

REVIEWING FEDERAL SENTENCING POLICY, ONE GUIDELINE AT A TIME

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The Federal Sentencing Guidelines are riddled with policy oversights. In United States v. Kimbrough, the Supreme Court permitted district courts to vary from the Guidelines based on categorical policy disagreements. Yet, although district courts often vary from the Guidelines for individualized reasons, the policy variance power has been underutilized. This Note provides a case study of the history of one obscure Guideline, section 2M5.1, as applied to one particular type of case, a non-military-related embargo violation. The case study exposes the United States Sentencing Commission’s systemic oversights in the history of creating Guideline section 2M5.1 and demonstrates how lawyers and judges can rely on that history on a case-by-case basis to expose categorical problems with Guidelines policy. Employing such a categorical policy approach to supplement an individualized approach promotes fairness, transparency, and feedback for future refinement of the Guidelines.

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INTRODUCTION

The Federal Sentencing Guidelines (“Sentencing Guidelines” or “Guidelines”) drastically changed federal criminal sentencing practice when they became law in 1987. In 2005, after almost two decades of sentencing under these mandatory and virtually unreviewable guidelines, the Supreme Court’s decision in *United States v. Booker* overhauled the sentencing regime by changing the Guidelines from mandatory to advisory.¹ Subsequently, in a series of decisions in 2006 and 2007, the Court affirmed district courts’ authority to vary from the Guidelines on virtually any reasonable basis.² Notably, in *Kimbrough v. United States* the Court upheld variance from the Guidelines on the basis of a purely categorical policy disagreement.³

A variance from the Guidelines based on a categorical policy disagreement is applicable in all cases involving the relevant guideline regardless of the individual defendant before the court. This type of policy variance is analytically distinct from a variance based on an individualized determination that the Guidelines sentencing range should not be imposed on a defendant because of the defendant’s particular characteristics and circumstances. In upholding the authority to vary from the Guidelines based on categorical policy disagreements as well as individualized determinations, *Kimbrough* confirmed the significant discretion held by sentencing judges in the post-*Booker* era of sentencing.

¹ 543 U.S. 220 (2005); see *infra* Subpart I.B (discussing *Booker*).

² See *infra* Subpart I (describing the Supreme Court’s transformation of the Guidelines from mandatory to advisory).

³ 552 U.S. 85 (2007); see *infra* Subpart I.C (discussing *Kimbrough*).

Although judges and academics alike have expressed extensive policy disagreements with the Guidelines, judges still adhere to the Guidelines' sentencing recommendations in over seventy-five percent of cases.⁴ However, judges are among the few actors that have the opportunity and ability to reexamine the policy decisions made over the last twenty-five years by the United States Sentencing Commission ("Commission"), the agency responsible for the Guidelines.⁵ A judicial determination that a guideline resulted from a defective decisionmaking process firmly justifies, under *Kimbrough*, a categorical policy disagreement between the sentencing judge and the Commission. As this Note demonstrates, the Commission's process for determining and implementing Guidelines policy often contains serious flaws, making increased judicial reexamination of the Guidelines important and desirable.

Because of these flaws in the Commission's process, judges should be particularly careful in examining policy outcomes in cases that involve obscure or little-used guidelines that have not yet received much scrutiny in the post-*Booker* era. The structural problems created by the Commission's flawed process are endemic to the Guidelines, so even rarely-used guidelines can have defects that in aggregate result in enormously unjust effects. By carefully deconstructing the policy decisions resulting from these structural problems and separating them from policy decisions based upon sound data and expertise, judges would help create a more effective and just sentencing regime.

This Note examines one obscure guideline, section 2M5.1,⁶ as applied to one type of offense, non-military-related violations of embargos under the International Emergency Economic Powers Act (IEEPA).⁷ The history of section 2M5.1 demonstrates the repeated structural failings of the Commission. These failings resulted in a guideline that has been interpreted to allow courts to impose the same sentence for non-military-related embargo violations—for instance, selling fire extinguisher equipment to a private company in Iran—as for trafficking ballistic missiles or nuclear weapons to hostile governments.

⁴ See U.S. SENTENCING COMM'N, 2011 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.N (2011), available at http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2011/TableN.pdf (providing statistics on federal sentencing practice for fiscal year 2011).

⁵ See Lynn Adelman & Jon Deitrich, *Improving the Guidelines Through Critical Evaluation: An Important New Role for District Courts*, 57 *DRAKE L. REV.* 575, 575–76 (2009) (arguing that district courts can and should review the Commission's policy decisions).

⁶ U.S. SENTENCING GUIDELINES MANUAL § 2M5.1 (2013).

⁷ 50 U.S.C. §§ 1701–1707 (2012).

Although written sentencing decisions employing section 2M5.1 are rare,⁸ the Northern District of Illinois has issued two decisions varying considerably downwards from section 2M5.1 for non-military-related IEEPA violations. One decision was issued in 2008,⁹ after the Supreme Court decided *Kimbrough*. The other was decided in 2006,¹⁰ before *Kimbrough*. However, neither decision clearly stated or justified its policy disagreement with section 2M5.1.¹¹

This Note argues that courts would better serve the regime created by the Sentencing Guidelines by issuing written sentencing opinions that explicitly evaluate the policy behind each guideline. Proposed by commentators Michelman and Rorty,¹² this analytical framework allows courts to overtly examine and pass judgment on the Commission's policymaking process that led to the creation of the guideline at issue. Explicitly analyzing the Commission's process as the Court did in *Kimbrough* would result in fairer and more transparent sentencing decisions and would provide much-needed case-by-case feedback on the operation of the Guidelines. The necessity for such feedback is especially pressing for obscure guidelines such as section 2M5.1.

This Note proceeds in three parts. Part I summarizes the operation of the Commission and the Guidelines. It also recounts the recent doctrinal changes to the sentencing regime. Part II examines the legislative history of section 2M5.1 and demonstrates how the Commission's systemic problems have produced a major policy oversight in that guideline as applied to non-military IEEPA embargo violations. Part III reviews the Northern District of Illinois decisions applying section 2M5.1 to non-military-related IEEPA violations. Although the courts noted some of the Commission's failings, they should have more explicitly justified their variances from section 2M5.1 in terms of the flawed policymaking process behind the Guideline. This Note applies the proposed analytical framework to section 2M5.1 to

⁸ The guideline itself was only applied on average about eight times per year between 2002 and 2011. See *Guideline Application Frequencies*, U.S. SENT'G COMM'N, http://www.uscc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Guideline_Application_Frequencies/index.cfm (last visited Jan. 25, 2014) (providing annual application frequencies of the Guidelines, including section 2M5.1). The majority of those sentencing decisions are unwritten or otherwise not publicly available.

⁹ United States v. Groos, No. 06 CR 20, 2008 WL 5387852 (N.D. Ill. Dec. 16, 2008).

