ZIA FARUQUI DOESN'T WANT TO BE DOJ'S FALL-GUY FOR MEDIA POLICY SECRECY

As I noted, on Friday, InfoWars personality Owen Shroyer was charged — at this point, with just trespassing — in the January 6 insurrection. But as I also noted that his affidavit, "is interesting because it clearly lays out evidence — at a minimum! — that he could be charged with obstruction because he specifically talked about obstructing the vote certification on January 5." As a general practice, the government has arrested many non-violent January 6 defendants on trespassing charges and then fleshed out any further charges afterwards (in part, because that maximizes the opportunity to get people to cooperate).

Tuesday, some documents were unsealed that reveal I'm not the only one who thinks so. So, apparently, does Zia Faruqui, one of three DC Magistrate judges dealing with all the January 6 cases as they come in (and, of note, until last year an Assistant US Attorney in the DC US Attorney's Office).

Faruqui attempts to hold the government to public record standards

We know what Faruqui thinks because he has been trying to force the government to treat court records as the public documents they're supposed to be, as he did here.

Not long after he became a Magistrate judge, Faruqui got stuck with government requests to collect journalists' communications that were predictably controversial when they were disclosed. In an order issued in July, Faruqui

scolded the government for suggesting they could seal the records request (along with its tactically unique approach to getting journalists' records) indefinitely.

> A sealed matter is not generally, as the government persists in imagining, "nailed into a nondescript crate, stored deep in a sprawling, uncataloged warehouse." Leopold, 964 F. 3d at 1133 (citing RAIDERS OF THE LOST ARK (Lucasfilm Ltd. 1981)). Rather, it is merely frozen in carbonite, awaiting its eventual thawing. Cf. THE EMPIRE STRIKES BACK (Lucasfilm Ltd. 1980)

As Faruqui describes it in an order drafted last week along with the arrest warrant for Shroyer, but not released until yesterday, the government was trying to do the same with Shroyer's arrest warrant. When the government asked for the arrest warrant, he asked if they would memorialize their basis for finding that Shroyer's arrest met DOJ's media guidelines. Magistrate Judge Michael Harvey forced the FBI agent to include language addressing the issue earlier this year in the arrest warrant for Matthew Purse; in that case, the Agent simply included language explaining how he had determined that Purse was not a member of the media.

But, as Faruqui describes it in his order, in Shroyer's case, the government was unwilling to assert that they had followed their media guidelines with Shroyer in the affidavit, much less explain their thinking surrounding it.

> On August 19, 2021, the undersigned had a telephone conference with representatives of the USAO regarding the Complaint. The undersigned inquired as to whether:
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> - *the Department of Justice considered*

> *Shroyer to be a member of the media;*
> - *the USAO had complied with Department of Justice policies regarding the arrest of media members; and*
> - *the Assistant U.S. Attorneys would memorialize the answers to these two questions in the Complaint, consistent with their prior practice.*
>
> The USAO represented that it had followed its internal guidelines but was unwilling to memorialize that or explain the bases for its determinations

Afterwards, Faruqui sent a draft of his order to USAO (that is, to his former colleagues). One of his former supervisors, John Crabb, wrote back and said that DOJ doesn't have to share this because it would reveal internal deliberations.

> [A] requirement to proffer to the Court how and on what basis the Executive Branch has made determinations under these internal Department policies would be inconsistent with the appropriate role of the Court with respect to such policies and would risk disclosing internal privileged deliberations. Moreover, such inquiries could risk impeding frank and thoughtful internal deliberations within the Department about how best to ensure compliance with these enhanced protections for Members of the News Media.

Crabb further explained that the Shroyer case is

distinguishable from the Purse case.

> As the Court notes, Addendum Order at 7-8, this Office has conferred on previous occasions with the Court regarding certain aspects of the Department's media polices. In the main, those situations are distinguishable; and, in any event, the government is not bound by those prior actions.

