

## THE RELATIONSHIP BETWEEN MEDICAL AND LEGAL PRACTITIONERS AND LEGISLATORS

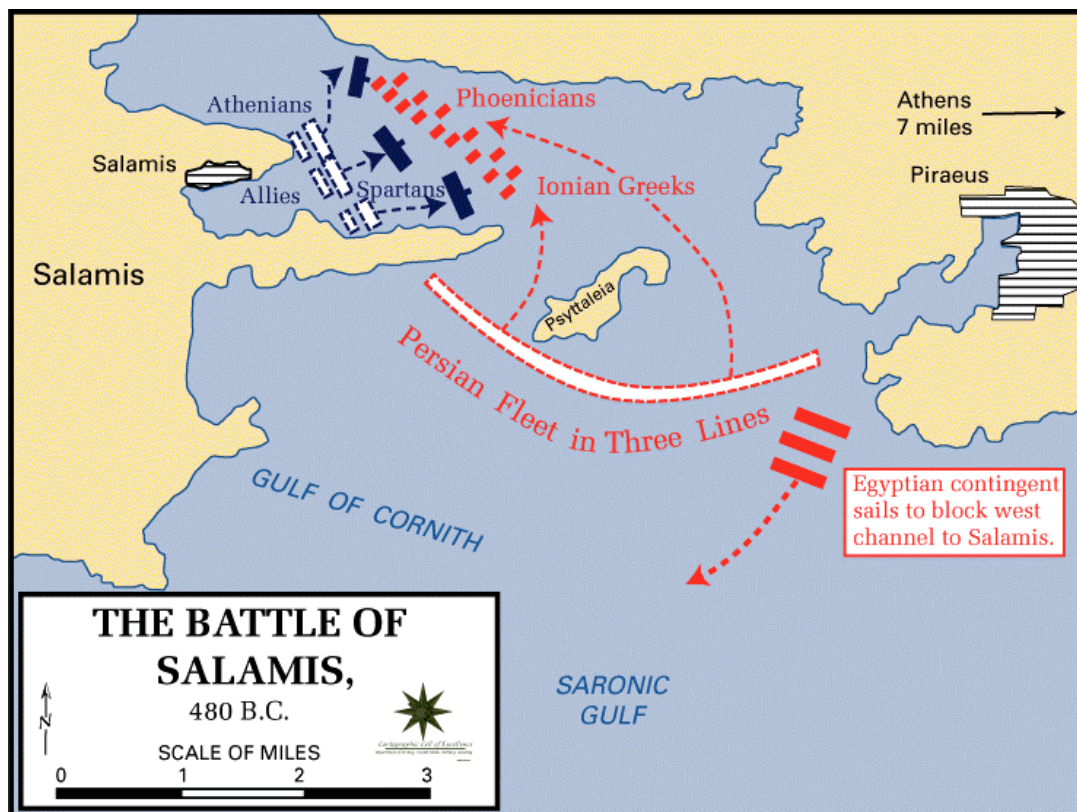
### Geoff Provest\*

This month<sup>i</sup> - September 2007 – marks the 2486<sup>th</sup> anniversary of the Battle of Salamis which was fought in the waters off Athens in 480 BC. The Battle of Salamis was one of the pivotal events of the ancient world which molded the world we know today because it stopped the expansion of the Persian empire westward into Europe.

Had the Greeks lost this important battle the subsequent development of Greek and later Roman **systems of law and democratic government and culture** would never have occurred as Persian domination would have been able to continue unopposed across the western Mediterranean.

However, as important as the battle of Salamis was to the subsequent history of the western European world as ethical legal and medical practitioners few of us would want to endorse the means used by the Athenian General, Themistocles, to secure that victory.





The Battle of Salamis was preceded in early September 480BCE by:

- The famous **Battle of Thermopylae** in which 300 Spartans and 700 allied Greek troops held the Persian army of over 1 million at bay for 3 days before succumbing; and
- The naval battle at **Artemesium** in which the Persians also triumphed and marched on to Athens which they occupied unopposed.

