BROADCASTING AND POLITICS*

Parliaments have provided their own testimony on the importance of political broadcasts in English-speaking democracies. The purpose of this paper is to review some of the implications and difficulties associated with certain legislation in this field. It is desirable at the outset, therefore, to record a series of relevant provisions and regulations.

Australia: *Broadcasting Act 1942-1951.*

Part 1A, sec. 6K (2) (b): "The (Australian Broadcasting Control) Board shall, in particular . . . (iii) ensure that facilities are provided (by broadcasting stations) on an equitable basis for the broadcasting of political or controversial matter."

Part V, sec. 89 (1): "Subject only to this section, the (Australian Broadcasting) Commission may determine to what extent and in what manner political speeches or any matter relating to a political or controversial subject may be broadcast from national broadcasting stations, and, subject only to this section and to Part IA of this Act, the licensee of a commercial broadcasting station may arrange for the broadcasting of such speeches or matter from that station."

Section 6L provides that the Australian Broadcasting Control Board, for the purpose of exercising its powers and functions under the Act, shall have power, *inter alia,* to make orders. Such instruments are to be tabled in both Houses of Parliament and are subject to disallowance by resolution in either House.

Canada: *Canadian Broadcasting Act 1936.*

Sec. 22 (1): "The (Canadian Broadcasting) Corporation may make regulations:— . . . (d) To prescribe the proportion of time which may be devoted to political broadcasts by the stations of the Corporation and by private stations, and to assign such time on an equitable basis to all parties and rival candidates."

Regulations made by the Corporation are not subject to disallowance by Parliament.

United States of America: *Communications Act 1934.*

Sec. 315: "If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for

* The opinions expressed in this article are those of the author, and in no way of the Commonwealth authority with which he is employed.

that office in the use of such broadcasting station, and the (Federal Communications) Commission shall make rules and regulations to carry this provision into effect: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed on any licensee to allow the use of its station by any such candidate."

Regulations made by the Commission are not subject to disallowance by Congress.

England is a fourth country in which special attention has been paid to political broadcasts. In this case, however, broadcasting is conducted as a public monopoly by the British Broadcasting Corporation (B.B.C.) which is incorporated by royal charter and licensed to operate by the terms of a licence and agreement between the Postmaster-General and the Corporation. The British Broadcasting Corporation since 1928 has made arrangements for broadcasts by political leaders. These have been reviewed and extended from time to time with a view to securing the most equitable distribution of time possible between the political parties.[1]

The legislation which has been quoted involves the Australian Broadcasting Control Board, the Canadian Broadcasting Corporation, and the Federal Communications Commission. All three are regulatory bodies. This is not the full story with respect to the Canadian Broadcasting Corporation, one of whose functions is to conduct the national broadcasting services of Canada.[2] With that one qualification, however, these authorities prescribe certain conditions under which others, including pre-eminently licensees of private commercial stations, may conduct broadcasting services. All three have taken steps to give effect to the statutory provisions which have been cited.

In Australia, the Australian Broadcasting Control Board made an important and comprehensive order in 1949 with respect to certain election broadcasts, which will be the object of special study in this paper. The Canadian Broadcasting Corporation has acted

1 For the development of English practices, also those of Canada, United States, New Zealand, and South Africa, see Second Annual Report of the Australian Broadcasting Control Board (1950), Appendix G, 39, and other references there cited.

2 Canada's national services may be compared with those of Australia operated by the Australian Broadcasting Commission (A.B.C.). With regard to private commercial broadcasting, however, the Australian Broadcasting Commission has no jurisdiction, whereas the Canadian Broadcasting Corporation has certain regulatory powers comparable with those of the Australian Broadcasting Control Board. It thus combines in one authority approximately the functions divided between our two.

in two directions; it has issued a general regulation[3] stating that all stations shall allocate time "as fairly as possible between political parties and candidates." Beyond this cautious and negative instruction it has not yet ventured with respect to the full range of party broadcasts over stations in general. Its second move, however, has been to implement an elaborate plan to provide free time for a limited number of broadcasts on behalf of political parties at election times, over the national and private broadcasting systems conjointly.[4] This arrangement applies in practice to perhaps a fifth of the total time involved in election broadcasts. The remainder, over private commercial stations, is sold to parties and candidates subject only to the regulations referred to.

Finally we have the Federal Communications Commission in the United States, which has issued regulations carrying section 315 of the Communications Act into effect.[5] These amplify the section to a small extent by defining "legally qualified candidate" and by specifying certain practices pertaining to "equal opportunities", such as non-discrimination in the rates charged to candidates purchasing time.