¹⁰ United States v. Sevilla (*Sevilla II*), No. 04 CR 0171, 2006 WL 3486872 (N.D. Ill. Nov. 29, 2006).

¹¹ See *infra* Subpart III.A (discussing the courts' failures to explicate their policy disagreements).

¹² Scott Michelman & Jay Rorty, *Doing Kimbrough Justice: Implementing Policy Disagreements with the Federal Sentencing Guidelines*, 45 SUFFOLK U. L. REV. 1083, 1089 (2012).

demonstrate how employing an explicit step of guideline history analysis results in better sentencing practice and policy.

I

THE SENTENCING GUIDELINES

Congress created the Sentencing Commission under the Sentencing Reform Act of 1984.¹³ Three years later, the Commission promulgated the Sentencing Guidelines.¹⁴ Congress adopted the Guidelines into law promptly and without amendment.¹⁵ The Commission suggests changes to the Guidelines every January and submits a revised version to Congress in April or May. The revisions become law every November absent congressional action to the contrary.¹⁶

The Guidelines instruct federal judges on the appropriate sentences for convicted criminal defendants based on specific characteristics of the offense and the offender.¹⁷ From 1987 until the Supreme Court decided *United States v. Booker* in 2005,¹⁸ federal judges were statutorily required to follow the Guidelines sentencing ranges. After *Booker* and its progeny, judges must still begin every sentencing decision by consulting the Guidelines, but they are no longer bound by the Guidelines. This Part of the Note summarizes the Guidelines' operation and relevant case law.¹⁹

A. *The Opaque Process of the Sentencing Commission*

Many scholars and judges find the Commission's procedures inadequate;²⁰ the Guidelines' creation and subsequent revisions have

¹³ Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

¹⁴ See KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 57–58 (1998) (summarizing the history of the Guidelines' creation).

¹⁵ See *id.* (describing the “muted” reaction of lawmakers to the proposed guidelines, which passed into law “without delay or legislative amendment”).

¹⁶ See 28 U.S.C. § 994(o)–(p) (2012) (setting forth duties of the Commission to revise and amend the Guidelines); see also *Proposed Amendments to the Guidelines Manual*, U.S. SENT'G COMMISSION, http://www.ussc.gov/Guidelines/Proposed_Amendments.cfm (last visited Jan. 25, 2014) (listing proposed and submitted amendments since 1998).

¹⁷ U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. 1.2 (2013). As of November 2013, the Guidelines Manual contains 582 pages of these rules.

¹⁸ 543 U.S. 220 (2005).

¹⁹ Other writers have thoroughly chronicled the genesis and history of the Guidelines. See generally STITH & CABRANES, *supra* note 14; Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. PA. L. REV. 1631, 1636–37 (2012); Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993).

²⁰ See, e.g., Lynn Adelman & Jon Deitrich, *Marvin Frankel's Mistakes and the Need to Rethink Federal Sentencing*, 13 BERKELEY J. CRIM. L. 239, 239 (2008) (“Students of federal

been widely criticized.²¹ The original members of the Commission had little to no experience with criminal sentencing prior to their appointment to the Commission.²² In addition, the Commission never articulated any particular principle or coherent philosophy behind its sentencing policy, nor did it state how the Guidelines serve the traditional purposes of sentencing.²³ Further, the Guidelines are constructed to constrain judicial discretion to a narrow sentencing range for each case—yet, because of the general lack of transparency surrounding the Commission’s decisionmaking process, “the courts are often without information regarding the underlying policies or objectives that the Commission is seeking to achieve through its sentencing rules.”²⁴ The original Commission was plagued by political infighting, staff retention problems, and misrepresentation of research and

sentencing generally agree that at least prior to *United States v. Booker*, the guidelines failed.” (citation omitted)); Marc L. Miller & Ronald F. Wright, *Your Cheatin’ Heart(land): The Long Search for Administrative Sentencing Justice*, 2 BUFF. CRIM. L. REV. 723, 723 (1999) (“It is hard to know where to begin in describing the disaster that has become federal sentencing reform over the past twenty years.”); Panel Discussion, *Federal Sentencing Under “Advisory” Guidelines: Observations by District Judges*, 75 FORDHAM L. REV. 1, 4 (2006) (“[T]he mandatory Guidelines system was deeply flawed.”); Kevin R. Reitz, *Demographic Impact Statements, O’Connor’s Warning, and the Mysteries of Prison Release: Topics from a Sentencing Reform Agenda*, 61 FLA. L. REV. 683, 685 (2009) (“[T]he federal system is widely regarded as a failure”); Michael Tonry, *The Success of Judge Frankel’s Sentencing Commission*, 64 U. COLO. L. REV. 713, 716 (1993) (“The guidelines . . . are the most controversial and disliked sentencing reform initiative in this century.”).

²¹ Professor Kate Stith and Judge José Cabranes chronicled many of these shortcomings in their seminal book, *Fear of Judging*. See, e.g., STITH & CABRANES, *supra* note 14, at 5 (“The rules themselves, which generally ignore individual characteristics of defendants, often seem to sacrifice comprehensibility and common sense on the altar of pseudo-scientific uniformity.”). Despite the doctrinal changes that have occurred since the book was published in 1998, many of the original shortcomings noted by Stith and Cabranes remain relevant today. See *supra* note 20 (collecting criticisms of the Guidelines).

²² See STITH & CABRANES, *supra* note 14, at 49–51 (discussing the qualifications of original Commission members).

²³ See *id.* at 53–56 (criticizing the lack of a comprehensive principle behind the Guidelines). The four traditional purposes of sentencing are deterrence, incapacitation, retribution, and rehabilitation. All four purposes are cited in the introduction to the Guidelines manual and referenced in the statute implementing the Guidelines. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. 1.2 (2013); see also 18 U.S.C. § 3553(a) (2012) (listing these same four purposes as factors to consider in sentencing). The traditional purposes of sentencing often point to opposing policy choices, but the Commission failed to reconcile them in creating the Guidelines. See Adelman & Deitrich, *supra* note 5, at 577 (“[T]he Commission has never explained how the Guidelines advance the purposes of sentencing.”). Although the Commission strongly emphasized a desire for “uniformity” in sentencing, even that goal is fraught with conflicting interpretations. See Michael M. O’Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749 (2006) (arguing that the current Guidelines fail to reflect the true value of uniformity as understood by the original sentencing reformers).