**Both of which the Greeks had lost.**

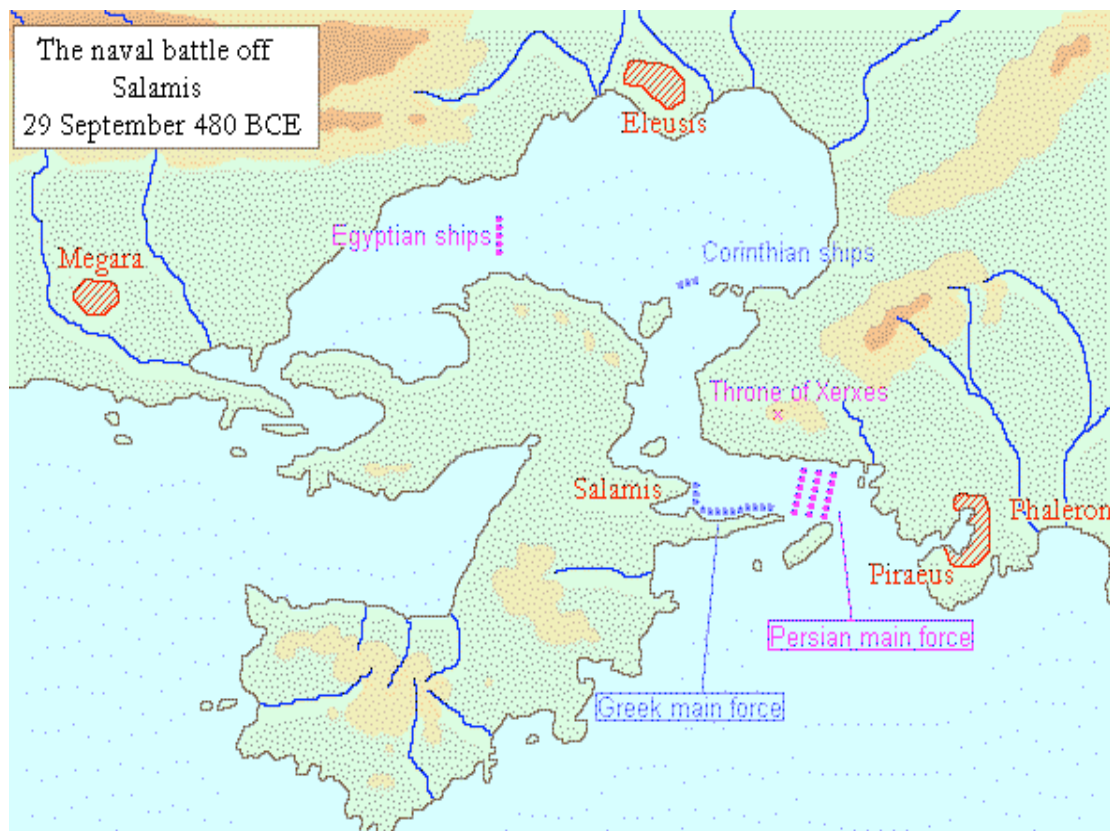
After Thermopylae, the only hope for Athens and for Greece was to prevent Xerxes being able to feed and support his large army. This was only possible by destroying the Persian transport fleet which supplied the army because lack of food would force the Persians to return. Fortunately, despite the loss at Artemesium, the Greek navy was still more or less intact so they could still mount a serious contest on the sea.

The Greek resistance from the remaining city states occupied the island of Salamis, opposite the Athenian port at Phaleron together with most of the population of Athens.

According to Herodotus, on the day before the battle Themistocles was unable to persuade his fellow generals from the other Greek city states to conduct the battle in the narrow straits between the island of Salamis and the mainland. The majority view of the generals led by the Spartans was to return to the Peloponnese, seal off the

isthmus of Corinth with a wall, and prevent the Persians from achieving victory on land.

Without the knowledge or consent of his fellow generals, Themistocles sent one of his slaves, Sinnicus, to leak this information to the Persians and falsely promise them the support of the Athenians if they would encircle the Greek fleet which was located west of the island of Salamis. The Persians believed Sinnicus and committed their fleet to the encirclement of the Greeks who were then left with no alternative but to remain and fight which they did and were ultimately victorious.<sup>ii</sup>



What is the relevance of this excursion into history? The relevance is simply that it demonstrates the reality that the acquisition and maintenance of power arises not as the result of moral force or the victory of good over evil (however much many of wish that were the case) but by the might of the strong prevailing over that of the weak.