The foregoing is far from a comprehensive survey of measures relating to political broadcasts. Certain subject-matters on which legislation exists have been deliberately excluded as lying outside the scope of this paper—for example, in Australia, broadcasting Parliamentary proceedings;[6] in Canada and Australia, prohibition of or limitations on the dramatisation of political events;[7] in Canada and Australia again, the prohibition of political broadcasts in the two-day period immediately preceding an election day.[8] It is necessary to confine attention to one central topic, which is either specified or covered in the provisions cited, namely the attempt to secure an equitable basis as between political parties and candidates in the use of broadcasting facilities.

This matter alone raises many questions. In the first place, it should be recorded that the attention paid to broadcasting in this

3 Regulation 8 (2).

4 Political and Controversial Broadcasting (*The White Paper*): Statement of policy issued by the Canadian Broadcasting Corporation on 21st February 1944 and revised to 1st May 1948; reproduced in Canadian Radio and Television Annual 1950, 271 ff.

5 Federal Communications Commission Rules and Regulations, Part 3, 190, in Broadcasting Year Book 1952, 419.

6 See Parliamentary Proceedings Broadcasting Act 1946.

7 Canadian Broadcasting Act 1936, sec. 22 (3); (Australian) Broadcasting Act 1942-51, sec. 89 (3).

8 Canada: *Ibid.*, sec. 22 (5); Australia: *Ibid.*, sec. 89 (2).

connection is unique among the communications media. In none of the countries mentioned do we find comparable efforts applying to the printed sources. This leads to a consideration of some distinctive features of the broadcast medium. Secondly, certain assumptions have been voiced as to the role played by broadcasting in the process of representative government. Such assumptions should be reviewed in the light of evidence concerning the impact of propaganda in democratic communities.

There are, thirdly, the legislative and administrative arrangements involved. Problems exist in the Australian legislation which have particular reference to the jurisdictions of the Australian Broadcasting Control Board and the Australian Broadcasting Commission. There are others which concern the spheres of activity of Parliament and subordinate bodies respectively in this field of legislation. The analysis proposed of the *Political Broadcasts (Federal Elections) Order 1949*, made by the Australian Broadcasting Control Board, and the reception of that order by Parliament, will throw light on such issues.

It is proposed to consider these matters in the following paragraphs.

POLITICAL BROADCASTS IN A DEMOCRACY

There is at least one compelling explanation for the distinctive attempt which has been made to regulate political matter in the field of broadcasting. It is inherent in the technical features of the broadcasting medium. Briefly, in any country, only a limited number of 'frequencies' or wavelengths are available for broadcasting purposes. This factor governs the number of stations which may be permitted to function, and the inescapable consequence is that the title to operate broadcasting facilities cannot be universally or even widely conferred. We can have only a limited system of multiple participation, or a monopoly. Whatever may be said of other factors which may influence the development of the printed media in the same direction, comparable technical limitations do not there apply.

It follows from this situation that special arrangements may be required if it is desired to secure the accommodation of other groups or persons seeking access to broadcasting facilities in order to express opinions or present information. Granted that objective, it might be expected that Parliaments would seek to impose conditions relating to political broadcasts on licensees of broadcasting stations.

That Parliament should espouse the objective has, however, important, if obvious, implications. There are on record a number of pronouncements from public authorities in broadcasting on this question. They invoke a wide variety of democratic premises, with particular emphasis on rights of free speech—the extension of the principle of 'freedom of speech' to broadcasting is generally assumed,[9] and can be accepted as an end in itself—and the important role allegedly played by broadcasting in the process of representative government. In connection with this last claim, three excerpts are worthy of quotation, one from the Canadian Broadcasting Corporation and two from the (Beveridge) Broadcasting Committee, 1949, in England:

> "For the proper functioning of representative and democratic government, it is essential that the public should be fully informed of the issues at stake in any election and of the position and policies of the various parties towards those issues. Broadcasting is today one of the most powerful means of disseminating information of this kind."[10]
>
> " . . . (To) bar all political controversy from the microphone would be to waste an invaluable means of securing the discussion which is the essence of democracy."[11]
>
> "Generally we would like to see broadcasting used more and more as a means of assisting the democracy to understand the issues on which it is required to decide at elections."[12]

These statements are not recorded because of any claim to novelty. On the contrary they are for the most part traditional stereotypes. And they involve wide assumptions which a critical age will surely want to put to the test. Do we actually know the extent to which broadcasting influences the electorate? The answer to such a question lies with certain fields of empirical research. In recent

9 The recent Commission on Freedom of the Press in the United States recommended that appropriate steps be taken to establish "radio, television and facsimile broadcasting clearly within the meaning of the term "press" as protected by the First Amendment" (to the Constitution of the United States); quoted by White. *The American Radio* (University of Chicago Press, 1947), ix-x. Article 19 of the Declaration of Human Rights adopted by the General Assembly of the United Nations in December 1948 reads: "Everyone has the right of freedom of opinion and expression; this includes freedom to hold opinions without interference, and to seek, receive and impart information and ideas through any media and regardless of frontiers."

10 *The White Paper* (see note 4, *supra*).