²⁴ STITH & CABRANES, *supra* note 14, at 56.

data.²⁵ More than twenty-five years after the initial Guidelines became law, there is still no process through which to hold the Commission accountable for its decisions.²⁶ Even formerly staunch advocates now acknowledge that the Guidelines system perpetuates a “one-way upward ratchet” of increasing sentence lengths,²⁷ with “the power to make and influence sentencing rules” concentrated in “polit-

²⁵ *Id.* at 65. In the words of a General Accounting Office report, the Commission suffered from “organizational disarray.” *Id.* (quoting U.S. GEN. ACCOUNTING OFFICE, GAO/T-GGD-90-17, U.S. SENTENCING COMMISSION: CHANGES NEEDED TO IMPROVE EFFECTIVENESS 12 (1990)). Overall, “the Commission operated in an environment poisoned by mistrust . . . engendered . . . by its incomplete and questionable data and its dubious public assurances that the Guidelines followed past sentencing practices.” *Id.* at 66.

²⁶ *See id.* at 56 (“The Commission . . . need not provide explanations for its rules, nor respond to criticisms of its proposed Guidelines.”). Scholars have proposed accountability measures. *E.g.*, Richard A. Bierschbach & Stephanos Bibas, *Notice-and-Comment Sentencing*, 97 MINN. L. REV. 1 (2012) (proposing that the Commission adopt notice-and-comment procedures similar to those of other agencies to increase legitimacy of and public participation in sentencing); Miller & Wright, *supra* note 20, at 728–29 (proposing a statutory solution to improve transparency and accountability of the Commission); Mark Osler, *The Promise of Trailing-Edge Sentencing Guidelines to Resolve the Conflict Between Uniformity and Judicial Discretion*, 14 N.C. J.L. & TECH. 203, 204 (2012) (envisioning a “computer-based sentencing information system” to harmonize judicial discretion with concerns about uniformity). So far, none have been adopted.

Prior to *Booker*, the Commission could not be held accountable by judicial process. Until *Booker*, sentences that departed from the Guidelines were subject to de novo review on appeal, whereas within-Guidelines sentences were subject to review only for misapplication of the law. *See* *United States v. Booker*, 543 U.S. 220, 259–62 (2005) (excising the statutory provision mandating deferential judicial review and explaining the new standard of “reasonableness”); *see also* STITH & CABRANES, *supra* note 14, at 72–73 (noting the deferential pre-*Booker* standard of review). For further discussion of the new “reasonableness” standard of appellate review, *see Gall v. United States*, 552 U.S. 38, 47 (2007) and *Rita v. United States*, 551 U.S. 338, 347 (2007). *See also* Sherod Thaxton, Comment, *Determining “Reasonableness” Without a Reason? Federal Appellate Review Post-Rita v. United States*, 75 U. CHI. L. REV. 1885, 1907–08 (2008) (discussing appellate review of the reasonableness of sentencing decisions).

²⁷ *See* Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1319 (2005) [hereinafter Bowman, *Failure*] (deciding “with the greatest reluctance” that the Commission was so structurally flawed that it could not be saved even after *Booker*); *see also* Frank O. Bowman, III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 STAN. L. REV. 235, 246 (2005) [hereinafter Bowman, *Mr. Madison*] (describing the one-way upward ratchet); Frank O. Bowman, III, *Nothing Is Not Enough: Fix the Absurd Post-Booker Federal Sentencing System*, 24 FED. SENT’G REP. 356, 356 (2012) [hereinafter Bowman, *Nothing*] (highlighting deficiencies in sentencing following *Booker*, especially the trend toward harsher sentences). One federal judge refuses to label the Sentencing Guidelines as an outright “failure” because he prefers them to the previous system in which sentencing judges had absolute discretion. William H. Pryor Jr., *Federalism and Sentencing Reform in the Post-Blakely/Booker Era*, 8 OHIO ST. J. CRIM. L. 515, 517 (2011). However, even he proposes reforming the Guidelines. *See id.* at 527–30 (outlining a proposal for reducing the reach of federal criminal law and returning enforcement power to the states).

ical actors in Congress and the central administration of the Department of Justice.”²⁸

In practice, the Guidelines operate to provide sentencing ranges based on the conduct, characteristics, and history of a criminal defendant.²⁹ The basic conduct involved in every federal offense corresponds to a specific guideline.³⁰ Each of these guidelines, in turn, corresponds to one “base offense level.”³¹ The base offense level is then adjusted upwards or downwards by other guidelines in accordance with aggravating or mitigating factors, including the defendant’s cooperation with the government.³² The court also calculates the defendant’s criminal history category, based mainly on the defendant’s prior convictions.³³ The court then cross-references the adjusted base offense level against the criminal history category on the Guidelines’ sentencing grid, which yields a narrow sentencing range given in months.³⁴ The sentencing grid includes forty-three base offense levels and six criminal history categories for a total of 258 potential sentencing ranges.³⁵ Prior to *Booker*, courts were required to follow the range provided by the Guidelines in conducting sen-

²⁸ Bowman, *Failure*, *supra* note 27, at 1319–20. The Justice Department is formally represented in the Commission and has “been notable for [its] almost invariable advocacy of ever-tougher sentencing rules and virtually unyielding opposition to any mitigation of existing sentencing levels.” *Id.* at 1340. Likewise, “Congress frequently increases and scarcely ever decreases the severity of federal sentences.” *Id.* at 1341; *see also id.* at 1344–46 (articulating flaws of congressional involvement with the Guidelines). Despite the desired neutrality of the “expert” Commission, Congress has intervened with increasing frequency in its work. *Id.* at 1341.

Indeed, the Guidelines allow for excessive congressional meddling in part because they are so complex. *See id.* at 1342–43 (“The complexity of the federal guidelines has also had a significant . . . effect on the relationship of Congress to the postguidelines development of sentencing law.”). This complexity gives Congress many options for demanding higher and higher sentencing ranges for any given offense, with potentially hundreds of intermediate stages before they reach the absolute maximum of life or, for some offenses, death. *Id.* at 1342–44. As Bowman puts it, “Congress lacks the time, criminological expertise, and knowledge of the history, structure, and context of guidelines language to make guideline-specific decisions at this level of detail.” *Id.* at 1344–45. Further, “[i]ncreasing penalties is almost always perceived as conferring political benefit.” *Id.* at 1346.

²⁹ *See generally* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. 1.3 (2013) (explaining the framework of the Guidelines).

³⁰ *See id.* § 1B1.1 (describing general application principles); *id.* ch. 2 (setting out offense conduct guidelines).

³¹ *Id.* § 1B1.1(a)(2).

³² *See generally id.* ch. 3 (setting out adjustment guidelines).

³³ *See generally id.* ch. 4 (setting out criminal history guidelines).

³⁴ *See id.* ch. 5, pt. A (providing the sentencing grid). In general, the top of each Guidelines sentencing range is statutorily constrained to be no more than twenty-five percent greater than the bottom of the range. 28 U.S.C. § 994(b)(2) (2012).