### The nature of power

The same principles apply irrespective of:

- The system of government whether it be democratic, aristocratic or authoritarian; and
- The reputation of the government for acts of good or evil or something in between.

The principles that determine how laws are made are one and the same as the principles that determine the exercise of power itself irrespective of the particular community in which power is exercised and laws are made. The principles seem almost to be Darwinian in nature. They have been the subject of consideration by political philosophers over the centuries including most famously, Machiavelli, Thomas More and Thucydides, in whose homeland we are meeting, in his *“History of the Peloponnesian Wars”* which documented and analyzed the conflict between the city states of Athens and Sparta and their allies between 431 and 404 BCE.

#### The golden rule of power

*“So far as right and wrong are concerned ... there is no difference between the two ... those who still preserve their independence do so because they are strong and if we fail to attack them it is because we are afraid.”<sup>iii</sup>*

*“Our opinion of the gods and our knowledge of men lead us to conclude that it is a general and necessary law of nature to rule whatever one can. We found it already in existence, and we shall leave it to exist for ever among those who come after us.”<sup>iv</sup>*

#### The rule of survival

*“This is the safe rule – to stand up to one’s equals, to behave with deference towards one’s superiors, and to treat one’s inferiors with moderation”<sup>v</sup>*

#### The relationship between justice and power

*“... the standard of justice depends on the equality of power to compel ...the strong do what they have the power to do and the weak accept what they have to accept.”<sup>vi</sup>*

#### The potential cost of standing on principle

*“... if one follows one’s self interest one wants to be safe, whereas the path of justice and honour involves one in danger...”<sup>vii</sup>*

*“Do not be led astray by a false sense of honour – a thing which often brings men to ruin when they are faced with an obvious danger that somehow affects their pride. For in many cases men have still been able to see the dangers ahead of them, but this thing called dishonour, this word, by its own force of seduction, has drawn them into a state where they have surrendered to an idea, while in fact they have fallen voluntarily into irrevocable disaster, in dishonour that is all the more dishonourable because it has come to them from their own folly rather than misfortune.”<sup>viii</sup>*

#### The desire of humanity to do good

*“... men never do good unless necessity drives them to it; but when they are too free to choose and can do just as they please, confusion and disorder become everywhere rampant.”<sup>ix</sup>*

Machiavelli, writing in Florence in 1516, noted of the challenges that confront a well meaning person in promoting new ideas in government:

*“... nothing is more difficult to handle, more doubtful of success, and more dangerous to carry through than initiating changes to a state’s constitution. The innovator makes enemies of all those who prospered under the old order, and only lukewarm support is forthcoming from those who would prosper under the new. Their support is lukewarm partly from fear of their adversaries, who have the existing laws on their side, and partly because men are generally incredulous, never really trusting new things unless they have tested them by experience.”<sup>x</sup>*

In the same year Thomas More, writing in England, reflected on the same issue and suggested a way forward:

*“It’s no use attempting to put across entirely new ideas, which will obviously carry no weight with people who are prejudiced against them. You must go to work indirectly. You must handle everything as tactfully as you can, and what you can’t put right you must try to make as little wrong as possible. For things will never be perfect, until human beings are perfect – which I don’t expect them to be for quite a number of years.”<sup>xi</sup>*

#### On the reality of life within government

*At Court you can’t keep your opinions to yourself or merely connive at other people’s crimes. You have to give open support to deplorable policies, and subscribe to utterly monstrous resolutions. If you don’t show enough enthusiasm for a bad law, you’ll be taken for a spy or even a traitor. Besides, what chance have you got of doing any good, when you’re working with colleagues like that? You’ll never reform them – they’re far more likely to corrupt you, however admirable a character you are.”<sup>xii</sup>*

Machiavelli’s view was that there are times when it is necessary to do admittedly evil things for the preservation and welfare of the political community – and if one is not so willing, one is simply stepping outside politics and, incidentally, abandoning it to those who have no scruples.<sup>xiii</sup>

This is a logic not unlike that of Caiaphas, the high priest of the Jews in 33 CE who justified the execution of Jesus on the ground that *“it is better that one man die than that the whole nation perish”*.<sup>xiv</sup>

It is not surprising that, writing from Ephesus to the Corinthians in 55CE, the Apostle Paul noted: *“The wisdom of this world is foolishness in God’s sight”*.<sup>xv</sup>

It is in some ways dispiriting to contemplate these realities about the nature of the world in which we live. However, they define the parameters within which we need to work if we seek to be effective in bringing about practical beneficial change where it is necessary.