11 Cmd. 8116, 66-67.

12 *Ibid.*, 69.

years at least some of the necessary investigations have been made, with the aid of newer techniques such as surveys and impact studies, to provide us with a body of evidence on such matters. Some of this material at least should be consulted before we accept any speculations concerning the role of broadcasting in the process of representative government.

Here, then, are some of the findings. Concerning Australian conditions, we have only a limited amount of data. We do know, however, that Parliamentary broadcasts attract relatively small audiences. The same is broadly true of broadcast ministerial speeches and a host of miscellaneous items such as Premiers' fireside chats, and broadcasts by political parties and groups.

These general conclusions hold at election times, as well as for the 'in-between' periods. The only major exceptions appear to be initial election campaign speeches by party leaders in the federal sphere, and an occasional announcement of outstanding national importance, for example, a Prime Minister's broadcast.

The following for certain news broadcasts is more encouraging. At 7 p.m. each night, some 60-70% of available receivers in most centres are tuned to a news session; of these, many were not on any programme at all immediately prior to 7 p.m. In other words, the news is an attraction. No one news session, however, claims the audience to the same extent as individual leading entertainment programmes.[13]

Such facts are of course in purely quantitative terms. What of the intelligibility of such broadcast matter? What effect, if any, does it have on the courses of action followed by people?

Recently, a thoroughgoing test was made of the responses of members of the armed forces who were listeners to Forces Educational Broadcasts from the British Broadcasting Corporation in England. It was found that—"Little of the average broadcast gets across, except to listeners who have had some secondary education or are of

[13] In Melbourne, March 1952, a classification of the fifteen night sessions enjoying the largest followings included only one news session. All the others were entertainment programmes of one sort or another—principally quiz sessions, talent shows, serials. The largest following was for a talent show. Expressed as a percentage of all homes in Melbourne with receivers, it was 39.8. The comparable figure for the news session (sixth on the list) was 26.5. In America a recent tabulation gave over 12 for nineteen entertainment shows (over 20 for four of them). The highest rating for a news commentator was 12 and only two out of six scored over 10. No educational programme recorded as high as 8 (H. M. Beville Jr., *The A.B.C.D.'s of Radio Audiences*, in *Mass Communications* (University of Illinois Press, 1949), 418-419.

superior intelligence. The proportions falling below the borderline defined earlier (a minimum score of 3 out of 12 points in tests on response to the broadcasts) were 8 per cent. of the highest education and intelligence group (School Certificate level or above), and 29 per cent. of the remainder with more than elementary education . . . But among the ex-elementary group of average intelligence, the proportion below the borderline rose to 56 per cent. and among the most backward quarter of the population to 82 per cent."[14]

In the United States a study of a somewhat different order found evidence to indicate that generally "the people who are more susceptible to radio education are those who need it less".[15] Some of the results of the survey were:—[16]

Information other than news learned from radio by people on different educational levels

Learn from Radio	*College*	*High School*	*Grammar School*
1. General Knowledge	94%	68%	49%
2. Political Information	23%	35%	30%
3. Enjoyment or Cultural Information	33%	28%	17%
4. Don't learn, or listen only for entertainment	14%	20%	36%

In this case the response to political information, as a separate category, did not decline directly with educational status. It was nevertheless at a fairly low level thoughout.

A further American survey of propaganda in Erie County, Ohio, connected with the presidential election of 1940, revealed the following:

(1) At the peak of the campaign, 54% of the respondents had heard one or more of 5 major political talks broadcast in the days immediately before they were interviewed. In the 12 days before the election, about half the population ignored stories on the front pages of their newspapers or political

14 Professor Philip E. Vernon, *The Intelligibility of Broadcast Talks*, B.B.C. Quarterly, Vol. 5, No. 4, 206, 208-9. See also Robert Silvey, *The Intelligibility of Broadcast Talks*, Public Opinion Quarterly, Summer 1951, 299 ff.

15 Lazarsfeld and Field, *The People Look at Radio* (University of North Carolina Press, 1946), 71-73.

16 *Ibid.*, 72.

speeches by the candidates themselves, and about 75% of the people ignored magazine stories about the election.

(2) Throughout the campaign, people who were 'exposed' to a lot of propaganda through one medium were similarly receptive to other media. The converse also was true; i.e., exposure was concentrated in the same group of people, not spread among people at large.

(3) People who were interested, and knew how they were going to vote, read and listened to more campaign material than those who did not know how they would vote.

(4) To the extent that the formal media exerted any influence at all on vote intention or actual vote, radio proved more effective than the newspapers.

(5) Most of the newspapers supported the Republican candidate, Mr. Wilkie. Mr. Roosevelt, the Democratic candidate, with his "superb radio voice", placed particular emphasis on broadcasting. The supporters of either party, Republican or Democratic, paid most attention to the medium favourable to their own candidate. People changing their vote intentions favourably for the Republicans mentioned newspapers more frequently as the source of their reason for change, and Democrats mentioned the radio more frequently.