³⁵ U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A (2013).

tencing.³⁶ Courts could impose sentences outside of the recommended sentencing ranges based on “departures,” which are deviations from the sentencing range legally sanctioned under the Guidelines. For example, many guidelines contain Application Notes that allow for upward or downward departures depending on the circumstances of the offense.³⁷ As described below, *Booker* significantly expanded the discretion of sentencing courts by allowing deviations from the Guidelines sentencing range based on “variances,” which are not sanctioned by the Guidelines themselves.³⁸

B. *United States v. Booker and the Return of Sentencing Discretion to the Courts*

After almost two decades under the mandatory Guidelines, the Supreme Court changed the rules, holding that the Sentencing Guidelines could not be mandatorily imposed. In *United States v. Booker*, the Court found that the mandatory Guidelines violated a criminal defendant’s Sixth Amendment right to trial by jury because they allowed the sentencing judge—rather than the jury—to make findings of fact that could increase a defendant’s maximum sentence.³⁹ However, the Court avoided the simple solution of subjecting the Guidelines provisions to the jury’s fact finding, like any other element of an offense.⁴⁰ Instead, it struck down the statutory sections that made the

³⁶ See 18 U.S.C. § 3553(b) (Supp. III 2004) (mandating that federal courts follow the Guidelines except in very limited circumstances), held *unconstitutional* by *United States v. Booker*, 543 U.S. 220, 245 (2005).

The mandatory Guidelines regime was criticized as a “shadow criminal code” that imposed additional punishment for conduct beyond that encompassed by the statutory elements of the crime. See, e.g., Markus D. Dubber, *Criminal Law in Comparative Context*, 56 J. LEGAL EDUC. 433, 436 n.8 (2006) (referring to the Guidelines as “the shadow federal criminal code”). The Guidelines contained mitigating and aggravating factors that were not statutorily specified—and therefore not subject to trial by jury, but rather found by the judge after conviction. See *Booker*, 543 U.S. at 232 (holding unconstitutional Guidelines factors that increased the length of a sentence without a jury finding or an admission by the defendant).

³⁷ See *infra* Subpart II.A (discussing section 2M5.1 Application Notes).

³⁸ See, e.g., *Irizarry v. United States*, 553 U.S. 708, 714 (2008) (explaining the distinction between departures and variances).

³⁹ 543 U.S. at 232.

⁴⁰ See *id.* at 284–85 (Stevens, J., dissenting) (“Rather than engage in a wholesale rewriting of the [Sentencing Reform Act], I would simply allow the Government to . . . prove any fact that is *required* to increase a defendant’s sentence under the Guidelines to a jury beyond a reasonable doubt.”).

Guidelines mandatory,⁴¹ decreeing that the Guidelines would be only “advisory.”⁴²

After removing the mandatory provisions, the Court determined that sentencing courts were still bound to consider the Guidelines, “together with” the factors provided in 18 U.S.C. § 3553(a), a section of the Sentencing Reform Act containing factors for courts to consider during sentencing.⁴³ Prior to *Booker*, the § 3553(a) factors helped courts determine the appropriate sentence to impose *within* the Guidelines sentencing range for each defendant. As described below, the post-*Booker* sentencing regime allowed courts to use these factors to justify *varying* from the Guidelines sentencing range based on the individual characteristics of the defendant.⁴⁴

C. Policy Variances Post-Booker: Allowed but Procedurally Ambiguous

Not surprisingly, confusion ensued as to the scope of discretion afforded to sentencing judges under the advisory post-*Booker* Guidelines. The Supreme Court clarified that scope in a line of cases that, like *Booker*, dealt with the sentencing provisions governing drug offenses involving crack cocaine versus powder cocaine.⁴⁵ The crack/

⁴¹ The Court excised 18 U.S.C. § 3553(b)(1), which made the Guidelines mandatory except in very limited circumstances, and 18 U.S.C. § 3742(e), which specified the standard of review for Guidelines decisions. *Booker*, 543 U.S. at 245.

⁴² *Booker*, 543 U.S. at 245.

⁴³ *Id.* at 259–60. The factors set out in 18 U.S.C. § 3553(a) are:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for—
 - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
 - . . .
 - (5) any pertinent policy statement—
 - (A) issued by the Sentencing Commission . . . ;
 - (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and the need to provide restitution to any victims of the offense.

⁴⁴ See *Gall v. United States*, 552 U.S. 38, 49–50 (2007) (stating that § 3553(a) factors may be used to determine sentences outside the Guidelines-recommended range).

⁴⁵ *E.g.*, *Kimbrough v. United States*, 552 U.S. 85 (2007) (discussing the disparity between sentences for possession of crack and powder cocaine).

powder disparity mandated the same sentence for a person convicted of possessing one gram of crack cocaine as for a person convicted of possessing one hundred grams of powder cocaine.⁴⁶

In *Kimbrough v. United States*,⁴⁷ the Supreme Court confronted the Guidelines' crack/powder disparity. The defendant in *Kimbrough* pleaded guilty to four charges relating to possession and distribution of both crack and powder cocaine, including possession with intent to distribute more than fifty grams of crack cocaine.⁴⁸ The district court varied from the Guidelines sentencing range, based in part on the "disproportionate and unjust effect that crack cocaine guidelines have in sentencing."⁴⁹ In other words, the sentencing judge imposed a non-Guidelines sentence based partly on a policy disagreement with the Guidelines themselves. The judge compared the Guidelines sentence for the crack offense (around twenty years) with the Guidelines sentence for a similar amount of powder cocaine (around eight or nine years).⁵⁰ The district court then imposed a sentence of fifteen years, which was the statutory mandatory minimum sentence for his offense and far below the Guidelines' recommended sentencing range.⁵¹ The

⁴⁶ See *id.* at 91 (referring to the "crack/powder disparity"). This disparity grew out of a statute that used the hundred-to-one ratio to set the minimum and maximum penalties for cocaine. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended at 21 U.S.C. § 841(b)(1)(A)(ii)–(iii), (b)(1)(B)(ii)–(iii) (2012)). The Commission imposed the disparity onto the Guidelines, applying it to every drug offense involving cocaine. *Kimbrough*, 552 U.S. at 96–97. Contrary to what the Commission believed in 1987, crack and powder cocaine function relatively similarly as recreational drugs. See *id.* at 97–98 (citing U.S. SENTENCING COMM'N, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 8 (2007), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200705_RtC_Cocaine_Sentencing_Policy.pdf) ("The current quantity-based penalties overstate the relative harmfulness of crack cocaine compared to powder cocaine.").

In addition, crack can be manufactured easily and cheaply from powder cocaine. See U.S. SENTENCING COMM'N, *supra*, at 62–63 (explaining how to manufacture crack cocaine from powder cocaine). However, unlike powder, crack is often sold cheaply in poor and minority neighborhoods, adding unsavory racial implications to the injustice of the crack/powder disparity. See *Kimbrough*, 552 U.S. at 98 (citing U.S. SENTENCING COMM'N, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 103 (2002), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200205_RtC_Cocaine_Sentencing_Policy/200205_Cocaine_and_Federal_Sentencing_Policy.pdf) (noting that the more severe penalties for crack cocaine primarily apply to black offenders).