## **Power and decision making in our system**

In our system “*might*” or *power* is exercised through more subtle means than the force of arms such as financial and media control and lobbying by interest groups.

Ultimate law making power vests in the elected legislature. That is the primary thing we elect Members of Parliament to do – ie make laws.

They do engage in various public debates and perform various official duties such as attending functions and acting as a communication link between the community and the government. It is from the ranks of the legislature that the executive government is appointed which has day to day carriage of the business of government.

However, the fundamental role of the legislature is to make laws.

Conflict in respect of law making is usually the outcome on a case by case basis of the interplay between the following forces:

- The parliamentary leadership of the party in power;
- The relevant bureaucracies;
- Their political party organization;
- Public opinion
- Media opinion
- Interest group lobbyists
- The opinion and ability to lobby of those in the community who are directly affected by a particular decision;

with the strongest force prevailing. Often the strongest force is also the force that has the capacity to do the most damage to the government of the day at the next election if the outcome is adverse to the interests of that force.

The fictional character Sir Humphrey Appleby highlighted this issue in the famous British comedy, *Yes Prime Minister*:

*“But what is the main objective of all politicians, what is it that obsesses them, day and night, for the whole of their lives? Popularity! Popularity, fame, publicity, their pictures on television, and their voices on the radio, their photos in newspapers. And why? Not just because it gives them a warm glow. Champagne gives them a warm glow but they are not obsessed with it.*

*“No, the answer is that popularity is essential to them because they want to be re-elected.”<sup>xvi</sup>*

That is perhaps why dissembling is such common practice amongst politicians.<sup>xvii</sup>

By definition the law making process is not a pure distillation of the general community interest but a compromise based on the “least worst” outcome each interest group will accept.

Nevertheless, despite their understandable obsession with job security (or re-election) in my experience most people who are or have been engaged in the practice of politics, irrespective of their individual philosophies and party political preferences, are sincerely motivated by what could broadly be described as a desire to promote the betterment of society as a whole and in particular the community which they represent. Some have lesser motives and political expedience does sometimes distort the outcome but I would have to say that, contrary to public opinion, the overwhelming majority of politicians I have come to know well over the years are sincere in their desire to promote the betterment of society.

As the former Prime Minister of Great Britain, Tony Blair, said in his recent farewell address to the House of Commons:

*“Some may belittle politics but we who are engaged in it know that it is where people stand tall. Although I know that it has many harsh contentions, it is still the arena that sets the heart beating a little faster. If it is, on occasions, the place of low skulduggery, it is more often the place for the pursuit of noble causes.”<sup>xviii</sup>*

Yet Members of Parliament are often constrained in their ability to achieve the best for the community because they do not have available to them independent professional advice as to the likely effect of the legislation from people who have not had involvement in development of the legislation. They are largely limited to the input of their parliamentary leadership and Minister/Shadow Minister and the lobby groups who contact them on a particular issue.

Yet it is the party room comprising the Members of Parliament of the party in government that has the ultimate say on all legislation.

There are numerous, although infrequent, examples of legislative reform resulting from decisions of the party room which overall the executive such as the amendments to the Federal legislation governing refugees and the proposed national identity card in the course of the current Federal Parliament. The role of the back bench, and with it the effectiveness of our system of representative democracy, could be greatly enhanced if Members of Parliament were able to obtain their own independent professional advice as to the nature and effect of proposed legislation. This is where I believe we could play a meaningful role.

As a practising lawyer, I have been surprised by the lack of vibrancy in the relationship between legislators and our profession, given that:

1. We play an essential role in the administration of the laws that are made by government as a result of the political process and;
2. We are ourselves members of the community served by those same laws.
3. As lawyers we enjoy a special position in the community and privileges not available to the rest of the community including the right to practice law and charge and receive fees from those in the community who use our services.

Yet we seem to regard ourselves mainly as artisans of the system rather than as having a responsibility to play a proactive role in the way the system works and the laws and regulations made under it, notwithstanding that we are very well placed to observe the practical impact of those same laws through our daily work.