(6) Changes in vote intention during the campaign were fewer than changes in vote intention during the preceding three-and-a-half years. Of those who stayed with the Republicans in their lean year of 1936, 99% voted Republican in 1940. Between election day 1936 and May 1940, 21 per cent. of the 1936 voters for the Democratic candidate had fallen away from the party. Between May and October 1940, the campaign period, only another 8% left the Democrats. In other words, as the authors observe, "all the events of the intermediate period—local, national, and international—changed over twice as many votes as all the events of the campaign."[17]

It could be misleading to remove these conclusions regarding the presidential campaign from the context of the full report. What-

[17] Lazarsfeld, Berelson and Gaudet, *Radio and the Printed Page as Factors in Political Opinion and Voting,* in *Mass Communications,* 481 ff.; also *The People's Choice: How the voter makes up his mind in a presidential campaign,* (Duell Sloan and Pearce, New York, 1944), especially c. xiv.

ever impression is conveyed, therefore, must be qualified by the rider that there was evidence that the campaign quickened interest in the election. If it did not induce new opinions, it at least activated latent ones for a number of people. Even when due allowance is made in this direction, however, the conclusion is inescapable that the formative influence of the campaign was very limited.

Some of the other evidence which has been reviewed indicates that not many people appear to learn about political affairs per medium of broadcasting; propaganda techniques over the air must take account of the level of education of the potential audience; probably fewer people than we might expect are of an educational status which allows them to be receptive to education of one sort or another over the air.

All this, of course, concerns only the impact of communications media on people. It has often been pointed that there is also the reciprocal process whereby the predispositions of the public are allowed to condition propaganda content—the sort of thing which led an American newspaper, whose correspondent had forwarded an account of a political crisis in Hungary, to reply, "We do not think it advisable to reprint this because it does not reflect Midwestern opinion on this point."[18]

In short—the accumulating body of evidence provides a salutary check against uncritical optimism concerning the influence of communications media in a democracy. If we ask 'Do our communications influence public opinion?', the answer can be only a qualified 'Yes'. As one writer has aptly said, " . . . . the proper answer is some kinds of *communication* on some kinds of *issues* brought to the attention of some kinds of *people* under some kinds of *conditions* have some kinds of *effects*."[19]

What this obviously implies is that the entire relationship between propaganda and its audience is as yet relatively uncharted. It is the difficult task of research on communications media to try to have it better understood. That this is a prerequisite to the full and effective use of such media in the democratic process is becoming increasingly apparent.

18 Leo Rosten, *The Washington Correspondents* (Harcourt Brace, 1937) 231, quoted in Berelson, *Communications and Public Opinion*, in *Mass Communications*, 496 ff.

19 Berelson, *ibid.*, 500.

PROBLEMS OF LEGISLATION AND ADMINISTRATION

(a) *Australian legislation, and the Political Broadcasts (Federal Elections) Order 1949*

The sections of the (Australian) Broadcasting Act 1942-51 which cover the provision of equitable arrangements for political broadcasts have already been set out. They should be considered in association with the dualism of the Australian broadcasting system.

We have first the national system which includes forty-two broadcasting stations in the medium-frequency band, whose programmes are provided by the Australian Broadcasting Commission.[20] Secondly, there is the commercial sector, comprising one hundred and three broadcasting stations in the same band operated by private concerns under licences issued by the Postmaster-General after advice from the Australian Broadcasting Control Board.

The effect of the relevant legislation under section 6K of Part IA of the Act in conjunction with section 89 (1) of Part V is to establish a divided jurisdiction in the field of political broadcasts as between the national and commercial sectors. Section 89 (1) specifically confers on the Commission the power to arrange political broadcasts over the national stations "subject only to this section." The section imposes conditions and restrictions on only a few specific headings—dramatised political broadcasts, political broadcasts immediately prior to election days, identification of speakers, keeping records. These minor limitations apart, the Commission has unfettered control over political broadcasts transmitted from its own stations.

Licensees of commercial broadcasting stations are, however, subject not only to section 89 but also to Part IA of the Act in which the Australian Broadcasting Control Board is charged "in particular (to) ensure that facilities are provided (by broadcasting stations) on an equitable basis for the broadcasting of political and controversial matter."

In practice the independent jurisdiction conferred on the Commission with respect to the national stations covers a wide range of matters, such as whether ministers of the Crown shall broadcast, whether Opposition speakers will be conceded a right of reply, the definition of parties on behalf of which broadcasts will be accepted at election and other times, the determination of a basis for the allocation of time between acceptable parties. In many cases, awkward problems of co-ordination and uniformity of practice exist as between

20 Hereafter referred to as the Commission.

the two sectors of broadcasting. Nowhere has this question been more acutely felt than in relation to the attempt made in 1949 by the Australian Broadcasting Control Board[21] to regulate election broadcasts.