Congress subsequently reduced the 100:1 ratio to 18:1 in the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (codified in scattered sections of 21 U.S.C.).

⁴⁷ 552 U.S. 85.

⁴⁸ *Id.* at 91.

⁴⁹ *Id.* at 92–93.

⁵⁰ *Id.* The defendant's Guidelines sentence range was 228 to 270 months. *Id.* at 92. If he had been convicted of the same offense for an equal amount of powder instead of crack, his Guidelines sentence would have been 97 to 106 months. *Id.* at 93.

⁵¹ *Id.* at 93.

Supreme Court held that such a variance from the Guidelines was “reasonable” and within the district court’s discretion.⁵²

In doing so, the Supreme Court examined the legislative and Commission-related history of the crack/powder disparity.⁵³ The Court noted that the Commission did not use its standard empirical approach of analyzing data from past sentencing practices in crafting the guidelines applicable to cocaine-related offenses.⁵⁴ Instead, the Commission incorporated the disparity in response to Congress’s belief “that crack was significantly more dangerous than powder cocaine,”⁵⁵ a belief that the Commission itself had subsequently renounced.⁵⁶ The Court noted that “those [crack/powder] Guidelines do not exemplify the Commission’s exercise of its characteristic institutional role,” and that “the Commission itself has reported that the crack/powder disparity produces disproportionately harsh sanctions . . . ‘greater than necessary’ in light of the purposes of sentencing set forth in § 3553(a).”⁵⁷ Based on these defects, the Court approved the sentencing judge’s decision to vary from the Guidelines even in a run-of-the-mill case.⁵⁸

Kimbrough thus approved a variance from the Guidelines based on the sentencing judge’s categorical disagreement with the Commission’s policy decision to implement the crack/powder disparity in the Guidelines.⁵⁹ However, although the crack/powder disparity reflected a flawed process lacking in empirical evidence, it at least resulted from

⁵² *Id.* at 111.

⁵³ *Id.* at 94–100.

⁵⁴ *Id.* at 96–97.

⁵⁵ *Id.* at 95.

⁵⁶ *See id.* at 97–99 (describing the Commission’s eventual decision that the hundred-to-one disparity was “unwarranted” because (1) it “rested on assumptions about the relative harmfulness of the two drugs and the relative prevalence of certain harmful conduct associated with their use and distribution that more recent research and data no longer support,” (2) it was “inconsistent with the [congressional] goal of punishing major drug traffickers more severely than low-level offenders,” and (3) it “fosters disrespect for and lack of confidence in the criminal justice system because of a widely-held perception that it promotes unwarranted disparity based on race” (citations omitted) (internal quotations omitted)).

⁵⁷ *Id.* at 109–10.

⁵⁸ *See id.* at 109 (noting that sentencing judges may vary downwards from the Guidelines “even in a mine-run case” based on the Guidelines’ systematic failings).

⁵⁹ *Id.* at 110–11. In particular, the Supreme Court emphasized that the Commission’s decision to implement the crack/powder disparity was not based on the “empirical approach” that the Commission claimed to follow in developing other guidelines. *Id.* at 96. Likewise, the Commission acknowledged its lack of data while considering amending section 2M5.1. *See* PAMELA BARRON ET AL., U.S. SENTENCING COMM’N, NUCLEAR, BIOLOGICAL, AND CHEMICAL WEAPONS POLICY TEAM REPORT TO THE COMMISSION 7 (Dec. 4, 2000) [hereinafter WMD REPORT] (“There is very little data to assist the Commission in its examination of sentencing issues for these offenses.”).

some deliberation by Congress and the Commission.⁶⁰ As Part II demonstrates, the creation of and amendments to Guideline section 2M5.1 lacked a deliberate decisionmaking process, as the Commission consistently ignored or overlooked the guideline's application to basic non-military embargo violations.⁶¹ For such cases, in which the Commission completely failed to engage in a reasoned and deliberate process, sentencing courts may more easily justify variances based on policy disagreements.⁶² When the Commission determines policy based on inadequate deliberation, incomplete data, or invalid reasoning, courts should not hesitate to disagree with the Commission's policy choice.⁶³

In *Spears v. United States*, the Court again affirmed that district courts might reasonably vary from the Guidelines on a categorical basis.⁶⁴ The Court affirmed its holding in *Kimbrough* and explicitly stated that "district courts are entitled to reject and vary categorically from the crack cocaine Guidelines based on a policy disagreement with those Guidelines."⁶⁵ The Court further stated that sentencing judges should make such "policy disagreements" clear and distinct from more routine "individualized determinations."⁶⁶

The Court further expanded the discretion of sentencing judges in *Gall v. United States*.⁶⁷ Prior to *Gall*, the Court had held that a within-Guidelines sentence could be considered presumptively reasonable on appeal.⁶⁸ *Gall* clarified that the converse was *not* true: A non-Guidelines sentence may not be considered presumptively unreasonable on appeal.⁶⁹

⁶⁰ See *Kimbrough*, 552 U.S. at 105–06 (discussing the legislative history of the crack/powder disparity).

⁶¹ See *supra* Part II (discussing development of Guideline section 2M5.1).

⁶² Even if courts disagree with the analysis in Part II, *infra*, regarding the procedural failure of the Commission in overlooking section 2M5.1(a)(1)'s application to non-military embargo violations, courts may still apply a *Kimbrough* policy variance based on a disagreement with the Commission's policy choice to include the non-military violations under this guideline.

⁶³ See *Adelman & Deitrich*, *supra* note 5, at 577–82 (reaching a similar conclusion and encouraging courts to accord less deference to Commission policy that results from faulty Commission process).

⁶⁴ 555 U.S. 261, 265–66 (2009). *Spears* was convicted of conspiracy to distribute both crack and powder cocaine. The district judge considered the Guidelines' crack/powder disparity and, like the judge in *Kimbrough*, decided the resulting sentence for the crack-related offense would be excessive. *Id.* at 262.

⁶⁵ *Id.* at 265–66.

⁶⁶ *Id.* at 266.

⁶⁷ 552 U.S. 38 (2007).

⁶⁸ *Rita v. United States*, 551 U.S. 338, 347 (2007).

⁶⁹ See *Gall*, 552 U.S. at 59 ("[I]t is not for the Court of Appeals to decide *de novo* whether the justification for a variance is sufficient or the sentence reasonable.").

