UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

UNITED STATES OF AMERICA, Plaintiff,	:	CASE NO. 1:03-CR-484
vs.	:	MEMORANDUM OPINION
FAWAZ MOHAMMED DAMRAH, aka FAWAZ DAMRA, Defendant.	:	

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

This case comes before the Court for sentencing upon the jury's verdict that found Defendant Fawaz Damrah ("Damrah") guilty of unlawfully obtaining citizenship, in violation of 18 U.S.C. § 1425. The jury found Damrah unlawfully obtained citizenship by making false statements in a citizenship application on October 18, 1993, and during an interview on December 17, 1993. The Court has entered a judgment setting out the sentence in this case. With this opinion, the Court provides the reasoning that underlies its judgment. Specifically, the Court denies the Government's request for an upward departure. The Court also issues an order revoking Damrah's citizenship, as required by 8 U.S.C. § 1451(e). The Court denies Defendant's motion for a stay of that order.

Background

On December 16, 2003, a grand jury in the Northern District of Ohio issued an indictment charging

Damrah with wrongful procurement of citizenship, in violation of 18 U.S.C. § 1425(a) and (b).[1] The one count indictment alleged that "[f]rom on or about October 18, 1993, to on or about April 29, 1994," Damrah knowingly applied for naturalization in a manner contrary to law and to which he was not entitled. Specifically, the Government alleged that Damrah completed a written naturalization application on October 18, 1993, that failed to disclose affiliation or membership with Al-Kifah Refugee Center (also known as Afghan Refugee Services, Inc.), the Palestinian Islamic Jihad ("PIJ"), and the Islamic Committee for Palestine ("ICP"). The Government alternatively alleged that Damrah falsely stated that he had never ordered, incited, assisted, or otherwise participated in the persecution of other persons because of race or religion. The Government also said that Damrah gave false responses on the same topics to Immigration and Naturalization Services examiner Kim Adams. After Defendant Damrah pled not guilty, this case proceeded to trial on June 15, 2004. After trial, the jury found Damrah guilty of unlawful procurement of citizenship or naturalization in violation of Title 18 U.S.C. §1425(a) or (b).

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[1] Section 1425 (Procurement of citizenship or naturalization unlawfully) provides:

(a) Whoever knowingly procures or attempts to procure, contrary to law, the naturalization of any person, or documentary or other evidence of naturalization or of citizenship; or

(b) Whoever, whether for himself or another person not entitled thereto, knowingly issues, procures, or obtains or applies for or otherwise attempts to procure or obtain naturalization, or citizenship, or a declaration of intention to become a citizen, or a certificate of arrival or any certificate or evidence of nationalization or citizenship, documentary or otherwise, or duplicates or copies of any of the foregoing –

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1425 (1993).

Discussion of General Sentencing Guideline Calculation

Ordinarily, sentencing courts apply the version of the Guidelines in effect at the time of sentencing. 18 U.S.C. § 3553(a)(4)(A) (2004). If, however, there is an ex post facto problem, the sentencing court applies the version of the Guidelines in effect at the time the offense occurred. *Miller v. Florida*, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987); *United States v. Holmes*, 975 F.2d 275, 278 (6th Cir.1992); *United States v. Nagi*, 947 F.2d 211, 213 n. 1 (6th Cir.1991). *See also* U.S.S.G. § 1B1.11(b)(1) (2003) ("If the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the ex post facto clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed."). A sentence violates the ex post facto provision when the version in effect at the time of sentencing makes more onerous the punishment for crimes committed before its enactment. *Miller v. Florida*, 482 U.S. 423, 435, 107 S.Ct. 2446, 2453-54, 96 L.Ed.2d 351 (1987) (quoting *Weaver v. Graham*, 450 U.S. 24, 36, 101 S.Ct. 960, 968, 67 L.Ed.2d 17 (1981)).

Here, both parties agree that the 2003 Guidelines call for a longer sentence than the 1993 Guidelines. The 1993 Guidelines call for a base offense level of 6 for a violation of 18 U.S.C. § 1425, while the 2003 Guidelines direct a base offense level of 8. See U.S.S.G. § §2L2.2. The Court therefore applies the 1993 Guideline in its entirety. See U.S.S.G. § 1B1.11(b)(2) ("The Guidelines Manual in effect on a particular date shall be applied in its entirety.").

Damrah violated 18 U.S.C. § 1425 (a) and (b). U.S.S.G. § 2L2.2(a) applies to a violation of 18 U.S.C. § 1425 (a) and (b) and sets a base offense level of 6. No evidence supports an adjustment for

specific offense characteristic, a victim-related adjustment, or an adjustment for role in the offense. No one disputes that this is Damrah's first criminal conviction. Having no criminal history points, Damrah's criminal history classification, unless subject to an upward enhancement, is I. With an offense level of 6 and a criminal history classification of I, Damrah faces a sentence of 0 - 6 months. U.S.S.G. Chapter 5, Part A. He is eligible for probation. U.S.S.G. § 5B1.1(a)(1).