Probably, this situation is distinguishable because Purse was affirmatively shown not to be media. Shroyer clearly is, in some sense. Under DOJ's media guidelines (assuming they're not using the exception for a suspected foreign agent), that leaves two possibilities. Either they deemed some of the things for which Shroyer got arrested to be outside his newsgathering role. And/or they determined he had committed a crime in the course of his newsgathering activities, the equivalent of hacking to obtain source materials for journalism.

DOJ's reliance on the Deferred Prosecution Agreement, including Shroyer's failure to even *begin* paying off his community service debt before January 6, provided DOJ with an easy way to publicly establish a crime largely independent of his actions on January 6, which is one of the reasons I was so interested in *how* they had arrested him.

Faruqui's probable cause determination

But Faruqui's order may hint at what DOJ is really thinking.

Faruqui's order is organized this way:

> I. Introduction, explaining why he's writing this order.
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> A. Events of January 6th, explaining the content of Shroyer's propaganda (including propaganda from before he

> trespassed on January 6)
>
> B. Prior Criminal Conduct, explaining Shroyer's past disruption charge and his DPA
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> C. Statutory Violations, **explaining the basis for the two misdemeanors Shroyer was charged with**
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> D. Inquiry of the Court, explaining that Faruqui tried to make DOJ go on the record for how this complied with their media guidelines
>
> II. Standard, explaining the reasons for treating the press with sensitivity and laying out the parts of the media guidelines that focus on protecting newsgathering
>
> III. Analysis, describing how on two earlier occasions DOJ had provided more on the record than they had here, but were unwilling to do so here, then **restating Shroyer's actions**
>
> IV. Conclusion, finding that even a credentialed journalist committing the same actions Shroyer had would have reached probable cause for a crime but also finding that DOJ gave an unsatisfactory answer about how it applied its media guidelines [my emphasis]

It's the last bit — the end of Section III and the short Section IV — I'm most interested in. In one paragraph, Faruqui explains that DOJ said something to him (presumably before he approved the warrant on the 19th) confirming they had followed the media guidelines, but were unwilling to put that they had done so or what their analysis was in writing. That's what led him to draft this order and ask again for them to put it in writing.

> Yet here the government is unwilling to address its compliance with its internal

> regulations regarding the press. When questioned by the Court, the USAO'srepresentatives respectfully stated that they had followed such guidelines but would not formally state this in their pleadings; nor would they memorialize the reasons underlying their determination that Shroyer was not "a member of the news media" who had committed the instant offenses "in the course of, or arising out of, newsgathering activities." 28 C.F.R. § 50.10(f)(2). The events of January 6th were an attack on the foundation of our democracy. But this does not relieve the Department of Justice from following its own guidelines, written to preserve the very same democracy.

The next paragraph restates Shroyer's alleged crime, but combines stuff that appears in sections I.A. and I.C., above, which results in a description of alleged crimes that go well beyond trespassing (though Faruqui does review how Shroyer knew he couldn't "engage in disruptive and riotous behavior" at the Capitol).

> Shroyer's January 2020 arrest gave him clear notice that he could not engage in disruptive and riotous behavior at the Capitol Building and Grounds. Yet beginning on January 5, 2021, Shroyer began urging others to join him in protest at the Capitol Building and Grounds premised on the false claim that the election was "stolen." Statement of Facts at 3. This conduct continued on January 6, 2021, when Shroyer made additional statements urging on the mob and personally entering the restricted area of the Capitol building in brazen defiance of his DPA. See Statement of Facts at 4–6. **His stated goal was clear: to stop former Vice President Pence from certifying the election by "tak[ing] the**

> **Capitol grounds".** Id. at 6. Shroyer described his personal role in the riot: "We literally own these streets right now." Id. at 6. On January 6th, Shroyer was "aid[ing], conspir[ing] with, plan[ning], or coordinat[ing] riotous actions." United States v. Munchel, 991 F.3d 1273, 1284 (D.C. Cir. 2021).