Unlike *Kimbrough*, *Gall* involved a variance from the Guidelines based on a purely individualized sentencing determination, with no policy disagreement at issue. Defendant *Gall* pled guilty to a conspiracy to distribute ecstasy. However, he had voluntarily withdrawn from the conspiracy and refrained from selling or using illegal drugs for three years before being charged as a member of the conspiracy.⁷⁰ Based solely on these factors, specific to *Gall* as an individual, the district court imposed a sentence of three years of probation and no imprisonment, far below the Guidelines recommendation of approximately three years in prison.⁷¹ The Supreme Court held that this was not an abuse of the trial court's discretion.⁷²

The Court took the opportunity in *Gall* to clarify a two-step procedure to be used in sentencing federal criminal defendants. In procedural step one, the sentencing court must calculate the applicable Guidelines range.⁷³ In step two, the court must consider the individualized sentencing factors delineated in 18 U.S.C. § 3553(a) as the basis for a variance from the applicable guideline.⁷⁴ The Court did not explain how *Kimbrough*-style variances—those based on categorical policy disagreements with the Guidelines—fit within the two-step process.⁷⁵ Given this ambiguity, lower courts have disagreed on the appropriate method for synthesizing variances based on policy disagreements with variances based on individualized circumstances, with some courts failing to give adequate consideration to policy-based variances altogether.⁷⁶

II

THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT (IEEPA) AND GUIDELINE SECTION 2M5.1

Kimbrough explicitly invites sentencing judges to vary from the Guidelines based on policy disagreements. While courts have used this discretion in the context of frequently used guidelines, including guidelines involving the infamous crack/powder disparity, they have not been as attentive when applying relatively obscure guidelines, such as those related to the national security statutes. Although infre-

⁷⁰ *Id.* at 41–42.

⁷¹ *Id.* at 43.

⁷² *Id.* at 59–60.

⁷³ *Id.* at 49–50.

⁷⁴ *Id.* See *supra* note 43 for the text of § 3553(a).

⁷⁵ See Michelman & Rorty, *supra* note 12, at 1087 (“[T]here is no agreement on a procedure for integrating policy-based variances with variances based on individual offender characteristics.”).

⁷⁶ See *infra* Subpart III.B (discussing various methods used by courts to reconcile *Kimbrough* with *Gall*).

quently invoked, these statutes can reach a broad range of conduct and carry heavy penalties. This Part examines the history of one such obscure guideline—section 2M5.1—as it applies to one category of offenses—non-military embargo violations under IEEPA. It argues that the history of section 2M5.1 demonstrates that the Commission has overlooked or ignored the Guideline’s application to such violations. These oversights on the part of the Commission can and should lead judges to vary from section 2M5.1 based on a categorical policy disagreement.

As Part III argues, courts should conduct a similar examination of the history of the Guidelines on a case-by-case basis to uncover flaws in the decisionmaking process that resulted in each particular guideline. These flaws may consequently justify *Kimbrough*-style variance from that guideline based on a categorical policy disagreement. Such scrutiny is particularly important for obscure guidelines such as section 2M5.1, which are more likely to suffer from a defective decision-making process and less likely to have their flaws remedied by congressional or Commission action.⁷⁷

A. *The Broad Range of Sanctions Authorized by IEEPA*

IEEPA grants broad authority to the executive to fight terrorism using financial tools.⁷⁸ The executive branch has used IEEPA to issue orders and regulations imposing economic sanctions on countries, organizations, and individuals.⁷⁹ The Office of Foreign Asset Control (OFAC), which implements executive orders issued under IEEPA, has issued broad and varied embargo regulations which “are aimed at reaching all forms of commerce and apply extraterritorially.”⁸⁰

Most courts interpret Guideline section 2M5.1 to apply its heightened base offense level, set out in section 2M5.1(a)(1), to nearly all violations of regulations authorized under IEEPA.⁸¹ Section

⁷⁷ See *infra* Subpart III.C (explaining the advantages of justifying policy disagreements for seldom-utilized guidelines that have not received much attention).

⁷⁸ See International Emergency Economic Powers Act, 50 U.S.C. § 1701(a) (2012) (delegating broad economic authority to the executive “to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States”).

⁷⁹ The individual conduct prohibited by this vast array of regulations ranges from selling nuclear reactors, 15 C.F.R. 774 Supp. 1 (2013), to sending more than \$100 in cash to a friend or relative in Iran, 31 C.F.R. 560.506 (2013).

⁸⁰ J. Triplett Mackintosh & Danielle R. Voorhees, *U.S. Sentencing Guidelines and Export Control Laws: How to Equate a Credit Card Transaction with a Violation of National Security Controls or Selling 400 Grams of Heroin*, 5 CARDOZO PUB. L. POL’Y & ETHICS J. 191, 193 (2006).

⁸¹ See, e.g., *United States v. McKeeve*, 131 F.3d 1, 14 (1st Cir. 1997) (“[S]ection 2M5.1(a)(1) applies to any offense that involves a shipment (or proposed shipment) that

2M5.1(a)(1) currently corresponds to a base offense level of twenty-six, which translates to a sentencing range of sixty-three to seventy-eight months in prison for a first-time offender.⁸² An in-depth examination of the history of section 2M5.1 demonstrates that the Commission has consistently overlooked the courts' broad application of section 2M5.1 to impose the heightened base offense level to all embargo violations, even those involving non-military goods that do not directly threaten national security.

Section 2M5.1 states, in its entirety:

§ 2M5.1. Evasion of Export Controls; Financial Transactions with Countries Supporting International Terrorism.

(a) Base Offense Level (Apply the greater):

(1) 26, if (A) *national security* controls or controls relating to the proliferation of nuclear, biological, or chemical weapons or materials were evaded; or (B) the offense involved a financial transaction with a country supporting international terrorism; or

(2) 14, otherwise.⁸³

The comments to section 2M5.1 note that the guideline applies to violations of IEEPA.⁸⁴ Importantly, courts that have spoken on the issue have universally interpreted section 2M5.1(a)(1) and its heightened base offense level of twenty-six to apply to *all* IEEPA violations because regulations promulgated under the statute are justified using