Ordinarily, a district court must impose a sentence falling within the applicable guideline range. *Koon v. United States*, 518 U.S. 81, 85, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996). 18 U.S.C. § 3553(b) cabins a court's authority to depart from the sentencing range: A court must not depart "unless [it] finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." Before a Court can sentence a defendant outside of the guideline range, the Court must find that the case falls outside of the heartland of cases controlled by the guideline. *Koon, supra*, 518 U.S. at 98.

To determine whether a case falls outside of the heartland, the Court need conduct "a refined assessment of the many facts bearing on the outcome, informed by [the district court's] vantage point and day-to-day experience in criminal sentencing." *Id.* If a court departs, the departure must be reasonable given the factors sentencing courts are required to consider and the facts of the case. *United States v. Crouse*, 145 F.3d 786, 792 (6th Cir.1998); see also 18 U.S.C. § 3742(e)(3)(C) (2004).

In this case, the Government seeks an upward departure of 18 levels, quadrupling Damrah's offense level from 6 to 24. This would allow Damrah to be sentenced to the statutory maximum of five

years. Specifically, the Government seeks an upward departure under U.S.S.G. § 5K2.15 (offense committed "in furtherance of a terroristic action") or, alternatively, under § 5K2.0 (general upward departure) or § 5K2.9 ("to facilitate or conceal the commission of another offense").

In response, Defendant Damrah argues there is insufficient evidence to show that he committed the offense "in furtherance of terrorism" under § 5K2.15. He further maintains that the government cannot show that he committed the offense to "facilitate or conceal commission of another offense" under § 5K2.9. He also argues that § 5K2.0 is inapposite.

Analysis

U.S.S.G. § 5K2.15

The Government primarily argues that the Court should depart upwardly under U.S.S.G. § 5K2.15. It posits two theories for why a departure should occur under that Guideline. First, it argues that Damrah acted "in furtherance of a terroristic action," because Damrah failed to disclose his links to PIJ/ICP during the naturalization application and interview, and this omission allegedly allowed the group to continue fundraising. Second, the Government says that Damrah's offense was "in furtherance of a terroristic action," because Damrah allegedly gave false or inconsistent statements in 1993 to FBI agents investigating terrorism. Neither of these theories succeeds. U.S.S.G. § 5K2.15 requires that the offense of conviction, not uncharged conduct, further a terrorist action. The evidence does not show sufficient connection between the offense of conviction, illegally obtaining citizenship, and a terrorist action.

U.S.S.G. § 5K2.15, effective November 1, 1989, provided:

> § 5K2.15. Terrorism (Policy Statement)
>
> If the defendant committed the offense in furtherance of a terroristic action, the court may increase the sentence above the authorized guideline range.

There is little that guides the Court as to what "a terroristic action" is or what "in furtherance of terroristic action" means. Amendment 292, Appendix C, which adopted § 5K2.15, did not describe "terrorism" or "terroristic action." In describing its adoption of § 5K2.15, the Sentencing Commission said that its enactment set forth a policy statement but the "amendment does not make a substantive change." *Id.*

Further, few cases have interpreted § 5K2.15. Among the few cases that have interpreted § 5K2.15, nearly all deal with defendants who were directly involved in terrorist activity. See *United States v. McKinley*, 38 F.3d 428, 430 (9th Cir. 1994) (defendant convicted of attempting to buy C-4 guns, mortar, and ammunition for the Irish Republic Army); *United States v. Hicks*, 997 F.2d 594 (9th Cir.1993) (defendant convicted of initiating a series of attacks against IRS buildings in California); *United States v. Kikimura,* 706 F. Supp. 331 (D. N.J. 1989) (in case predating § 5K2.15, defendant member of the Japanese Red Army convicted of possession of explosives). In each of these cases, the defendant suffered conviction of an offense that was directly related to a terrorist act or planned terrorist act. These cases provide little guidance in the present case, a case where the offense of conviction, illegally obtaining citizenship, has no obvious terrorist implication.

