



LINCOLN'S ATTORNEY GENERAL:

*Edward Bates and His
Historic Opinion on Citizenship*

By Chief Justice Frank J. Williams



Many have compared Barack Obama and Abraham Lincoln's appointment of challengers to top cabinet posts. On this bicentennial anniversary of Lincoln's birth and at the dawn of the historic tenure of President Obama, we examine the achievements of Edward Bates, Lincoln's Attorney General and former rival, who repudiated the principals of Dred Scott, dismissing the issue of color when determining citizenship, thus taking a small step towards racial equality in the United States.

Since the first colonists cast off their ties to the British monarch, Americans have found the notion of citizenship significant. In modern society, we tend to define citizenship almost effortlessly as a person's origin, the country in which someone was born or naturalized, one's social and political attachment to a country, or one's sense of belonging in a community. But these definitions hardly capture the struggle that this country and its residents have endured for centuries over the issue.

In the early days of America, the existence of slavery complicated the citizenship question. The American Revolution is regarded as the precipitating factor in the abolition of northern slavery; and by the end of the 1700s, more and more Americans opposed slavery. As the northern states abolished slavery and an increasing number of former slaves became free members of society, America faced the daunting question of whether these former slaves of African descent, now free men, were entitled to the same privileges and rights as white men. One man, Attorney General Edward Bates, played an unlikely role in helping to determine the answer to this question.

Attorney General Edward Bates

At the age of 21, Edward Bates left his hometown in Virginia for St. Louis, Missouri, where he pursued and successfully completed his legal training. He was admitted to the bar and after spending some time practicing law as a U.S. attorney and handling the legal affairs of then-Governor William Clark's

administration, Bates entered politics. Bates was elected as a member of Missouri's constitutional convention and later became the new state's attorney general. He also spent some time serving in the Missouri House of Representatives as well as the state Senate. In 1847, Bates was the chairman of the River and Harbor Convention, which Abraham Lincoln attended as a delegate. Bates' career as a frontier-lawyer-turned-politician laid the foundation for his political career in the nation's capital.

In 1860, Bates attracted national attention as a candidate for the Republican Party nomination for president of the United States. He and three other men—New York Sen. William H. Seward, Ohio Governor Salmon P. Chase, and former Illinois Rep. Abraham Lincoln—vied for the Republican nomination. After winning the presidential election, Lincoln decided to include his Republican Party rivals in his Cabinet, an unprecedented move. In the words of historian Doris Kearns Goodwin, Lincoln's Cabinet quite accurately became a "team of rivals."¹

Lincoln appointed Seward as secretary of state and Chase became secretary of the treasury. In 1861, Abraham Lincoln asked Edward Bates to serve as the U.S. attorney general.

The attorney general was an important political advisor to the president and had the power to legitimize and defend the actions of the president. A less significant, although occasionally important, function of the attorney general was to write advisory opinions for the president and other members of the Cabinet. Bates recognized that although he lacked the jurisdiction to decide a question of law, he had the power to furnish legal opinions to aid the president and his administration.

Prudent in his opinion writing, Bates typically declined filing an opinion on a matter that was either pending in court or likely to go to court. He stated that it was not the executive department's job "to correct the errors of, or furnish

legal assistance for, the courts of the United States. ..."² Despite the importance of a case, Bates believed that "the Attorney General has nothing to do with suits to which the United States was a party, or with criminal prosecutions in a court, until they reach the Supreme Court of the United States."³ Bates exercised restraint, declining to give general advice or express general legal views on other problems.

During his tenure as attorney general, Bates authored 154 opinions, comprising two volumes of the *Opinions of the Attorney General*. These opinions broadly spanned the legal field. Bates advised Lincoln on matters ranging from the power to suspend the writ of habeas corpus (the president had the power) to whether Aaron Burr's wife, who had divorced him prior to his death, was entitled to a Revolutionary War widow's pension (she was not entitled).

Bates on Citizenship

Perhaps the most noteworthy, and certainly the most progressive opinion that Bates authored as attorney general was on the issue of black citizenship. In the longest opinion he ever wrote, the attorney general answered the following question: "Is a man legally incapacitated to be a citizen of the United States by the sole fact that he is a colored, and not a white man?"⁴ Although conservative in his politics, Bates was modern-minded in his philosophy on the issue of black citizenship.

Conceivably, his outlook stemmed in large part from his Missouri roots

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and the political climate in Missouri at the time that he lived there. He was greatly involved in state politics at the time of the Missouri Compromise, when Congress tried to control the extension of slavery. Passed in 1820, the act prohibited the expansion of slavery north of the 36th parallel, with the exception of the new state of Missouri.