offends the embargo, whether or not the goods are actually intended for some innocent use.”); *United States v. Hanna*, 661 F.3d 271, 293 (6th Cir. 2011) (same); *United States v. Elashy*, 554 F.3d 480, 509 (5th Cir. 2008) (same, rejecting rule of lenity as a counterargument); *United States v. Harb*, 111 F.3d 130, 1997 WL 173230, at *2 (4th Cir. Apr. 11, 1997) (unpublished disposition) (affirming that the defendant’s conduct violated section 2M5.1(a)(1) because it implicated national security concerns); *United States v. Abulfeilat*, 89 F.3d 846, 1996 WL 355564, at *1 (9th Cir. June 25, 1996) (unpublished disposition) (same); *United States v. Shetterly*, 971 F.2d 67, 76–77 (7th Cir. 1992) (declining to review the district court’s sentence determination, which stemmed from national security concerns under section 2M5.1(a)(1)); *United States v. Groos*, No. 06 CR 420, 2008 WL 5387852, at *3 (N.D. Ill. Dec. 16, 2008) (affirming that the defendant’s conduct violated section 2M5.1(a)(1) because it implicated national security concerns); *Lin v. United States*, No. 06-C-1208, 2007 WL 1029215, at *4 (E.D. Wis. Mar. 29, 2007) (finding that section 2M5.1(a)(1) applied because some of the goods shipped were restricted for national security reasons); *United States v. Sevilla (Sevilla II)*, No. 04 CR 0171, 2006 WL 3486872, at *3 (N.D. Ill. Nov. 29, 2006) (affirming that the defendant’s conduct violated section 2M5.1(a)(1) because it implicated national security concerns); *United States v. Min*, No. 99 CR 875 KTD, 2000 WL 1576890, at *2 (S.D.N.Y. Oct. 23, 2000) (same); *see also* Mackintosh & Voorhees, *supra* note 80, at 196 (“The courts have shown a willingness to look for broad language in executive orders and the Export Administration Act to find even a suggestion that a violation of an export regulation implicates ‘national security controls,’ therefore triggering applicability of section [2M5.1(a)(1)].”).

⁸² U.S. SENTENCING COMM’N, SENTENCING TABLE (2013), available at http://www.ussc.gov/Guidelines/2013_Guidelines/Manual_PDF/Sentencing_Table.pdf.

⁸³ U.S. SENTENCING GUIDELINES MANUAL § 2M5.1 (2013) (emphasis added).

⁸⁴ *Id.* cmt.

the term “national security.”⁸⁵ However, export controls are broad in scope, often reaching conduct that is only *malum prohibitum*,⁸⁶ and they may be justified by concerns besides national security.⁸⁷

The legislative history behind section 2M5.1 does not address whether Congress or the Commission intended the higher offense level to apply to basic, non-military embargo violations involving goods like computers⁸⁸ or fire extinguishers.⁸⁹ Congress enacted section 2M5.1 with no commentary in 1987, pursuant to the original Sentencing Reform Act that created the entire Guidelines via the Commission’s recommendation.⁹⁰ Section 2M5.1 has since been amended three times: in 2001, 2002, and 2011.⁹¹

B. The Commission’s Failure to Recognize the Scope of Guideline Section 2M5.1

Although courts and prosecutors, following the plain meaning of the text, have applied section 2M5.1(a)(1) to a wide variety of IEEPA violations, neither the Commission nor Congress has ever addressed whether the heightened base offense level of section 2M5.1(a)(1) should apply uniformly to the breadth of conduct that IEEPA forbids. This oversight over the course of the history of section 2M5.1, described in this subsection, illustrates the systemic failures of the Commission.

The original 1987 version of section 2M5.1 was simply titled “Evasion of Export Controls.”⁹² It provided for a base offense level of twenty-two “if national security or nuclear proliferation controls were evaded,” and a level of fourteen for otherwise prohibited conduct.⁹³ Because section 2M5.1 was enacted as part of the omnibus creation of

⁸⁵ See *supra* note 81 (citing cases applying broad interpretation of section 2M5.1(a)(1)).

⁸⁶ See Mackintosh & Voorhees, *supra* note 80, at 198–99 (“[T]he *malum prohibitum* nature of embargo regulations, standing on their own, indicates that a base offense level of 26 is excessive.”).

⁸⁷ See *id.* at 200–01 (“Embargoes and other export controls are implemented for a variety of reasons—not only for national security.”).

⁸⁸ See *United States v. McKeeve*, 131 F.3d 1, 14 (1st Cir. 1997) (applying section 2M5.1(a)(1) for export of computers).

⁸⁹ See *United States v. Groos*, No. 06 CR 420, 2008 WL 5387852, at *3 (N.D. Ill. Dec. 16, 2008) (applying section 2M5.1(a)(1) for export of fire extinguishing equipment).

⁹⁰ See STITH & CABRANES, *supra* note 14, at 57–58 (chronicling how the Commission’s final proposed Guidelines passed into law “without delay or legislative amendment” in 1987).

⁹¹ See *infra* notes 128–132 and accompanying text (discussing the amendments to section 2M5.1).

⁹² U.S. SENTENCING GUIDELINES MANUAL § 2M5.1 (1987), available at http://www.uscc.gov/Guidelines/1987_guidelines/Manual_PDF/1987_Guidelines_Manual_Full.pdf.

⁹³ *Id.* In 1987, the recommended sentence for a first-time offender subject to Base Offense Level 14 was fifteen to twenty-one months. *Id.* ch. 5, pt. A. The recommended

the entire Guidelines system, very little legislative history exists to elucidate the intent behind section 2M5.1 specifically. Although IEEPA had existed for ten years by the time the Guidelines were enacted,⁹⁴ it was not referenced anywhere in the initial version of the Guidelines.⁹⁵ No one in Congress or the original Commission⁹⁶ seemed to consider IEEPA when drafting the Guidelines.⁹⁷

Application Notes 1, 2, and 3 remain unchanged since 1987.⁹⁸ The Application Notes allow for Guidelines-sanctioned departures from the Guidelines sentencing range.⁹⁹ Application Note 2 is of particular interest because courts have relied on it to justify departing from the Guidelines range in cases involving non-military-related goods.¹⁰⁰ It reads as follows:

In determining the sentence within the applicable guideline range, the court may consider the degree to which the violation threatened a security interest of the United States, the volume of commerce involved, the extent of planning or sophistication, and whether there were multiple occurrences. Where such factors are present in

sentence for a first-time offender subject to Base Offense Level 22 was forty-one to fifty-one months. *Id.* Those ranges remain the same today. *Id.*

⁹⁴ See An Act with Respect to the Powers of the President in Time of War or National Emergency, Pub. L. No. 95-223, 91 Stat. 1625 (1977) (enacting IEEPA).

⁹⁵ See U.S. SENTENCING GUIDELINES MANUAL (1987), available at http://www.usc.gov/Guidelines/1987_guidelines/Manual_PDF/1987_Guidelines_Manual_Full.pdf (not referencing IEEPA).

⁹⁶ I use “Congress” and “the Commission” somewhat interchangeably in my discussion of the intent behind the Guidelines, given that the Guidelines are presumptively enacted as law absent any intervention from Congress. There is no doubt, however, that the Commission bore most of the responsibility for the initial draft. See STITH & CABRANES, *supra* note 14, at 57–58 (describing the “muted” reaction of lawmakers to the final 1987 Guidelines, which passed into law “without delay or legislative amendment”).