The particular instrument involved was an order made by the Board, pursuant to its power under Part IA of the Act, cited as *The Political Broadcasts (Federal Elections) Order 1949*.[22] It provided, *inter alia,* that:

(1) All commercial stations must rebroadcast, free of charge, those speeches of the leaders of the political parties which the Australian Broadcasting Commission broadcast on interstate relay. A 'political party' for these purposes was one "on behalf of which candidates are nominated at the election." (The reasons for introducing this clause were that first it was deemed a necessary public service by broadcasters to provide facilities for such broadcasts; secondly, the practice had been adopted in the past by many broadcasters; thirdly, for technical reasons, the nationwide relays envisaged must originate in the studios of the Commission).

(2) Any licensee of a commercial broadcasting station making time available for political matter in the election period other than that referred to in (1) above, must arrange to allocate time as between parties and candidates applying for it so that it was "distributed among all such parties and candidates on a basis which will afford fair and reasonable opportunities to those parties and candidates to put before the electors the opposing views on issues at the election." There was no obligation for stations to provide free time for these broadcasts. "Party" in this case was defined as "a political party on behalf of which candidates are nominated in at least 15 per centum of the electoral divisions for the House of Representatives, provided that those divisions are situated in not less than three States."

It appears on the face of the order that both the provisions referred to were necessarily determined to a large extent by the position

21 Hereafter referred to as the Board.

22 The order, dated 8th September 1949, is reprinted as Appendix E of the Second Annual Report of the Board (1950). A comprehensive account of the circumstances connected with the making of the Order and its subsequent reception by the Press and Parliament will be found in the same report at 18ff. The only provisions of the order considered here are those relating to political parties and candidates. It contained others applying to organisations other than parties.

and practices of the Commission. For example, with regard to relays of broadcasts from the Commission's stations, a definition of 'party' must be adopted which would be consistent with any such ruling employed by the Commission for its own purposes. Hence the very general terms adopted. With regard to other broadcasts over commercial stations, however, a firm definition of 'party' must be laid down, to enable stations to reserve time and facilities for bodies which fulfilled certain conditions. But here again, it would have been anomalous and a matter for public ridicule to employ a basis at variance with the practice of the Commission. The Board states that it obtained certain confidential information from the Commission on this question before formulating its own definition.

The order was ill-fated. With regard to the first provision, objection was raised that it would guarantee time on all commercial stations for the policy speech of the Communist party if this should be broadcast by the Commission. For the previous federal election, the Commission was known to have made an allocation of time to this party. Its policy on the matter with respect to the 1949 election had not been revealed when the Board's order was made.[23] Between the two elections, however, Communism had become a particularly live issue.

With regard to the second provision, exception was taken to the fact that commercial stations would be obliged to accommodate the Communist party in the "fair and reasonable opportunities" formula if that party should apply for time and be prepared to pay for it.

The order was hotly challenged in the press and in a debate on an adjournment motion moved by the Leader of the Opposition in the House of Representatives on 28th September 1949,[24] with particular though not exclusive reference to these matters. Under threat of its disallowance by the government which itself more than matched the opposition and press in the discourtesy of some of its strictures,[25] the contentious provisions of the order were withdrawn

23 At the twelfth hour, after the Parliamentary debate referred to below, the decision of the Commission was announced, refusing time to the Communist party: *Daily Telegraph* (Sydney) 22nd-29th September 1949; *Argus* (Melbourne) 29th September 1949; and other newspapers.

24 (1949) 204 Commonwealth Parliamentary Debates, 643 ff.

25 The Minister representing the Postmaster-General declared that "in respect of that portion of it which defines parties, it is a stupid order." He was surpassed by another member of the Government party who described the order as, "a piece of ineffable stupidity. It is not often that a Government beats its own baby, but, in this instance the slapping is salutary and disciplinary, I hope." (*ibid.*, 653).

by the Board. The Board declined, however, on principle to amend the order so that it might, in effect, discriminate against the Communist party.

The substance of the Board's defence of its actions was as follows:[26]

First, it is accepted practice in countries professing the parliamentary system of government, that a subordinate authority must carry out the powers delegated to it as they may be reasonably interpreted from the statute. In the case in point, the relevant provision of the Act provided no warrant for discrimination against any minority party or group. If anything, it would be construed as implying protection for such a body.

Secondly, at the time the order was made the Communist party was a legal entity in Australia. As such it was entitled to share in all benefits accruing to such parties under the broadcasting legislation. The only authority which might be competent to declare the Communist party illegal was Parliament itself which to date had not acted in the matter. Failing such action, it would be a presumption on the part of a subordinate authority to take upon itself the task of disfranchisement.

Thirdly, the statutory direction to provide equitable facilities could not in fact be discharged in any manner other than that adopted in the order.