More than 25 years later, the origins of the most noteworthy opinion on black citizenship arose in Missouri. A man by the name of Dred Scott challenged his status as a slave. Scott, a black man and a slave, spent many years living with his master in the free state of Illinois as well as in the Wisconsin territory, where slavery was prohibited. Scott filed suit for his freedom after relocating to Missouri, a slave state. Because Scott had formerly resided in a free state and free territory, Scott contested his status as a slave in Missouri.

The Missouri Supreme Court had previously followed the principle of "once free, always free," consistently holding that slaves who entered free states were automatically free. Although Scott initially prevailed in his trial, the Missouri Supreme Court reversed the lower court's decision and concluded that Scott's status had not changed — he was still a slave.

The Missouri decision dealt primarily with the problem of comity or conflict of laws. Judge William Scott announced the decision of the court, explaining that every state had the right to determine to what extent it respected the laws of its sister states; in this instance, the court would not

recognize that its sister states would consider Scott a free man. Reconciling the inconsistencies between Missouri's past decisions and this decision, Judge Scott rationalized that "[t]imes are not now as they were when the former decisions on this subject were made."⁵

In 1857, the U.S. Supreme Court heard Scott's case. *Dred Scott v. Sandford*⁶ presented the country's highest court with the novel issue of whether a black slave who lived in a free state could be considered a U.S. citizen. In a decision with seven justices in the majority and two dissenting, Chief Justice Roger B. Taney declared that all people of African ancestry, slaves and free men alike, could never become citizens of the United States and, therefore, could not sue in federal court.

Taney intended his opinion to be an authoritative judicial resolution of the slavery issue. Writing for a majority of the Court, he first determined that Scott was not a citizen of Missouri and that no state had the power to grant him citizenship. The Court then concluded that Scott did not gain citizenship by residing in a state declared free by Congress because Congress had the power only to make rules and regulations for territories that existed at the time of the Constitution. Missouri was not a territory of the United States when the Constitution was ratified. Finally, the Court held that Scott could not become free after living in a free state because one state did not have the power, through its property laws, to ensure an individual's freedom. Taney declared that "[blacks] had no rights which the white man was bound to respect."⁷

With this important precedent, amid the turmoil of the brewing Civil War, Treasury Secretary Salmon P. Chase asked Bates by letter dated September 24, 1862, about the citizenship of men of color. A commercial schooner was detained because its captain was a black man. Because *Dred Scott* declared that blacks were not citizens and because naval law mandated that a citizen must command a ship flying the American

flag, it was imperative to determine whether the black man commanding the ship was a citizen of the United States.

On November 29, 1862, Bates responded to Chase's letter. At the outset, Bates acknowledged the difficulty in determining who was a citizen of the United States: "I have often been pained by the fruitless search in our law books and the records of our courts, for a clear and satisfactory definition of the phrase *citizen of the United States*."⁸

Bates' approach to evaluating the concept of citizenship was novel. Traditionally, when citizenship was discussed, the debates did not concern the inherent elements of citizenship but rather whether an individual was entitled to a right or privilege to which a citizen was typically entitled. Unlike most other statements on the topic, Bates' opinion sought to address the question outright.

Importantly, Bates dismissed the idea that color should have any bearing when making a determination of citizenship:

What can there be in the mere *color* of a man (we are speaking now not of *race*, but of *color* only) to disqualify him for bearing true and faithful allegiance to his native country, and for demanding the protection of that country. And these two, allegiance and protection, constitute the sum of the duties and rights of a natural born citizen of the United States.

Bates stated that "there is not a single nation in Christendom which does not regard the new-found idea [that citizenship derives from color] with incredulity, if not disgust."¹⁰ In this opinion, Bates effectively declared the *Dred Scott* decision illegal, even before the enactment of the Thirteenth Amendment, the Civil Rights Act, and the Fourteenth and Fifteenth Amendments. He repudiated the principles of *Dred Scott* and affirmed that every free person born in the United States was "at th

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moment of birth, *prima facie* a citizen."¹¹ Bates attributed one's citizenship to the "accident of birth" and particularly the fact that one happens to be born in the United States.¹² He believed that citizenship should be determined by where a person is born and that neither color nor race could disqualify a person from U.S. citizenship under the Constitution.¹³

Bates carefully limited his opinion to the question of the citizenship of free black men born in the United States. His opinion did not address the status of black men who were not born free, nor did it address the status of slaves. These questions were left undecided until the final Emancipation Proclamation on January 1, 1863, and the passage of the Thirteenth and Fourteenth Amendments. Interestingly, according to the logic in Bates' opinion, black men born free in the United States were *prima facie* citizens, whereas white men born outside the country were not *prima facie* citizens.