We could play a role in helping Members of Parliament to understand how a proposed item of legislation would work in practice before it is considered by the legislature and we could also play a role in helping them to understand how particular laws and regulations are working after they become law.

I am not suggesting that we turn into politicians or political activists, simply that we be prepared to contribute our experience and expertise to assist legislators to carry out the democratic process more effectively.

How could this happen in practice?

### **Some practical examples**

Theory is not much use unless it works in practice so I would like to turn now to some practical examples of the legislative process in action and the potential for our profession to assist in providing greater vibrancy to the legislative process.

### **Section 280 Criminal Code (Qld) 1899**

In February this year the Queensland State Minister for Education (and former Attorney General) Dean Wells, called for changes to the *Criminal Code* 1899 (Queensland). These changes were in relation to the right of parents to physically discipline their children.

Section 280 of the State's Criminal Code provides that it is lawful for a parent, schoolteacher or master to use by way of correction, discipline, management or control towards a child or pupil under the person's care such force as is reasonable under the circumstances.

The Minister was concerned that under identical legislation in New Zealand parents who physically abused their children had been acquitted of child abuse charges, in one case, of the accused beating a child with a lump of wood and in another case the accused beating the child with a horse whip. The Minister was concerned that the

current section 280 of the Criminal Code in Queensland effectively allows a parent to “belt the living daylights” out of a child.

Whilst he was not able to identify specific instances of abuse in Queensland to compare with those in New Zealand he was concerned at the potential for abuse in that State and he advocated a “small tailoring of the law” to prevent such abuses being permitted in Queensland.<sup>xix</sup>

Every day medical and legal professionals across Australia, particularly those practising in family and criminal law, are consulted and give professional advice in real life cases involving instances of actual and alleged child abuse.

We have available a substantial body of current examples that could be used to assist the Minister to identify the range of potential abuses and to help him identify where the line should most appropriately be drawn between the “discipline, management or control” of a child and criminal assault.

This could be done without identification of particular individuals and with maintenance of client confidentiality.

#### **Tax Laws Amendment (Simplified Superannuation) Bill 2006 and related bills**

In February this year the Australian Senate considered amendments to the taxation and superannuation laws. In the course of the debate Senator Stephens, an ALP Senator from New South Wales lamented of the committee process:

*“One of the most frustrating things that we found in questioning Treasury and ATO officials about the superannuation bills was the lack of detail and the lack of information that was available to the committee prior to the hearing and during the hearing itself. We asked lots of questions about examples. We believe that the explanatory memorandum and the information provided to the committee would have been much stronger if we had had some case studies and vignettes to describe for us the implications of the changes. It would certainly have helped to illuminate some of the difficulties that we experienced in understanding some of the submissions that were presented to us.”<sup>xx</sup>*

Professionals practising in the area of superannuation law, such as lawyers, accountants and financial advisers, could no doubt have provided a range of case studies to assist the consideration of the legislators.

#### **Crimes Amendment (Bail And Sentencing) Bill 2006**

In November 2006 the Federal Parliament considered the *Crimes Amendment (Bail and Sentencing) Bill 2006* which sought to amend the bail and sentencing provisions within the Commonwealth *Crimes Act 1901 inter alia* so as to prohibit a court from taking into account any form of customary law or cultural practice as a reason for:

- Lessening or aggravating the seriousness of the criminal behaviour; and
- Avoiding DNA testing.

This bill was bitterly debated between the Government and Opposition on the basis of perceived racism.

None of the speeches referred to actual experience of the enforcement of the existing law in Commonwealth jurisdictions. Were perceived injustices to victims or accused persons occurring? I would expect that the police, magistrates and judges and lawyers practicing criminal law in the Commonwealth jurisdictions would have been able to provide helpful input to the legislators as to what was actually happening on the ground and as to the possible effects of the proposed changes.

The parliamentary debate does not indicate that this occurred and we were left with legislation debated and ultimately passed on the basis of perceptions by the legislators as to “issues of principle”.

### **P-plate driving reforms**

In 2004 the New South Wales Government introduced the *Road Transport (Safety and Traffic Management) Amendment (Alcohol) Bill*, which provided that all New South Wales P-plate drivers must adhere to a zero blood alcohol level. However, the legislation prescribed no specific blood alcohol level provisions for interstate P-plate drivers, therefore providing a loophole that continues to allow interstate P-plate drivers to drive with a legal blood alcohol limit of up to 0.05.