The practical difficulties revealed by this episode display with some force the weaknesses of the appropriate provisions of the Broadcasting Act relating to political broadcasts, and require no further elaboration. The Board has since consistently maintained that the legislation requires amendment before it can be applied in practice, and pending such action by Parliament, it has made no further attempt directly to introduce regulation in the field of political broadcasts.

It would be misleading, however, to imply that the particular complications which have been reviewed, relating to the divided jurisdiction between the Board and the Commission, are the only important ones which Parliament might need to consider. Reference has been made to two other matters which together raise a separate issue, namely, the relations between Parliament itself and the Board. The first is that the government proposed to invoke the power of Parliament to disallow the *Political Broadcasts (Federal Elections)*

[26] These matters are considered in the Second Annual Report of the Board (1950), 18 ff.

Order. The second is that the Board, in the face of this proposal, declined on principle to modify the provisions of the order to which objection was taken.

Such a situation focuses attention on the scope of the power delegated by Parliament to the Board. Within the limits of its application, namely, commercial broadcasting, and irrespective of argument as to whether that field should be modified, the question must be asked: "Is the power, as formulated, too broad?" We should go further perhaps, and look not only at the amplitude of the Board's authority, but also that of the Commission. For here we have yet another subordinate body deriving its powers from the same legislature, yet possessing an even wider discretion in the same field, one which is not subject to Parliamentary review. Is there good reason for this difference in status? Is Parliamentary review desirable in either the case of the Board or of the Commission?

The final task is to review these questions, drawing in the process on comparisons overseas.

(b) *The delegation of powers relating to political broadcasts.*

In many quarters, the view has long been held that governmental authority in the field of broadcasting should be reposed wholly or largely in semi-autonomous instrumentalities in preference to departments of state. The reason is not hard to find; broadcasting is a means of communication which is liable to political abuse or the allegation of abuse if the line of responsibility terminates in all matters with a minister of the Crown who is also a member of a political party in power. It is pertinent to recall that in one case, New Zealand, where control is exerted through such traditional channels, arrangements were made in 1949 for election broadcasts which gave the Prime Minister a final opportunity to present his party's case on election eve. Despite the fact that equivalent time was allocated to government and opposition broadcasts as a whole during the election campaign, opposition circles characterised the allocation of this final broadcast at such a time to the Prime Minister as "an abuse by the party in power of publicly-owned facilities."[27]

In the countries referred to earlier—Britain, Canada, United States, and Australia—appropriate instrumentalities have been established. It would be instructive, but is again beyond the scope of this paper, to discuss broadly both the formal legal independence and the effective autonomy of these bodies. Suffice it to say that varying

[27] Reported in *Argus* (Melbourne) of 19th November 1949.

degrees of freedom exist, in circumstances which themselves differ from country to country, and that the general principle of independence was explicitly reaffirmed by the recent report of the (Beveridge) Broadcasting Committee, 1949, in England, and accepted by the late Labour and current Conservative governments.[28] In all four countries this general approach has been applied to some extent in the specific task of securing equitable arrangements for broadcasts by political parties and candidates. But here again the discretion conferred on the subordinate body, and the legislative arrangements whereby it is secured, vary from case to case. The position in the four countries may be summarised as follows on the basis of the legislative provisions quoted earlier, it being understood that these do not reveal the informal channels whereby some decisions may be reached in practice.

In England, the British Broadcasting Corporation has complete authority over domestic political broadcasts.

In Australia, the Commission's jurisdiction with regard to the national service is virtually unlimited. With respect to commercial services the Board has a wide but not unlimited power which may be exercised by making orders which are subject to disallowance in Parliament.

In Canada, similarly, the authority delegated to the Canadian Broadcasting Corporation is broad. The Corporation may make regulations to carry it into effect, but these regulations are not subject to disallowance in Parliament.

In the United States, Congress has provided a combination of substantive legislation on certain points, and a narrower, more specific statement of overall objectives than we find in Australia or Canada. The Federal Communications Commission administers the section through regulations which are not subject to legislative review.

It should be stated, parenthetically, that there are, in practice, important qualifications to the American position, arising from the fact that the Federal Communications Commission is also the licensing authority and is empowered to issue broadcasting licences "if public interest, necessity or convenience will be served thereby."[29] In this capacity, it has assumed supervisory and quasi-judicial functions which actively condition the practices of broadcasters. Numerous of its decisions, dicta and statements have moulded the conduct of

28 Cmd. 8116, 7-9; Cmd. 8291, para. 8; Cmd. 8550, para. 5.
29 Communications Act 1934, sec. 307.

political broadcasts within and beyond the limits of section 315.[30] For example, it has insisted on the affirmative duty of broadcasters, as a public service, to make facilities available for such broadcasts generally. Here again, legislative review is not provided and there are other limitations in the field of procedure and judicial review which have been the subject of criticism and examination elsewhere.[31]