Finding no clear authority suggesting U.S.S.G. § 5K2.15 should apply, this Court initially focuses on the language of the § 5K2.15 guideline. Under that language, the defendant must have "committed the offense in furtherance of a terroristic action." The language reads "the offense," not "an offense." Logic

suggests that § 5K2.15 thus refers to the offense of conviction – "the offense" for which the defendant is being sentenced. In this case, that offense was unlawful procurement of citizenship, in violation of § 1425(a) and (b). In other words, § 5K2.15 indicates the Government need prove that Damrah unlawfully procured citizenship in order to promote or advance a terroristic action, or as part of an ongoing scheme to engage in terroristic activity.[2/]

PIJ Affiliation and Fundraising

In support of its theory that Damrah's failure to disclose information in the naturalization process furthered terrorism, the Government argues:

> "By participating in fund-raising on behalf of the PIJ/ICP, and then not revealing this fund-raising during the naturalization process, the defendant acted `in furtherance of a terroristic action.' . . . Providing truthful answers to the INS would have risked discovery of the leaders and the methods of fund raising for the PIJ/ICP in the United States. It also would have risked disruption of future fund raising."

Gov't Sent. Mem. [Doc. 179] at 3, 5-6.

At trial, the United States established that in April 1991, Damrah introduced University of South Florida engineering professor Sami al-Arian to a gathering of Muslims in Cleveland. Damrah then encouraged contributions to the Islamic Committee for Palestine (ICP), a group headed by al-Arian and associated with the Palestinian Islamic Jihad (PIJ). Gov't Exh. 8-5. The Government also showed that Damrah introduced al-Arian to a conference of Muslims in Chicago in 1992 and solicited contributions to

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[2/] The Oxford English Dictionary defines "furtherance":

> "The fact or state of being furthered or helped forward; the action of helping forward; advancement, aid, assistance. Also concr. a means or source of help."

Oxford English Dictionary Online (Oxford Univ. Press 2004), *at* http://dictionary.oed.com.

the Islamic Committee for Palestine. Gov't Exh. 9-4. Finally, the Government offered evidence that Damrah similarly assisted the Islamic Committee for Palestine in raising monies at another event near the same time. Gov't Exh. 7-5. The Government produced additional evidence that Damrah had conversations with al-Arian about fundraising in January and March 1994. Gov't Exhs. 28-2, 29-2.

Although the above evidence may have established a link between Damrah and PIJ/ICP, it does not necessarily show that Damrah's failure to disclose his association advanced a terroristic action in any meaningful way. As noted, § 5K2.15 speaks about terrorist acts associated with the offense of conviction, illegal procurement of citizenship. The Government must show that Damrah illegally procured citizenship to further a terroristic action. *Cf. United States v. Biheiri*, 299 F. Supp. 2d 590, 607 (E.D. Va. 2004). As to this required nexus, the Government offers little evidence.

At the time Damrah applied for citizenship in October 1993, he was a permanent resident under no immediate threat of deportation. As a permanent resident, Damrah enjoyed the same ability to raise monies that he later enjoyed as a citizen. Damrah may have applied for citizenship simply because he was nearing the close of five years on his permanent residency – the period required to obtain citizenship. Indeed, if Damrah sought to avoid scrutiny of PIJ and ICP, he would have been better served not to have applied for citizenship at all. *Cf. id.* ("By applying for naturalization, defendant invited greater government scrutiny of him and his immigration status, thereby jeopardizing his then secure permanent resident status. . . . [T]he government has not proven by a preponderance of the evidence that defendant procured his naturalization in order to engage in financial dealings with terrorists.").

Besides showing insufficient evidence of a nexus between Damrah's offense and any terrorist

activity, the Government faces an additional hurdle: § 5K2.15 uses the language "a terroristic action," rather than "terrorist activity" or "terrorism" generally. This language indicates that the Sentencing Commission contemplated an upward departure for those involved in discrete acts or planned acts of terrorism. Contrast U.S.S.G. § 3.14 (2003) (providing for adjustment if "the offense is a felony that involved, or was intended to promote, a federal crime of *terrorism*") (emphasis added). The Government does not directly link Damrah to any specific terrorist act.

At trial, the Government showed that Damrah made odious statements during a fundraising effort that praised a horrific attack upon Jews in Israel. The Government contends that these statements are sufficient to connect Damrah to that act and others. See Sentencing Tr. 9-10. But this is a highly attenuated link. The offense of conviction relates to illegally obtaining citizenship, not to the fundraising. The Government never obtained any indictment, nor established to any jury, that Damrah's fundraising violated any federal law. And there is no evidence that the defendant's actual offense – failure to provide truthful answers to questions relating to his fundraising activities during the naturalization process – furthered specific terroristic acts of that violent nature.

The Government offers a different interpretation of "a terroristic action." In its view, the Court should look to U.S.S.G. § 5K2.15's successor, U.S.S.G. § 3A1.4, for guidance in determining the meaning of "a terroristic action" and in interpreting § 5K2.15 generally. Specifically, the Government argues that "terroristic action" should include fundraising for a terrorist organization. The Government analogizes to the later enacted U.S.S.G. § 3A1.4 and its application of 18 U.S.C. § 2339C. For the below reasons, the Court rejects this path.

