

## Judging A Book: Richardson Reviews 'Criminal Dissent'

By U.S. District Judge Eli Richardson (April 29, 2020, 3:28 PM EDT)

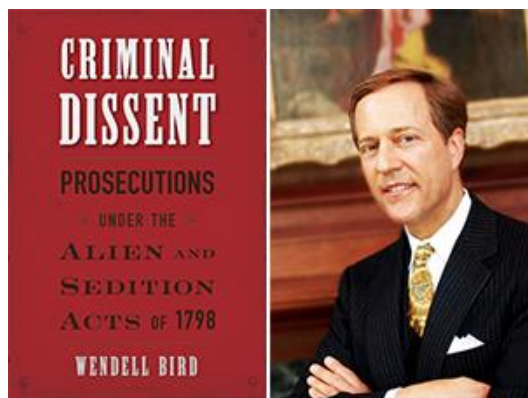
*This article is part of an Expert Analysis series of book reviews from judges.*

A nation sharply divided by political party and ideology. Complaints, from each side of the divide, about fake news. Complaints, conversely, also about the suppression of free speech. Debates over the meaning of the free speech clause of the First Amendment. Partisan media outlets stridently supporting one side over the other. Government officials and pundits switching sides. Impeachment. Efforts to find crimes to pin on political opponents. Allegations that the president and vice president are serving foreign powers. Claims of war mongering, and anti-immigrant sentiment, on the part of the president's party. Allegations that the president's party wants to turn his office into a monarchy. The approach of a watershed presidential election. The progress of criminal cases impaired by an epidemic.



Judge Eli Richardson

The United States in 2020? No, the United States circa 1800, during the Federalist administration of President John Adams, as thoroughly recounted by Wendell Bird in his important book, "Criminal Dissent: Prosecutions Under the Alien and Sedition Acts of 1798." As the title makes plain, this work is about four federal laws known generally as the Alien and Sedition Acts. Although (with one exception) these laws were short-lived, they remain notorious even today.



"Criminal Dissent: Prosecutions Under the Alien and Sedition Acts of 1798," by Wendell Bird, Harvard University Press, 560 pages.

The lamented existence of these laws is well remembered. But their specifics are not, and that's where Bird comes in. He effectively lays out the particulars of these laws, including their substance, enactment and expiration.

The Alien and Sedition Acts comprise a total of four statutes passed by Congress narrowly (with one exception), and promptly signed into law by President Adams, in June and July of 1798. At that time, Adams and other members of the Federalist Party were fuming from especially harsh attacks in newspapers partial to the rival Republican Party — a surprising and new phenomenon inasmuch as Federalists previously had been somewhat shielded because they had been led by the nearly unassailable

George Washington, Adams' presidential predecessor. As Bird explains, the Alien and Sedition Acts constituted a coordinated response to blunt such criticism and otherwise curtail pro-Republican sentiment.

The Naturalization Act, prompted by what Bird describes as a wave of anti-immigrant (primarily anti-French and anti-Irish) fever triggered by a variety of circumstances, increased from five years to 14 years the residency requirement for U.S. citizenship. It also imposed specific registration requirements for noncitizens arriving in the U.S. The Naturalization Act was eventually repealed by the Naturalization Act of 1802.

The Alien Enemies Act authorized the president to arrest, restrain or remove natives and citizens of a hostile nation, that is, one that had declared war or threatened or perpetrated an invasion upon the United States. Due to the absence of an enemy provocation, the president's authority was never triggered or invoked during the period covered by Bird. This, and the bipartisan support for its passage, make this statute uniquely noncontroversial among the Alien and Sedition Acts, and indeed a version of the Alien Enemies Acts remains in effect even today.

The Alien Friends Act authorized the president, in his sole discretion, to deport any "alien" if he found that the noncitizen was "dangerous to the peace and safety of the United States" or that there were "reasonable grounds to suspect" that such noncitizen was "concerned in any treasonable or secret machinations against the government."

In what surely was cold comfort, any noncitizen subject to a presidential deportation order could apply for a license to remain in the United States, which the president in his discretion could grant (with or without discretionary conditions) if the president found that so doing would pose "no injury or danger." Absent such a license, a noncitizen subject to a removal order had to comply with it, under pain of up to three years in prison.