In the bolded language, Faruqui describes obstruction as it is being charged in January 6. He then purports to cite from *Munchel*, the DC Circuit decision that DC judges have used to separate those who assaulted cops and those who masterminded the attack from those who pose less of a threat going forward. Only the quote doesn't appear in the opinion, not even in other grammatical form. Faruqui's citations should end before (or bracket) the word "riotous." Here's how the passage appears in *Munchel*:

> In our view, those who actually assaulted police officers and broke through windows, doors, and barricades, and those who aided, conspired with, planned, or coordinated such actions, are in a different category of dangerousness than those who cheered on the violence or entered the Capitol after others cleared the way.

This is, as I noted, the language that District judges have used since *Munchel* in justifying detaining people. Faruqui is seemingly saying that Shroyer did things — and this language has primarily been used with militia leadership — that have gotten other people detained. Effectively, Faruqui has suggested that Shroyer is, like Kelly Meggs and Joe Biggs, one of the key leaders in this attack.

After having likened Shroyer to the likes of Meggs and Biggs, then, Faruqui says (in the conclusory section) that there is probable cause that Shroyer committed the crimes he has just described.

> The undersigned finds there was probable cause to believe Shroyer committed the above-described violations.

Coming immediately after the sentence likening Shroyer to Meggs and Biggs, this language might *not* refer solely to the trespass charges approved in the warrant, but also to the broader language Faruqui used, encompassing obstruction and conspiracy.

And indeed, the affidavit does substantiate (at least) obstruction charges, even if it doesn't include that among the charges (as I noted before all these documents were unsealed).

Who is making this case — Faruqui or DOJ?

As noted above: according to Faruqui's order, it's not that the government didn't say whether it had adhered to its media guidelines. He explicitly says that they did.

> The USAO **represented that it had followed its internal guidelines** but was unwilling to memorialize that or explain the bases for its determinations.
>
> [snip]
>
> When questioned by the Court, the USAO's representatives **respectfully stated that they had followed such guidelines** but would not formally state this in their pleadings; nor would they memorialize the reasons underlying their determination that Shroyer was not "a member of the news media" who had committed the instant offenses "in the course of, or arising out of, newsgathering activities." [my emphasis]

Rather, DOJ refused to put that it had in writing.

Which makes it unclear whether this extrapolation from Shroyer's arrest affidavit, from the details that substantiate the two trespassing charges in it to the details that could not have any role in a trespassing charge but which show that Shroyer pre-meditated an attempt to stop the vote count, is Faruqui's own extrapolation or something he heard in his discussions with DOJ last week, the things they're not willing to put into writing.

Contrary to some analysis of this order, it is not a prospective order for anything — Faruqui had already approved the arrest warrant when he issued it. Nor is Faruqui saying that he doesn't know if DOJ considers Shroyer a journalist (though he's more oblique on that point than he is on others).

Rather, the reason he wrote this order was to memorialize what he understands, from conversations he had with DOJ, went on.

> The Court issues this addendum opinion to ensure that the record accurately reflects: 1) the conversations between the Court and the Department of Justice; and 2) the Department's break with its prior practice of confirming its adherence to these regulations.
>
> [snip]
>
> The Court issues this addendum opinion in response to the USAO's break with prior practice, and to ensure that the judicial record accurately reflects: 1) the conversations between the Court and the USAO; and 2) the undersigned's understanding of the steps taken by the Department to comply with 28 C.F.R. § 50.10.

What Faruqui doesn't say, though, is where in this opinion DOJ's representations (at a minimum, that they did, in fact, follow media guidelines) end and where his own analysis begins. That is, we don't know whether the

analysis that implies Shroyer is one of the key planners of this operation, just like Biggs and Meggs, is Faruqui's analysis or what DOJ explained, verbally but not in writing, when they explained that they had complied with media guidelines.

Update: DOJ has unsealed an Information charging Shroyer *just* with trespassing.