Effected in November of 1996 and after Damrah applied for and secured citizenship, § 3A1.4 reads:

> "If the offense is a felony that involved, or was intended to promote, a federal crime of terrorism, increase by 12 levels..."[3]

U.S.S.G. § 3A1.4 refers to 18 U.S.C. § 2332b for the definition of "a federal crime of terrorism." § 2332b defines "a federal crime of terrorism" as an offense that:

> (A) is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct; and
> (B) is a violation of – [*inter alia*] 2339C (relating to financing of terrorism).

18 U.S.C. § 2332(b) (2004). 18 U.S.C. § 2339C, effected in June of 2002, in turn, prohibits the financing of terrorism.

The Government argues that, although Damrah's fundraising activity violated no statute in effect in 1993, when he applied for and obtained citizenship, this Court should borrow the definition supplied by the later-enacted § 2332b and analogize to § 3A1.4 to grant an upward departure. To do so, however, would be tantamount to applying § 3A1.4 ex post facto.

Most importantly, before 2002, fundraising for a group engaging in terrorist activities was not an offense for which someone could be charged. In addition, significant differences between the older provision and its successor suggest the Court must use caution in looking to U.S.S.G. § 3A1.4 for guidance when interpreting U.S.S.G. § 5K2.15. The amended provision is not merely an extension of the earlier

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[3] Section 3A1.4, as effected in 1996, amended an immediate predecessor, which read: "If the offense is a felony that involved, or was intended to promote, international terrorism, increase by 12 levels..."

one. Rather, by its choice of terms, it broadens the activities for which someone's punishment can be increased and applies more strictly to defendants. Importantly, U.S.S.G. § 3A1.4 operates as an adjustment to the offense level, not as an enhancement. By contrast, U.S.S.G. § 5K2.15 acts as an enhancement, not an adjustment. Chapter Three adjustments apply in each appropriate case, while Chapter Five enhancements do not. U.S.S.G. § §1B1.1. Thus, under § 5K2.15, a court "*may* increase the sentence above the authorized guideline range"; § 3A4.1 *requires* an adjustment ("increase by 12 levels") if the appropriate criteria are met.

Further, U.S.S.G. § 3A4.1, effected in 1996, broadened the scope of conduct subject to its adjustment and loosened the nexus required between the offense and the terrorist activity. The change from "a terroristic action" to "terrorism" is significant, as is the change from "in furtherance of" to "involved, or intended to promote." The previous 1993 language, "in furtherance of a terroristic action," suggests the perpetrator must stand in some proximity to the specific activity mentioned. In contrast, "involved in, or intended to promote, a federal crime of terrorism" encompasses those who are much more removed from a specific and concrete action. In 1994, Congress pushed for a change to incorporate "promoting international terrorism" (subsequently amended). Even the Sentencing Commission did not support changing the language. *See, e.g.*, *United States v. Graham*, 275 F.3d 490, 530-35 (6th Cir. 2001) (giving history). Congress clearly felt that the new provision was different from the earlier provision.

Given the differences outlined above, this Court will not apply § 3A1.4 to determine the meaning of "terroristic action" under § 5K2.15. In sum, the Government has not sufficiently demonstrated that Damrah's failure to disclose links to PIJ/ICP in the process of naturalization furthered "a terroristic action."

Obstruction of Terrorism Investigation

In addition to its theory that Damrah's unlawful procurement of citizenship furthered the terrorist activity of PIJ and ICP, the Government offers a second theory. Under this second theory, Damrah's unlawful procurement of citizenship was "in furtherance of a terroristic action," because he allegedly obstructed the investigation of terrorism. Specifically, the Government alleges that Damrah's omission impeded investigation of certain members of the PIJ/ICP. The Government also alleges that Damrah's failure to reveal any affiliation with Al-Kifah/Afghan Refugee Services impeded investigation of individuals linked to terrorist acts in 1993. As with the first theory, the Government's second theory lacks sufficient support in the record.

First, the Government argues that "[i]f Damrah had revealed his association with the PIJ, and had told the INS that the ICP was a front organization for the PIJ, the government may very well have been able to pursue a criminal investigation of Al-Arian, Bashir Nafi, Ramadan Shallah and Abdel Aziz Odeh in a more efficient way." Gov't Sent. Mem. at 6. This argument, in addition to being highly speculative, faces an obvious problem. The Guidelines say that an upward departure cannot be based upon a failure or refusal to give information. U.S.S.G. § 5K1.2. states:

> U.S.S.G. § 5K1.2. Refusal to Assist (Policy Statement)
>
> A defendant's refusal to assist authorities in the investigation of other persons may not be considered as an aggravating sentencing factor.

