
  - Exempt from FOI laws
- New FERC rule on CEII
  - Non-disclosure agreements
- Foreign government information
  - Presumed to require classification

Proposition #2:  
The ORCON rule will collide  
more frequently with public  
expectations about  
governmental openness.

## How ORCON works

- Weatherhead v. USA, 1998:
  - Extradition case
  - State Dept: ORCON applies "regardless of contents" of shared document
- Do-Ky v. Minister of Foreign Affairs, 1999:
  - Immigration case
  - Vietnam objects, Canada reverses position on disclosure



	<ul style="list-style-type: none"> <li>• The amendment proposed in Bill C-36 authorizes the Attorney General to issue a certificate in those limited circumstances required to prevent the disclosure of highly sensitive information in relation to matters of national and international security through judicial proceedings or which are subject to access to information requests.</li> <li>• Such an amendment is necessary to give our allies the absolute guarantee of confidentiality that they expect from us when they share with us highly sensitive information about defence and international affairs.</li> <li>• I can assure the House that the decision to issue a certificate - which I must take personally - will of course not be taken lightly and will only be made when absolutely necessary.</li> <li>• It is worth noting that the <i>Access to Information Act</i> already has an exemption in s.15 protecting information if its disclosure would be injurious to the conduct of international affairs, the defence of Canada or any allied State or the detection, prevention or suppression of subversive or hostile activity.</li> </ul> <p><i>If pressed on the studies mentioned in the article</i></p> <ul style="list-style-type: none"> <li>• The studies mentioned in the article were commissioned by the Access to Information Review Task Force. The Task Force was</li> </ul>
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## Changing ORCON

- We can change the terms on which information is shared
- Example of Mutual Legal Assistance Treaties
  - Disclosure if required by constitution or statute
  - Subject to notice
- Comparable to rules for personal, commercial information
- Discretion to make judgment about harm, benefits relating to disclosure

## Summary

- Combined impact of:
  - "All channel networks"
  - ORCON creep
- Clashes with expectations on openness
- Illustrated my homeland security concerns, but broader impact
- Remedy may be amendment of the ORCON rule