Doing the right thing

Two hundred years ago, on the night of 12/13 September 1814, British troops attacked the city of Baltimore and British ships bombarded the city's defences, especially Fort McHenry.

The unsuccessful attack inspired a Baltimore lawyer, Francis Scott Key, to write a poem on the following day.

When set to music, the poem became the song now known as the Star-Spangled Banner, which was adopted in 1931 as the national anthem of the United States of America. The powerful sentiments which that song stirs up whenever it is played demonstrate how much can be achieved by a lawyer who finds the right words to advance his cause.

Unpopular causes

Another American lawyer deserves mention for his response to an incident involving British soldiers. In Boston, on 5 March 1770, soldiers fired on a crowd of civilians, killing five people. The Boston Massacre was a significant step leading to the American War of Independence. John Adams, a Boston lawyer who was a signatory of the Declaration of Independence and who became the first Vice-President and then the second President of the United States, said that "the foundation of American Independence was laid" on that day.

The soldiers were charged with murder, but the lawyers they approached refused to represent them, until John Adams agreed to do so, despite being firmly of the anti-British party and despite the fact that his doing so "procured me Anxiety, and Obloquy enough". Thanks to his efforts, the soldiers were acquitted of murder, with only two being convicted of manslaughter. Adams' willingness to act in an unpopular cause was entirely in the spirit of our cab-rank rule. Everyone is entitled to a fair trial, which often requires a lawyer as advocate, and it is a matter of constitutional importance that the advocate's role is to represent, not to sit in judgment on, his client. In return, society needs to recognise that the advocate is doing his duty, and that he should not be vilified for representing an unpopular cause.

Fond farewells

Two individuals who have had to argue an unpopular cause in recent years are Dominic Grieve QC and Oliver Heald QC. As law officers, they acted as a bridge between the profession and the government, a vital role when so few ministers are lawyers, even those with important responsibilities concerning the legal system. They discharged this role admirably. For instance, Dominic Grieve QC attended last year's Bar Conference and spoke on the unpopular subject of the government's legal aid proposals. They both regularly attended Bar Council meetings, where we had the opportunity to express our views and to demonstrate the strength of our feeling on issues such the proposed legal aid cuts, to people who could understand our concerns and who could, and I have no doubt did, communicate the profession's point of view to others in government.

Always approachable, they (like Oliver Heald's predecessor as Solicitor General, Sir Edward Garnier) deserve our thanks for their support of the profession, for their helpful and sensible

advice and for the influence which they wielded on our behalf. I encourage the new law officers to follow their example.

Legal aid cuts

The courts have considered the government's legal aid cuts in several recent decisions. In his judgment of 13 June 2014 in Gudanavice v Director of Legal Aid Casework [2014] EWHC 1840 (Admin), Collins J considered the Lord Chancellor's guidance on exceptional case funding under s 10 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), and held that the guidance "is defective in that it sets too high a threshold". As Susan Jacklin QC explained in the July issue of Counsel, a great disappointment of LASPO has been the paltry number of cases of exceptional case funding, which was intended to act as a safety net for those cases where legal aid was needed but which LASPO took outside the scope of legal aid. It seems from Collins J's judgment (which is subject to appeal) that one reason for the low numbers may be that the Legal Aid Agency has been applying the wrong test.

On 6 August 2014 Sir James Munby delivered a careful and thoughtful judgment in Q v Q [2014] EWFC 31, addressing the many problems which can arise in family cases if there is no representation for a father who is accused of rape or serious sexual assault. He said he was inclined to think that one such father (in the case of Re C) required access to legal advice and representation and that, if no other funding was available, the cost would have to be borne by HM Courts and Tribunal Service. (We are grateful to Janet Bazley QC and Julien Foster, who represented the father pro bono, instructed by the Bar Pro Bono Unit).

Meanwhile, on 15 July 2014, Moses LJ gave judgment in R (Public Law Project) v Secretary of State for Justice [2014] EWHC 2365 (Admin), holding that the Lord Chancellor's introduction of a residence test was unlawful. Dismissing an argument that the residence test improved public confi dence in the legal aid system, he said: "In the context of a discriminatory provision relating to legal assistance, invoking public confidence amounts to little more than reliance on public prejudice."

One more word about John Adams. He was the first President to occupy the White House. But it did not acquire that name until it was rebuilt and repainted, something rendered necessary by British soldiers setting fire to it on 24 August 1814.