Despite its shortcomings, Bates' opinion was a breakthrough for the status of black Americans. Although Bates' opinion on citizenship did not carry the legal authority necessary to officially "overrule" *Dred Scott*, the position set forth in the opinion was clear and effective. Bates' view was soon considered an official declaration of the rights of black citizens.

Bates was not required to respond to Chase's letter; it certainly was not necessary for Bates to issue an opinion on citizenship. But Bates chose to undertake this task, perhaps attempting to pave a way for the future of black Americans and to inform the country of the Republican stance on the issue.

The Aftermath

On January 1, 1863, Lincoln issued the Emancipation Proclamation, the first of many efforts to officially resolve the issue of black citizenship. He declared black Americans in the Confederate states free; however, the Emancipation Proclamation was not a declaration of citizenship.

The Thirteenth Amendment to the U.S. Constitution, sent to the states

during Lincoln's presidency early in 1865 but not ratified until December 1865, officially abolished slavery in the United States. However, emancipation of the slaves only exaggerated the citizenship issue; the free black population in the United States increased from half a million to approximately five million. To resolve the issues surrounding the status of free blacks, Congress passed the Civil Rights Act of 1866, an act that reversed Taney's earlier ruling in *Dred Scott*. The act provided freed slaves with increasingly more rights, neces-

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sary to citizenship, including the right to enter into contracts, sue, bear witness in court and own private property.

Perhaps even more significantly, and certainly more conclusively, the Fourteenth Amendment, ratified in 1868, resolved the issue of black citizenship once and for all. The Fourteenth Amendment provides an expansive definition of *citizenship* and thereby legally overruled the *Dred Scott* decision. Concluding that blacks were citizens, the Fourteenth Amendment removed the restriction that blacks could not sue in federal court under the diversity of citizenship requirement. The drafters of the Fourteenth Amendment defined *citizenship* as "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof." The amendment also established that equality before the law is a fundamental right of every citizen.

Bates played a crucial role in the debate on the citizenship of black Americans. He could not have written his opinion at a more appropriate time. The country was split on this issue based on geographic location. The North and South were engaged

in a great civil war over slavery. The U.S. Supreme Court thought that it had "settled" the question of black citizenship in *Dred Scott*. Yet, Bates issued a revolutionary opinion proclaiming that the color of one's skin was not an acceptable basis upon which to determine citizenship. Bates declared that free blacks, born in the United States, were citizens of the United States; they acquired this status the instant they were born in this country. Although the opinion of the attorney general was advisory in nature and did not have the power of law, its effect was momentous, helping to change the future of black Americans and paving the road for the chance of racial equality in the United States. ■

Endnotes

1. DORIS KEARNS GOODWIN, *TEAM OF RIVALS* (2005).
2. 10 Op. Att'y Gen. 50-52 (1863).
3. *Id.* at 95-96.
4. *Id.* at 383.
5. *Scott v. Emerson*, 15 Mo. 576, 586 (1852).
6. 60 U.S. 393 (1857).
7. *Id.* at 407 (1857).
8. 10 Op. Att'y Gen. 383 (1863).
9. *Id.* at 397.
10. *Id.*
11. *Id.* at 394.
12. *Id.*
13. *Id.* at 413.

Shadowbox images p. 8 (from top clockwise):

- Artist unknown, New York, July 13, 1861. Wood engraving from Harper's Weekly. In this accurate portrayal of the cabinet members and President Lincoln, Attorney General Bates is second from right.
- Mathew B. Brady, photographer, [Edward Bates]. New York, 1861. Carte-de-visite photograph. Rarely photographed, Edward Bates posed for this widely distributed portrait when he arrived in Washington to become Lincoln's Attorney General.
- Mathew B. Brady, photographer, [Abraham Lincoln]. February 23, 1861. One of a series of photographs taken after a night of travel through Baltimore when Lincoln was advised of a plot to assassinate him.
- Peter E. Ehrgott, Forbriger & Co., after a painting by David Gilmour Blythe, President Lincoln, Writing the Proclamation of Freedom, January 1st, 1863. Lincoln is surrounded by items that the artist believed influenced the President to decide on freedom as well as re-union as a goal of the Civil War.

All images from the Frank & Virginia Williams Collection of Lincolnia