This aspect of the Federal Communications Commission's work apart, the problems associated with the foregoing examples of delegated powers may now be examined. First, a distinction should be drawn between the general position of the British Broadcasting Corporation and the Commission on the one hand, and the other authorities under consideration, in that the exclusive function of these two is to conduct publicly-owned broadcasting services in England and Australia respectively. It has already been indicated that the same two bodies enjoy particularly wide freedom from Parliamentary control with respect to political broadcasts. Does their peculiar function demand such independence? It is difficult to establish such a proposition. In Australia, it appears plainly anomalous that the Commission should be fully empowered to act in the field of political broadcasts without even final reference to parliament whereas the Board is subject to the overriding authority of the legislature. Broadly the same objectives are involved in the legislation in both cases, and the principal distinction between them appears

30 For example, within sec. 315, a Federal Communications Commission letter advises Columbia Broadcasting System that the equal time requirement of section 315 must be given effect regardless of the licensee's opinion as to the practical chances of a candidate at election (7 Pike and Fischer, *Radio Regulation (U.S.A.)* (1952), 1189). Beyond sec. 315: "The public interest clearly requires that an adequate amount of time be made available for the discussion of public issues" (*Public Service Responsibility of Broadcasters*: Report by the Federal Communications Commission of 7th March 1946, at 40). Again in report of 2nd June 1949, the Federal Communications Commission refers to the "affirmative duty of broadcasters to encourage and implement broadcasts on controversial issues, over and above the obligations of Section 315" (1 Pike and Fischer (1949), 91:21). In *The Mayflower Case*, 1941, the Federal Communications Commission vetoed editorialisation by stations in support of candidates (Warner, *Radio and Television Law* (Matthew Bender and Co., New York, 1948), 395-396), and subsequently modified the view in the report of 2nd June 1949 to permit editorialisation on condition that, overall, a station must present a fair balance of material for all sides.

31 Kenneth Culp Davis, *Administrative Powers of Supervising, Prosecuting, Advising, Declaring, and Informally Adjudicating,* (1949-50) 63 Harv. L. Rev. 193. [New legislation has since been passed and some proposed dealing with procedural and appellate questions relating to the Federal Communications Commission (1 Pike and Fischer, *Radio Regulation* (1951) 31, and Release 4-2 of 7th February 1951)].

to lie in terms of the outlets through which the broadcasts are directed to the public—national stations on the one hand, commercial stations on the other. It would seem more logical for Parliament to exercise the same degree of control in both sectors.

Secondly, what measure of control is appropriate? This is the crucial point. When it made the *Political Broadcasts (Federal Elections) Order 1949,* the Australian Broadcasting Control Board was exercising the broad power conferred upon it by Parliament. The order was assailed, however, principally on a general issue which Parliament regarded as of special national importance but on which it had not attempted to legislate. Moreover this issue, like so many others which complicate the field of delegated authority, was in fact a hybrid. If communism is from one point of view a matter of urgent national importance, it is, from another, one involving the status of a minority group, and it could be strongly urged that the task of making determinations affecting the status and rights of such groups in general should be expressly removed from political circles.

A case such as this is clearly one of conflicting objectives. Which one should prevail? There are obviously strong arguments either way. Constitutional limitations aside, it would seem reasonable to hold that having regard to the legislative supremacy of Parliament which many people in recent decades have been at pains effectively to secure, and whatever the attendant dangers, Parliament should be conceded the prerogative of determining whether a matter is of such overriding importance as to justify its direct concern. In the circumstances of the order which has been under discussion, it would follow from such a view that the existence and exercise of the reserve power to intervene were appropriate. Obviously, however, prior action by Parliament on the issue would have been equally suitable and a good deal more convenient. What the Australian Broadcasting Control Board found was that, in the absence of such action, the practical exercise of its broad discretionary power was impossible.

This experience points to two conclusions. In the first place, effective action will be facilitated, and uncertainty reduced, by Parliament's prior resolution of contentious major issues, and its provision of relatively specific directions relating thereto. How specific will always be a matter for consideration in each individual case, but at least it can be said that the general instruction "to ensure that facilities are provided (by broadcasting stations) on an equitable basis for the broadcasting of political and controversial matter" is so

broad as to be capable of producing more difficulties than it solves—indeed it solves none. Viewed in this light the American provision referred to is worthy of close examination.[32]

Secondly if, notwithstanding the foregoing, a broad discretionary power is to be delegated, it would seem prudent for Parliament to retain a reserve power in respect of it. For this purpose, the tabling of statutory instruments in Parliament and provision for their disallowance by that body are well established techniques.[33] On this basis, the method pursued in Australia would appear to be distinctly preferable to the Canadian, in the examples referred to.

Even after reducing the issue to these alternatives, however, there still remain a number of awkward associated problems.