This serious loophole in the New South Wales legislation meant that interstate P-plate drivers, particular those from towns bordering New South Wales could drink and drive in New South Wales whereas New South Wales P-plate drivers could not.

If input to the proposed legislation had been sought from the police and legal practitioners who practice in the area of motor traffic law in the towns that border New South Wales I suspect that the oversight would have been identified and corrected immediately, possibly saving lives in New South Wales and bordering states as P-plate drivers became aware they could not drink and drive across the New South Wales border.

### **Conclusion**

There is the potential for us as medical and legal professionals to play a useful and role in promoting more informed debate about proposed legislation.

There are practical things we could all do:

- Engage the legislators. We all have local State and Federal Members of Parliament who are elected by the community in which we live. It is easy to

get to know these people. Just ring up their office and call by to see them. They are delighted to participate in intelligent conversation with capable people who have no axe to grind and are genuinely prepared to help;

- Let the legislators know we are prepared to be considered a resource to assist them in their role. Tell them of our areas of expertise and our preparedness to comment on bills and proposed policies based on our experience of how proposed changes will impact the community. To a legislator an intelligent view from the coalface is invaluable.
- Perhaps our respective professional societies could maintain electronic bulletin boards where members could post issues of concern and which could act as a catalyst of discussion and debate;
- Keep our minds open at all times to the impacts of laws, regulations and government policies on our clients and the broader community. Be prepared to say something when we see an area of law that is dysfunctional.

In my opinion we should see this role as part of our overall professional responsibility to the community which we serve.

As Winston Churchill once said:

*“What is the use of living, if it be not to strive for nobler causes and to make this muddled world a better place for those who will live in it after we are gone?”<sup>xxi</sup>*

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## END NOTES

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<sup>i</sup> The modern Hellenic Navy celebrates 12 September 480BCE as the date of the Battle of Salamis. The precise date is not known. However, the consensus of historians is that the date of the battle was in September of 480BCE. As to the 2486<sup>th</sup> anniversary, note that there was no year “0”.

<sup>ii</sup> Plan showing the Persian advance from Thermopylae to Salamis and the location of the battle of Salamis see Annexure 1

<sup>iii</sup> Thucydides, *History of the Peloponnesian War*, Penguin Classics, 1972, Book V, page 403, par 111)

<sup>iv</sup> Thucydides, *op cit*, par 105, p 104

<sup>v</sup> Thucydides, *op cit*, par 111 at p. 406

<sup>vi</sup> Thucydides, *op. cit*, par 89, p. 402.

<sup>vii</sup> Thucydides, *op. cit*, par 107, p. 405

<sup>viii</sup> Thucydides, *op. cit.*, par 111, p. 406

<sup>ix</sup> Machiavelli, *op cit*, Book 1, Discourse 3, p. 112

<sup>x</sup> Machiavelli, *The Prince*, Penguin Books, 2003, p. 21

<sup>xi</sup> Thomas More, *Utopia*, *op. cit.* p. 42.

<sup>xii</sup> Thomas More, *Utopia*, Penguin Classics, 2003 p 43.

<sup>xiii</sup> Introduction by Bernard Crik to Machiavelli, *The Discourses*, *op cit*, p. 68.

<sup>xiv</sup> John 11:50, NIV Study Bible, Zondervan Corporation, 1985, p 1621.

<sup>xv</sup> 1 Corinthians 3:19, NIV Study Bible, *op cit*, p 1738.

<sup>xvi</sup> Jonathan Lynn and Antony Jay, *The Complete Yes Prime Minister*, BBC Books, 1989, p. 394-395.

<sup>xvii</sup> Acknowledgement to Time Magazine, July 16 2007.

<sup>xviii</sup> Honourable Tony Blair, House of Commons Hansard Debates for 27 June 2007

<sup>xix</sup> For a transcript of the Minister’s interview and a copy of section 280 of the Criminal Code 1899 (Qld) see Annexure 1.

<sup>xx</sup> For a transcript of Senator Stephens’ speech see Annexure 2.

<sup>xxi</sup> Quote taken from James C Humes, *Churchill, Speaker of the Century*, Stein and Day Paperback Printing 1984 p. 279. I have not been able to locate the source of the original quotation by Churchill.