U.S.S.G. § 5K1.2.

In addition to citing a factor that the Guidelines say cannot be considered, the Government does not show Damrah refused to give information or that Damrah had any information not otherwise available

to the Government. The FBI had begun wiretapping Sami al-Arian, the President of the PIJ affiliate ICP, by December 1993 and was apparently aware of al-Arian's connection to terrorism since the middle of that year. Thus, this Court concludes that Damrah's failure to disclose his affiliation with PIJ did not obstruct an investigation of terrorism.

Second, the Government contends that Damrah's failure to list his alleged affiliation with Al-Kifah/Afghan Refugees Services, as well as his allegedly inconsistent statements to FBI officials, obstructed an investigation of individuals later found to be linked to terrorist acts. The trial testimony, however, does not show that Damrah gave false information. Nor does it show that Damrah's omission prevented the FBI from obtaining information that it did not already have.

The time line is important. Damrah completed his naturalization application on October 18, 1993, and was interviewed by INS examiner Kimberly Adams on December 17, 1993. But well before the December 17, 1993 INS interview, Damrah had given Federal law enforcement agents information admitting his support for Al-Kifah.

Former FBI Special Agent Joe Haluscsak testified that he interviewed Damrah in Cleveland in February 1993, significantly before Damrah's citizenship application. In that interview, Damrah acknowledged association with Mustafa Shalabi, head of Afghan Refugee Services in the U.S.:

> Q Now, in the course of the interview, Mr. Damrah told you that he knew Mustafa Shalabi, correct?
>
> A Yes.
>
> Q He told you that Mr. Shalabi had an office at the Farooq Mosque there in Brooklyn where Mr. Damrah had been the Imam?

A Yes.

Q He told you that Mr. Shalabi's main purposes was to collect money to send Afghanistan Muslims to fight the Soviets?

A Yes.

Q And he told you, according to Mr. Shalabi, the money went to Sheikh Azzam in Afghanistan?

A Yes.

Q And about the counterfeiting that you were asked about a moment ago, what he told you is that he heard rumors that Mr. Shalabi was involved in counterfeiting, correct?

A Correct.

Q He said that he heard rumors in October and November of 1990 that Shalabi was involved in counterfeiting as a way to raise money to aide the Muslims in Afghanistan, and never heard any details, correct?

A Yes.

Tr. 472-73.

Haluscsak's testimony not only demonstrates that Damrah acknowledged his association with Shalabi and Al-Kifah, but also points to another difficulty for the United States in establishing that Damrah's false naturalization application impeded the investigation of terrorism – by the time of the application in October 1993, the FBI already knew of Shalabi and the Afghan Refugee Service organization.

To like effect, New York Joint Terrorism Task Force Agent Louis Napoli testified that he had participated in an investigation of Mustafa Shalabi and the Afghan Refugee Services, also known as Al-Kifah, from 1989, four years before Damrah's naturalization application. Tr. 379. On October 21, 1993,

Agent Napoli interviewed Damrah, only days after Damrah had completed the naturalization questionnaire and before his naturalization interview. In that conversation, Damrah acknowledged much information, none of which appears to have been inconsistent with earlier statements. Agent Napoli testified:

> Q And he told you that he met Mustafa Shalabi in 1987, correct?
>
> A Correct.
>
> Q He told you that Mr. Shalabi had been to Afghanistan to fight with the Afghan resistance against the Soviet occupation, correct?
>
> A Right.
>
> Q And you know that the United States was supporting the Afghan resistance against the Soviet occupation as well, correct?
>
> A Right.
>
> Q Mr. Damrah told you that he was impressed with the passion Mr. Shalabi showed for the plight of the Afghan people, correct?
>
> A Right.
>
> Q Mr. Damrah told you that he brought up the suggestion that an office be opened in the United States to gather donations for the Afghan people, correct?
>
> A Right.
>
> Q He told you that Mr. Damrah, that is, told you that he went to the board of the Farooq mosque and talked him into opening the office inside the mosque, correct?
>
> A Correct.
>
> Q He told you after the Board of the mosque approved the office, Mr. Shalabi became the Emir or leader?
>
> A Correct.

Q And Mr. Damrah told you that he, Mr. Damrah, became the Emir or leader for Palestine, correct?

A Right.

Q Mr. Damrah told you and the district attorney and investigator and federal prosecutor that he and Mr. Shalabi would go to different mosques and they would speak about helping the Afghan people and their struggle against the Soviet occupation?

A Correct.

Q And Mr. Shalabi would collect donations at these locations, correct? Mr. Damrah told you that?