The Alien Friends Act also authorized the president in his discretion to remove a noncitizen held in prison when "necessary for the public safety." The law did contain a sunset provision, however, limiting its duration to two years.

The Sedition Act was, and is to this day, by all accounts the most reviled and controversial of the four laws. In Section 1, it made it a crime to, among other things, "unlawfully combine or conspire together, with intent to oppose any measure or measures of the government of the United States ... or to impede the operation of any law of the United States, or to intimidate or prevent any [any federal official from performing his duty]."

Violations were punishable by imprisonment between six months and five years and a fine of up to \$3,000 — a substantial amount indeed at the turn of the 19th century. In its less-used Section 2, the Sedition Act criminalized involvement in "writ[ing], prin[ing]t, utter[ing] or publish[ing] ... any false, scandalous and malicious writing against the [federal] government ... Congress ... or the President," with intent essentially to: defame, or bring into "contempt or disrepute," it or (him); stir up either hatred towards it (or him), sedition towards the federal government, or opposition to federal laws; or aid or abet or any hostile designs of any foreign nation against United States or its people. Violations of Section 2 were subject to less severe penalties than violations of Section 1: imprisonment up to two years (with no mandatory minimum) and a fine of up to \$2,000. The statute provided for its own expiration in March 1800.

Bird focuses on the latter two laws. He apparently does so for two reasons: because these laws were

more constitutionally suspect, and more consequential during the Adams administration; and because they worked in tandem to suppress dissent from Federalist views. There is a great deal to unpack about these laws — politically, historically, biographically, legally and even morally — and Bird seemingly manages to unpack virtually all of it. This is no small feat, and one that cannot be described completely in these pages, let alone with the required nuance that Bird applies. But it is possible to succinctly summarize highlights of Bird’s subject matter, objectives, opinions, conclusions and achievements.

Bird places these laws into context by explaining their origins in the burgeoning conflict during the 1790s between what in retrospect became the first pair of opposing political parties in the nation’s history, although neither initially bore nearly all of today’s indicia of a separate and cognizable political party. One was the Federalists, who were de facto political party of the first two presidents, George Washington and Adams. The other was the Republicans, whose de facto leader was Thomas Jefferson, then serving as vice president despite his staunch opposition to Adams — the kind of schism at the top of the executive branch that was possible in the days prior to the ratification of the 12th Amendment in 1804. The differences in political viewpoints between Federalist and Republicans were readily apparent.

Federalists actually were a somewhat heterodox group, divided between so-called High Federalists such as Alexander Hamilton, who were especially anti-Republican, and other Federalists (including President Adams) who were at odds with the High Federalists as well as the Republicans. Yet Federalists as a whole generally held identifiable views; they strongly tended to be pro-British, anti-immigrant, pro-national government, pro-merchant, arguably pro-“elite,” and accepting of a standing U.S. Army. Republicans tended to be pro-French, pro-immigrant, suspicious of the federal government, pro-farmer, predisposed towards “common” folks, and deeply mistrusting of a standing Army.

Notably, Federalists and Republicans could be found throughout the 16 states in the Union, but Federalism was strongest in New England (not coincidentally the home of President Adams), and Republicanism was strongest in the South (not coincidentally the home of Vice President Jefferson).

Bird walks through all of this, but he omits any real discussion of the extent to which the two sides disagreed over the vital issue of slavery. This is unfortunate but perhaps understandable inasmuch as the political fault lines at that time were not yet drawn over slavery, and Federalists and Republicans alike owned slaves.

Given the ostensible political parallels between today and the turn of the 19th century, Bird’s readers may be tempted to draw parallels between the Federalist/Republican divide and today’s divide. One might seize upon the Federalists as prototype “blue-staters,” given their relative favoritism toward the national government and their strong base in New England and in urban areas. One might likewise conceive of Republicans as prototype “red-staters,” given their relative mistrust for the national government, their predilection towards rural communities, and their prevalence in the South. This would be unhelpful, because neither the Federalists nor the Republicans are particularly analogous to either of the current sides.

Federalists were actually considered to be the conservatives (or “tories,” in the jargon of the time) and the Republicans the progressives and radicals; this makes sense, given their respective political views. Any comparison to today would be inapt also because one of the biggest dividers of that day — Federalist support for Great Britain opposing Republican support for France — is simply irrelevant today in its particulars, even if it generally reflected a schism between partisans of conservative (Britain) versus radical (post-revolutionary France) systems.