To begin with, should the power delegated to the subordinate be permissive, as in Canada, or mandatory, as in the case of the Board in Australia? No doubt this will depend partly on the extent of the authority delegated. The Board's experience indicates, however, the difficulties which may be associated with a definite obligation that may call for action at a time which also happens to produce acute related problems. On the other hand, it may be surmised that to confer a wide power of the permissive type, particularly if dissociated from parliamentary review, may induce administrative timidity in a contentious field such as political broadcasts.

Again, if Parliament adopts the practice of providing substantive legislation, the situation becomes more rigid, and changes in respect of the matters specified depend on fresh legislative action. For example, had the American provision been embodied in the Australian broadcasting legislation in 1949, and had Parliament pursued the particular issue which led to disallowance of the Board's order, it could have acted in only one of two ways—either by amending the Broadcasting Act or by bringing down general anti-communist legislation. It might well have been the latter, since to take the necessary action in one particular field might have been considered

32 Communications Act 1934, section 315, *supra.*

33 In England, the Statutory Instruments Act of 1946 and a Select Committee, first created in 1944 and now generally known as the Statutory Instruments Committee, combine to bring this about. In Australia the comparable legislation is the Acts Interpretation Act 1901-50, but no government has ever established an appropriate committee. In the Senate, however, a Standing Committee on Regulations and Ordinances functions, dating from 1932. For recent developments in England, see Hanson, Stacey, and Hanson in *Public Administration* (London), Winter 1949, Winter 1950, Autumn 1951.

anomalous. In either event, there would be the difficulty of the congestion of the parliamentary time-table to be considered.

Thirdly, there are the political implications of such action. It is understandable that some governments may have strong political reasons for refraining from overt and semi-permanent discrimination against a particular minority group. It may be argued, further, on broad grounds, that it is desirable to stop short of writing measures of such a character into the statute book if at all possible. These considerations suggest that there is something to be said for the more flexible situation provided by the current Australian broadcasting legislation applying to the jurisdiction of the Board, whereby Parliament may achieve a limited objective, in a particular instance, by the more negative means of applying a veto.

There is, however, an opposed point of view. In 1942-1943, the Parliamentary Standing Committee on Broadcasting considered the wisdom of embodying the Commission's policy for election broadcasts in legislation.[34] (The Commission's position was then the same as it is today.) It objected that such a move might place the Commission in a position where it could be obliged to recognise and grant facilities to a subversive party. The Committee gave attention to an alternative, namely, that the policy might be embodied in regulations. Again it objected that these might be subjected to arbitrary interference by governments. At the time, and on the basis of these two propositions, the Committee recommended no change in the Commission's jurisdiction, i.e., it favoured the retention of a complete administrative discretion.

A fourth and final issue: Can Parliament be expected to have either the time or the prescience to provide substantive legislation on all matters of major importance? The most reasonable approach to this problem would appear to be for Parliament to clear the ground in piecemeal fashion, adding legislation progressively as required. There might be delays in such a process, but a good deal might be achieved, particularly since Parliament would have at its disposal the *expertise* of its subordinate body.

Any solution to problems such as these will be less than ideal. In some it may be urged, however, that the following elements are likely to be appropriate in a difficult and novel field of legislation such as has been reviewed; in legislation, the pursuit of limited objectives capable of later extension, in conjunction with reasonably specific

[34] First Report of the Parliamentary Standing Committee on Broadcasting, Canberra, 2nd February 1943, 14 ff.

instructions to a subordinate body regarding such objectives; a limited field of discretion for the subordinate authority; and the retention of parliamentary review of the exercise of such discretion.

It now remains to add the anti-climax to this analysis as it applies to Australia.

After the events of 1949 which have been discussed, the High Court, in *The Australian Communist Party and Others v. The Commonwealth and Others*,[35] rejected legislation of the Commonwealth Parliament aimed at terminating the legal existence of the Communist Party. Later, the electorate voted against a referendum[36] to give the Commonwealth Parliament certain powers to deal with communists and communism.

In view of these developments, it seems unlikely that the communist *bete noire* of the *Political Broadcasts (Federal Elections) Order 1949*, will be removed by legislative action, although the Court's recent favourable judgment on the Defence Preparations (Capital Issues) Regulations[37] has raised the possibility of currently writing anti-communist legislation under the defence power. Granted no such action, however, even if amendment of the Broadcasting Act should be contemplated with a view to terminating the division which exists in the jurisdiction relating to political broadcasts, it is doubtful if a workable scheme for the purposes envisaged in that Order will be within reach, unless the communist issue should recede in importance. If, finally, this should come to pass, the possibility will nevertheless remain that important differences may arise on other issues. Such a prospect will continue to call for reconsideration of the form in which our legislation relating to political broadcasts is cast.

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35 (1951) 83 C.L.R. 1.

36 Referendum on The proposed Law - Constitution Alteration (Powers to deal with Communists and Communism) 1951, held 22nd September 1951.

32 *Marcus Clark & Co. Ltd. v. The Commonwealth and Others*, (1952) 26 Aust. L. J. 321.

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