A Yes.

Tr. 419-21.

As with the interview with Agent Haluscsak, nothing suggests that Damrah's false naturalization application impeded Agent Napoli's investigation of terrorism. Napoli had investigated the Al-Kifah Refugee Center since 1989. The questions posed by Agents Haluscsak and Napoli suggest the Government had significant knowledge of the Al-Kifah Refugee Center long before Damrah's naturalization application.

Moreover, the trial testimony shows that Damrah had left New York and Al Farooq Mosque in 1990, in part because of mounting conflict with Shalabi. Tr. 412, 470. Although the Government contends Damrah continued to hide information, Damrah appears to have cut off his connection to Shalabi three years before the FBI interviews. In those interviews, he may not have had any additional information to give. The Court is not persuaded that Damrah's failure to list his affiliations with the Al-Kifah Refugee Center had any effect upon the defense against terrorism.

The Government alternatively argues that Damrah lied about the extent of his association with certain individuals and that this impeded an investigation of terrorist-related activities by giving incomplete information. Given the record evidence in this case, this argument is noticeably weak.

In support of this position, the Government argues:

> Over the course of 1993, the defendant was interviewed by law enforcement officers on three separate occasions about his relationships to individuals associated with Al-Kifah. His responses differed in each interview; indeed, from the first interview in February 1993 to the final interview in November 1993, Fawaz Damrah's story changed dramatically.

Gov't Sent. Mem. at 7.

As described above, Former FBI Agent Joe Haluscsak testified about Damrah's statement regarding the Al-Kifah organization during Haluscsak's February 1993 interview with Damrah:

> Q Did you ask him about his relationship with a Mustafa Shalabi [the head of the the Al-Kifah organization]?
>
> A Yes, I did.
>
> Q And what did he tell you about that?
>
> A He said he knew Mustafa Shalabi at the mosque. Mustafa Shalabi is, as far as he knew, spent a considerable amount of time, almost all of his time raising funds and setting up fund raisers for money to be sent to the fighters in Afghanistan.
> He had his own room at the mosque on the first floor, he had his own telephone, and would handle anything regarding fundraising through the telephone through that office on the first floor. And the money was -- Mr. Damrah's understanding was this money would go to Sheikh Azzam in Afghanistan.

Tr. 469.

The United States seems to complain that Damrah gave Agent Napoli more information in a November 15, 1993, interview than he gave in an October 21, 1993, interview. In the November

statement, Damrah acknowledged more information than he had in the October discussion. Nothing suggests the different statements had any significance nor that the three week delay made any difference. Recall, the Government has never brought any charge against Damrah for having made a false statement to Agent Napoli. In addition, as mentioned, little evidence suggests Damrah was withholding additional information. In 1990, Damrah and Al-Kifah co-founder Mustafa Shalabi conflicted after Damrah accused Shalabi of misusing large amounts of the funds raised for assistance to the Afghans fighting the Soviets and the subsequent communist government. In part because of this conflict, Damrah left the Brooklyn mosque.

Finally, the Government argues that Damrah lied about his knowledge of two individuals implicated in later terrorist activities, El-Sayyid Nosair and Mahmoud Abou Halima. Gov't Sent. Mem. at 8-11. The Government points out that in February 1993, Damrah denied knowing either Nosair or Abou Halima. Tr. 469. When interviewed in October 1993, Damrah told Agent Napoli that he had no personal knowledge of Nosair, but knew "of" him. Id. at 394. In November 1993, Damrah told Agent Napoli that Nosair would visit Shalabi at the Farooq Mosque. *Id.* at 404, 406. He also said that Abou Halima was a close associate of Shalabi. *Id.* at 411.

As the interviews progressed, Damrah's answers with regard to Nosair and Abou Halima certainly became more complete. But they do not appear to have been inconsistent; Damra always maintained that he did not know these men personally. Significantly, nothing suggests that Damrah's omissions in the naturalization process made any difference in the FBI investigation. Indeed, Damrah's more forthcoming October and November 1993 statements preceded his December 1993 interview with Kim Adams.

In sum, the Court is not convinced that Damrah's offense obstructed a terrorism investigation.

Neither theory the Government asserts under § 5K2.15 warrants an upward departure.