What does still resonate now, just as then, are the free-speech issues implicated by the Sedition Act and its companion, the Alien Friends Act. Bird presents an airtight argument that the Sedition Act was intended to, and did, restrict what can only be considered pure political speech. This effort included prosecutions for raw opinions, which, as Bird notes, were not susceptible to the Sedition Act's "truth" defense and never should have been deemed falsities proscribed by the Sedition Act in the first place. In both substance and articulation, many of these supposedly outrageous and slanderous opinions were quite mild by today's standards. A reader may justifiably ask why they were considered such a big deal as to be worthy of prosecution.

Bird also does an excellent job dismembering the various asserted justifications — advanced at the time by Federalists and in some cases viewed sympathetically by later historians — for such restrictions. For instance, he counters the claim that the Sedition Act was consistent with both the English common law crime of seditious libel and a supposedly then-universal narrow view of free speech rights that purportedly survived the ratification of the First Amendment.

Bird notes — perhaps too briefly — that the Federalists may truly have had good faith concerns that the new nation — an uncertain experiment in popular self-government — simply could not survive what they considered to be never-ending outrageous lies unjustly undermining confidence in the national government. But he also persuasively asserts that such concerns cannot justify efforts to punish political speech, which, after all, is at the very heart of the kind of popular, constitutional self-government the Federalists purported to desire.

Importantly, even Federalists who were not High Federalists, including John Adams, supported the Alien and Sedition Acts. Republicans despised the Alien and Sedition Acts — and with good reason. As Bird shows in walking through their legislative history and subsequent enforcement, these laws were aimed at stifling Republican, anti-Adams, and anti-Federalist viewpoints. Sedition Act prosecutions were deployed against such viewpoints however they might be expressed — for example, as a sign on a "liberty pole," as a stump speech, or even one case as a drunken expletive that was far more comical than menacing or "seditious."

Most significantly, the Sedition Act was used against numerous editors of pro-Republican newspapers, including even Ben Franklin's grandson, whose patriotic pedigree did not save him from indictment under the Sedition Act. (He died before trial, a victim of the 1798 yellow fever epidemic striking Philadelphia.) Other targeted pro-Republican editors were foreigners and thus noncoincidentally also at risk of removal under the Alien Friends Act for allegedly posing some "danger" to the United States. Many other noncitizens in the United States, especially Irish and French, were considered threats by many Federalists due to their customs and likely Republican sympathies, and chose to leave before facing possible removal under the Alien Friends Act.

The Alien and Sedition Acts have received its share of (disdainful) attention over the years, everywhere from the loftiest of scholarly heights to standard high-school curricula. But Bird claims, persuasively, to cover the subject differently than it ever has been before. He does so in several ways.

First, he challenges biographers of prominent Federalists who downplay their subjects' support for the Alien and Sedition Acts. If you have read a biography of, say, Adams or Hamilton, you may understand what Bird is talking about.

Second and relatedly, he urges that the Federalists' overall record, with its many achievements of various kinds, should take account of their unfortunate enactment and enforcement of these dreadful laws.

Third, he challenges the conventional wisdom that, despite the ratification of the First Amendment, there was not yet a recognized theory of broad free-speech rights to challenge the relatively narrow view prevailing under British law. Among other things, he describes how defendants in Sedition Act cases, some of whom asserted a defense sounding in broad free-speech rights and/or the First Amendment, did not conveniently conjure up a broad view just in time for trial but rather had previously gone on record with a broad view.

Fourth, he endeavors to catalogue every single actual, or even threatened, prosecution under the Sedition Act and removal under the Alien Friends Act. This is a monumental undertaking, but based on what clearly is exhaustive research, he accomplishes it with both extensive narration of every one of the cases and a useful appendix listing them.

The results are striking. As Bird shows, even setting aside mere threatened prosecutions, the number of actual prosecutions was far greater than previously recognized. Readers will draw their own conclusions regarding the statistics, which Bird effectively slices and dices. But there is little doubt that for a nation of only roughly 5.3 million (of which roughly 900,000 were enslaved persons), with a nascent U.S. Department of Justice a minuscule fraction of today's size, the number of prosecutions was enormous and must have been a huge percentage of the federal criminal caseload. Unfortunately, on this specific point, Bird sheds little light.

