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What's the First Amendment Got to Do with It?
James Comey's Indictment for a Seashell "Threat"

By Eli Segal

On April 28, 2026, former FBI Director James Comey was indicted again. This time, it was for posting a photograph on Instagram that allegedly threatened the life of Donald Trump, the 47th President of the United States. In May 2025, Comey came across a collection of seashells on a North Carolina beach that were arranged in the pattern "86 47." He posted a picture he took of the pattern, along with the caption, "Cool shell formation on my beach walk."

Merriam-Webster's website gives the following explanation of the term "86" and its origin: "*Eighty-six* is slang meaning 'to throw out,' 'to get rid of,' or 'to refuse service to.' It comes from 1930s soda-counter slang that an item was sold out. There is varying anecdotal evidence about why the term *eighty-six* was used, but the most common theory is that it is rhyming slang for *nix*." But Merriam-Webster also notes: "Among the most recent senses adopted is a logical extension of the previous ones, with the meaning of 'to kill.' We do not enter this sense, due to its relative recency and sparseness of use."

This "recent and sparsely" used meaning of "86" sparked immediate online outrage, with some maintaining that Comey's post amounted to a threat to kill (i.e, "86") the President (i.e., "47"). That same day, Comey deleted his seashell post and offered this rationale in a new Instagram post: "I posted earlier a picture of some shells I saw today on a beach walk, which I assumed were a political message. I didn't realize some folks associate those numbers with violence. It never occurred to me but I oppose violence of any kind so I took the post down." In an interview a few days later, Comey rejected the notion that he had intended to threaten violence, saying that it was "a silly picture of shells that I thought was a clever way to express a political viewpoint"—namely, that President Trump should be removed from office.

In the April 28, 2026, indictment—filed five months after the dismissal of a prior indictment of him for allegedly lying to Congress—Comey is accused of violating 18 U.S.C. § 871(a) and § 875(c) by posting his seashell picture. Section 871(a) makes it a crime to transmit a writing that contains a threat to kill, kidnap, or inflict bodily harm upon the President of the United States, and Section 875(c) makes it a crime to transmit a communication in interstate commerce containing a threat to kidnap or injure another person.

Crucially, no matter what Section 871(a) or Section 875(c) may say about the elements of the crimes with which Comey has been charged, the First Amendment imposes a two-prong test that the government must satisfy to obtain a conviction. In general, the First Amendment prohibits the government from punishing speech because of its content. Indeed, the Supreme Court has reiterated this bedrock principle time after time. There are, however, several narrow exceptions, including one that is relevant here: "true threats" are not protected by the First Amendment. But to counter the risk that protected speech will be chilled by fear that the speech will unreasonably or unexpectedly be deemed a "true threat," the Supreme Court has held that the First Amendment requires two findings before speech can be punished under that umbrella. First, the government must show that the speech is a serious expression—as opposed to, say, hyperbole or a joke—that conveys to the audience that the speaker intends to commit an act of violence. Second, the government must show that the speaker consciously disregarded a substantial risk that the speech would be viewed by the audience as threatening violence.

So, what does this mean for Comey? First, the government must show that his post actually conveyed to his audience that Comey intended to kill the President. Given the nature of the post—a flippant message on Instagram beside a picture of shells on the beach—satisfying this prong should be a tough row to hoe. So too with the second prong, which requires the government to show that Comey knew that there was a substantial risk that his post would be viewed as threatening to kill the President but made the post anyway. Indeed, any suggestion that Comey had this requisite knowledge is undermined by Comey's behavior shortly after making the post—taking it down the same day and explaining that he was doing so because he had not realized that some people associate "86" with violence. The two-page indictment is thin on both these issues, and a motion to dismiss it on First Amendment grounds is likely coming down the pike.