§ 5K2.0

As an alternative to its theory that U.S.S.G. § 5K2.15 warrants an upward departure, the Government argues that U.S.S.G. § 5K2.0 should apply. U.S.S.G. § 5K2.0 applies 18 U.S.C. § 3553(b), and permits a departure only where "the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result." The Government argues that "the underlying actions of the defendant were not adequately taken into consideration in formulating the guideline range under § 2L2.2." Gov't Sent. Mem. at 13. Specifically, the guidelines do not address factors such as fundraising for a terrorist group (PIJ/ICP), or participating in or inciting persecution. *Id.*

The Government, however, fails to account for § 5K2.15 itself. § 5K2.15, termed "Terrorism," provides: "If the defendant committed the offense in furtherance of a terroristic action, the court may increase the sentence above the authorized guideline range." In promulgating § 5K2.15, the Sentencing Commission took into consideration the aggravating circumstance of terrorist activity and terrorism generally. Having found that § 5K2.15 does not warrant an upward departure, the Court may not turn to § 5K2.0 as an alternative. See, e.g., *United States v. Kuhn*, 345 F.3d 431, 439 (6th Cir. 2003) ("A district court abuses its discretion when it departs based on a factor already considered by the Commission in the guidelines") (citing *Koon v. United States*, 518 U.S. 81, 111, 135 L.Ed. 2d 393, 115 S. Ct. 2035 (1996).). Thus, § 5K2.0 is not an appropriate basis for an upward departure in this case.

§ 5K2.9

The Government also argues that an upward departure is warranted under U.S.S.G. § 5K2.9. That Guideline reads: "If the defendant committed the offense in order to facilitate or conceal the commission of another offense, the court may increase the sentence above the guideline range to reflect the actual seriousness of the defendant's conduct." The Government, however, has not provided additional proof that § 5K2.9 should apply, and has not briefed the issue. Moreover, § 5K2.15 replaced 5K2.9 for conduct relating to terrorist activity. See Amendment 292, Appendix C. For the reasons given in the discussion above, the Court declines to grant an upward departure under § 5K2.9.

Revocation of Citizenship

This Court now turns to the issue of Damrah's revocation of citizenship. At sentencing, the Government moved to revoke Damhrah's citizenship under 8 U.S.C. § 1451(e).[4/] The Government argues that this Court "should" revoke citizenship and that the statutory text of Section 1451(e) "suggests immediate action upon conviction at the trial level rather than waiting for the disposition of an appeal." Gov't Sent. Mem. at 16-17. Responding, Damrah asks this Court to stay any revocation order pending appeal, citing as potential consequences immigration detention and deportation. While this Court is not inclined to stay Damrah's sentence, it is a different matter whether to stay his revocation of citizenship.

After reviewing the applicable law, this Court revokes Damrah's citizenship under Section

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[4/] Section 1451(e) of Title 8 of the Federal Criminal Code (2004) provides that: "When a person shall be convicted under section 1425 of title 18 of the United States Code of knowingly procuring naturalization in violation of law, the court in which such conviction is had shall thereupon revoke, set aside, and declare void the final order admitting such person to citizenship, and shall declare the certificate of naturalization of such person to be canceled. Jurisdiction is hereby conferred on the courts having jurisdiction of the trial of such offense to make such adjudication."

1451(e) of Title 8. At this time, this Court will not stay the revocation order. Because the Government has stated on the record that immigration authorities will not detain Damrah pending his appeal, Damrah's request for a stay appears moot.

After a defendant is convicted under Section 1425 of Title 18, the district court "shall thereupon" revoke his citizenship.[5] *See* 8 U.S.C. § 1451(e). A court may revoke citizenship under Section 1451(e) at sentencing; it need not wait until the direct appeal concludes. *See United States v. Fofana*, 50 Fed. Appx. 725, 726 (6th Cir. 2002) (affirming conviction under 18 U.S.C. § 1425 and revocation of citizenship). Here, the issue is not whether to revoke Damrah's citizenship. The issue is whether this Court has authority to stay its revocation order pending appeal.

Few cases address whether a district court may stay a revocation order under Section 1451(e). Notably, neither party cites any Sixth Circuit cases pertaining to revocation of citizenship under 8 U.S.C. §1451(e) for unlawfully procuring citizenship under Section 1425 of Title 18. Neither party cites any case prohibiting a district court from staying a revocation order. In particular, the Government has cited no cases showing that this Court *may not* stay the revocation order pending revocation. At most, the Government's cases show that a district court's determination whether to stay a revocation order is permissive.

The Government argues that this Court should issue the revocation automatically at sentencing

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[5] Damrah argues that a conviction is not final under Section 1451(e) of Title 8 until the defendant exhausts avenues of direct appeal. Cases have not discussed when a conviction becomes final for purposes of revoking citizenship under Section 1451(e). Some courts have revoked citizenship at the time of sentencing, without discussion of when the conviction became final. At a minimum, this suggests a "conviction" under Section 1451(e) occurs when the defendant is sentenced. This Court assumes, without deciding, that a "conviction" under Section 1451(e) occurs at sentencing. Accordingly, the revocation order issues at sentencing. As noted below, some circumstances may warrant staying the revocation order.

under the statutory language of Section 1451(e). Gov't Sent. Mem. at 16-18. On the other hand, Damrah asserts that this Court has authority to stay a revocation order pending appeal, but he cites no authority for this proposition. Def. Sent. Mem. at 3 n.2.