There is much more of interest in "Criminal Dissent." Among other things, Bird provides an interesting glimpse into federal criminal procedure in the early days of the republic. It was, to say the least, different from the current version. For instance, contrary to the prevailing situation today in most federal district courts and federal criminal cases, in those days, the imposition of monetary bail pending trial, and a substantial fine upon conviction, were standard.

Also, in those days, a federal district court bench comprised a district judge and a circuit-riding U.S. Supreme Court justice. The judges were involved with grand juries in a manner and to an extent utterly absent from today's practice; for example, they, rather than federal prosecutors, instructed grand juries as to the law applicable to a proposed indictment. One might think that this would guarantee a measure of impartiality as to grand jury instructions. Alas, as Bird details, partiality was rampant in the grand jury instructions provided by judges (who were invariably Federalists) in Sedition Act cases. Even worse, judges' instructions to trial juries often were just as slanted, as Bird shows with several examples, contributing to what unsurprisingly almost always turned out to be a conviction.

Bird recounts in detail Justice Joseph Story's handling of Sedition Acts trials. Suffice it to say that the reader will wonder how such patently unfair trials ever could have taken place in courts supposedly subject to the Bill of Rights. Small wonder that when the Republicans won both the presidency (Jefferson) and Congress in 1800 — evidence, Bird notes, that the Alien and Sedition Acts failed to suppress Republican sentiments — Story was impeached, though not removed from office.

Bird conveys all of this, and more, with an agreeable style. He can drily turn a phrase without ever appearing to get too "cute." And although he occasionally includes a somewhat inscrutable reference or a nonsequitur, his writing is generally error-free. "Criminal Dissent" is serious, but its length and style make it appropriate even for casual (not to say lazy) readers, who will appreciate that they can get the full story Bird is telling without separately reading Bird's numerous footnotes, which serve to authoritatively document his meticulous historiography but not to stash large nuggets of important information.

Bird is especially critical of the Sedition Act, correctly perceiving it to be procedurally and substantively both unconscionable and unconstitutional, both as written and as enforced. For this reason he tends understandably to condemn Federalist stances and side with the Republicans. But he does not refrain from calling out Republicans' hypocrisy where it appears. However, he would have done well to highlight the irony of Republican insistence on the importance of free speech while so many Republicans were ardent admirers of the French Revolution, which (especially in particular stages) was a veritable juggernaut of political oppression and denial of human rights.

This leads us to the silver lining to the dark cloud that was the Sedition Act and the Alien Enemies Act. As Bird and some others before him have opined, the Alien and Sedition Acts represented the worst of the Federalists, a considerable stain on their legacy. Bird shows that the stain was worse and larger than previously understood.

Federalists are to be condemned for a regime whereby persons were fined substantially and sentenced to some prison time merely for expressing political opinions. But is worth remembering the Federalists did not do; they did not execute (or even give long prison terms to) people for their beliefs, or seek to retain power (after the Republican sweep of the election of 1800) for themselves no matter what and irrespective of the popular will. This stands in stark contrast to sequential rounds of French revolutionaries of the same era.

The contrast is telling. Federalists may have betrayed the American Revolution, and the Constitution, in foisting of the Alien and Sedition Acts upon the American public. But despite such culpability, Federalists, just as much as Jefferson and his Republicans, legitimately could claim credit for the American Revolution and its ideals. After all, Federalist leaders included the likes of Hamilton and Adams who risked everything to ensure the revolution's success.

The Federalists may have been flat wrong about the Alien and Sedition Acts, but unlike so many revolutionaries throughout world history, they were neither murderous thugs nor authoritarian autocrats. For that matter, neither were Jefferson's Republicans, despite their sympathy for French revolutionaries. These vital truths about the heirs of the American Revolution help explain the extraordinary success of the revolution and the nation it spawned. Thankfully, the Alien and Sedition Acts do not endure. What does endure, thanks in large part to Federalists and Republicans alike, is self-government of the American people under the United States Constitution.

---

*Eli J. Richardson is a federal judge for the U.S. District Court for the Middle District of Tennessee. He was nominated by President Donald Trump, and joined the court in 2018.*

*The opinions expressed are those of the author and do not necessarily reflect the views of Portfolio Media Inc. or any of its respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*