The statutory text Section 1451(e) is silent as to whether a court may stay a revocation order. Likewise, most cases do not indicate whether the trial court could have stayed the revocation order pending appeal. At least one court has issued a revocation order at the time of sentencing, but stayed the order pending appeal. *See United States v. Alameh*, 341 F.3d 167, 171 (2d Cir. 2003) (affirming district court sentencing for one count under 18 U.S.C. § 1425). In another case, the district court did not revoke citizenship until well after direct appeal concluded. *See United States v. Inocencio*, 328 F.3d 1207, 1209 (9th Cir. 2003) (affirming district court's revocation order, which was issued five years after the conviction).

Under 8 U.S.C. §1451, this Court concludes that it must revoke Damrah's citizenship upon his conviction for unlawfully procuring citizenship under Section 1425 of Title 18. Although this Court's order revokes Damrah's citizenship, this Court has discretion whether to stay the revocation order pending appeal. As the Government asserts, the decision whether to issue the revocation order may be a "simple ministerial task." *See* Gov't Sent. Mem. at 16. But the issue whether to revoke Damrah's citizenship is analytically distinct from whether to stay the revocation order pending appeal. Absent authority to the contrary, this Court has authority to stay a revocation order pending appeal under its sound discretion. In contexts other than revocation under Section 1451(e), courts have recognized that revocation of citizenship may have severe consequences. Pending appeal, courts may stay revocation

orders if the circumstances warrant. *See United States v. Kowalchuk*, No. 77-118, 1983 U.S. Dist. LEXIS 13612, *2 (E.D. Pa. Sept. 21, 1983) (staying a revocation of citizenship pending appeal under Rule 62 of the Federal Rules of Civil Procedure, because "to strip a person of American citizenship, even temporarily, constitutes severe and irreparable harm" and the government would not suffer harm from the grant of a stay when ten years elapsed before the government filed suit).

Pending his appeal of his conviction under Section 1425 of Title 18, Damrah asserts two potential consequences of the revocation order: deportation or detention by immigration authorities. Damrah's concerns are valid. In determining whether these circumstances warrant staying its revocation order, this Court finds it especially significant that the Government has stated on the record that neither consequence will occur in this case. Sentencing Tr. at 54-55, 59. Damrah's right to obtain a stay of the revocation of citizenship could significantly differ if he faced detention or deportation pending his appeal.

Addressing Damrah's concerns individually, he fears that immigration authorities will deport him pending his appeal of his conviction. With regard to deportation proceedings, a conviction is not final until the defendant exhausts his direct appeal. *E.g., Pino v. Landon*, 349 U.S. 901 (1955); *United States v. Garcia-Echaverria*, 374 F.3d 440, 445 (6th Cir. 2004); *Aguilera-Enriquez v. INS*, 516 F.2d 565, 570 (6th Cir. 1975). The parties agree that Damrah's appeal must conclude before the immigration authorities may deport him. Sentencing Tr. at 54-55; *see* Def. Sent. Mem. at 3 (citing cases defining "conviction" under federal immigration statutes). Under statutes governing deportation, Damrah's conviction is not final until the appellate process concludes.

Damrah further is concerned that immigration authorities will detain him until his appeal concludes and until he is deported. This could state a valid reason to stay the revocation order. Yet the Government has indicated on the record that immigration authorities will not detain Damrah pending his appeal. In response to Defense counsel's concern that Damrah would be detained, the Government's attorney stated: "I'm saying it is not done that way and it won't be done that way." Sentencing Tr. at 59. As noted, this offense arose from Damrah's illegal acquisition of citizenship in 1993-94. He has no prior, nor subsequent conviction of any criminal offense. He has significant ties to this community.

As there is no imminent threat of detention, this Court need not determine whether to issue a stay at this time because Damrah's request to stay the revocation order appears moot. Absent a change in circumstances, this Court will not stay its revocation order.

CONCLUSION

For the reasons described above, the Court DENIES the Government's request for an upward departure under U.S.S.G. § 5K2.15, or alternatively, under § 5K2.0 or § 5K2.9. The Court orders Damrah's citizenship be revoked under 8 U.S.C. § 1451(e) and denies a stay of the order of

revocation.

IT IS SO ORDERED.

Dated: September 23, 2004

s/ *James S. Gwin*
JAMES S. GWIN
UNITED STATES DISTRICT JUDGE