⁹⁷ Most statutes are referenced in the Sentencing Guidelines Manual, both in the “Commentary” sections directly following each guideline and in “Appendix A: Statutory Index” at the end of the Sentencing Guidelines Manual. See generally U.S. SENTENCING GUIDELINES MANUAL (2013) (referencing applicable statutes for each guideline). The only statutes referenced by Guideline section 2M5.1 in 1987 were 50 U.S.C. app. §§ 2401–2420, which is the “Export Regulation” appendix to chapter 50, “War and National Defense.” U.S. SENTENCING GUIDELINES MANUAL § 2M5.1 cmt. (1987), available at http://www.usc.gov/Guidelines/1987_guidelines/Manual_PDF/1987_Guidelines_Manual_Full.pdf. Appendix section 2402 recognizes multiple justifications for export controls, including but not limited to national security.

⁹⁸ Compare U.S. SENTENCING GUIDELINES MANUAL § 2M5.1 cmt. (1987), available at http://www.usc.gov/Guidelines/1987_guidelines/Manual_PDF/1987_Guidelines_Manual_Full.pdf, with U.S. SENTENCING GUIDELINES MANUAL § 2M5.1 cmt. (2013), available at http://www.usc.gov/Guidelines/2013_Guidelines/Manual_HTML/2m5_1.htm.

⁹⁹ These factors may warrant either an upward or a downward departure. U.S. SENTENCING GUIDELINES MANUAL 579–80 (2013).

¹⁰⁰ See *infra* notes 150–156 (discussing uses of Application Note 2).

an extreme form, a departure from the guidelines may be warranted.¹⁰¹

Thus, Application Note 2 provides courts with some unquantified authority to depart from section 2M5.1. However, it does not excuse or resolve the failures of the Commission's decisionmaking process demonstrated by section 2M5.1's amendment history, described below.

C. Congress's Misguided Prompt to Increase Criminal Penalties for IEEPA

In 2001, the Commission increased the base offense level of section 2M5.1(a)(1) by four levels, from twenty-two to twenty-six, an enhancement that typified the unbalanced and poorly justified one-way ratchet of the Commission's decisionmaking process during this period.¹⁰² The increase occurred primarily because of a Commission report (WMD Report)¹⁰³ on nuclear, biological, and chemical weapons ("weapons of mass destruction" or "WMD"). The WMD Report constituted the Commission's response to a 1996 Sense of Congress¹⁰⁴ that expressed concern about the "inadequacy" of guide-

¹⁰¹ U.S. SENTENCING GUIDELINES MANUAL § 2M5.1 application n.2 (2013). Notably, the phrasing of Application Note 2 suggests it should primarily be used to reach upward departures as each factor, when "present in an extreme form," would seem to be more aggravating than mitigating. For example, "volume of commerce," when *present* in an extreme form, indicates a high volume of commerce. This reading is consistent with the general structure of the Guidelines, which were written to tolerate some upward departures but heavily discourage downward departures. *See, e.g.,* STITH & CABRANES, *supra* note 14, at 72 ("[B]oth the [Sentencing Reform Act] and the Commission discourage departure, especially *downward* departure, in a number of ways."). Courts have nonetheless used Application Note 2 to justify applying a downward departure when the Application Note 2 factors are *absent*. *See, e.g.,* United States v. Groos, No. 06 CR 420, 2008 WL 5387852, at *4–5 & n.5 (N.D. Ill. Dec. 16, 2008) (citing Application Note 2 in departing six levels downward from Base Offense Level 26 because the court found three factors to be "significantly absent").

Application Note 2 presumably applies to all of section 2M5.1, not just to a single subpart. Congress therefore would have intended that the Application Note 2 factors, including "the degree to which the violation threatened a security interest of the United States," to apply to either a situation under subsection (a)(1), in which explicit national security controls were evaded, or under subsection (a)(2), in which some export controls were evaded that did not directly impact national security (for example, smuggling of Iranian carpets) but national security interests were still threatened somehow (for example, carpet smugglers using concealed weapons in American airports). However, given that courts have never applied subsection (a)(2) in a written decision, we do not know whether Application Note 2 would be applied in that way.

¹⁰² *See* Bowman, *Failure*, *supra* note 27, at 1319 (explaining the "one-way ratchet"); *see also* Adelman & Deitrich, *supra* note 5, at 578–79 (summarizing common criticisms of the Commission).

¹⁰³ WMD REPORT, *supra* note 59.

¹⁰⁴ *Id.* at 1–2.

lines related to the import and export of materials for weapons of mass destruction and “urge[d]” the Commission to increase penalties.¹⁰⁵ This Sense of Congress focused entirely on the movement of “nuclear, biological, or chemical weapons or related materials or technologies.”¹⁰⁶ It does not mention general economic sanctions or any other industry besides weapons. The Commission cited the Sense of Congress as the reason for ultimately raising the base offense level of section 2M5.1(a)(1) by four levels.¹⁰⁷

Potentially indicating that Congress did not sufficiently consider sentencing issues in passing the Sense of Congress, the Commission team that authored the WMD Report (the Commission Team) found very little other guidance regarding this sentencing directive from Congress, despite an extensive review of legislative history.¹⁰⁸ Based on the scarce legislative history available, the Commission Team concluded that Congress was concerned about the spread of nuclear and biological weapons as a result of the fall of the U.S.S.R. and technological innovations.¹⁰⁹ The available records contain no discussion, either in the congressional history or in the WMD Report, of basic embargo violations.

¹⁰⁵ National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 1423(a), 110 Stat. 2422, 2725 (1996) (codified at 50 U.S.C. § 2332 (2012)); *see also* WMD REPORT, *supra* note 59, at 1–2 (responding to Sense of Congress).

¹⁰⁶ National Defense Authorization Act § 1423(b).

¹⁰⁷ Sentencing Guidelines for United States Courts, 66 Fed. Reg. 7961, 8009–10 (Jan. 26, 2001) (proposing a four-level increase for section 2M5.1 and citing the Sense of Congress as the reason for doing so). For the WMD Report’s specific recommendations, *see infra* Subpart II.E.

The Sense of Congress typifies a pervasive congressional micromanagement of Commission priorities. *See supra* note 28 (discussing, among other problems with the Commission, the excessive congressional intervention in Commission affairs); *see also* Adelman & Deitrich, *supra* note 5, at 579 (“Many of the Commission’s amendments increasing the severity of sentences came in response to Congress’s actions . . .”).

¹⁰⁸ *See* WMD REPORT, *supra* note 59, at 2–5 (reviewing testimony from legislative hearings that resulted in the Sense of Congress).

¹⁰⁹ Specifically, the Commission Team determined that Congress was concerned about (1) the fall of the U.S.S.R., which left available to the world “30,000 nuclear weapons, hundreds of tons of fissile material, at least 40,000 tons of chemical weapons, advanced biological weapons, [and] huge stores of sophisticated conventional weapons”; (2) increasing availability of information and ingredients for advanced chemical, biological, and nuclear weaponry due to the spread of the Internet; (3) dual-use chemicals which can be used to make chemical weapons in particular; and (4) the ease and effectiveness with which chemical and biological weapons—which the Commission Team termed a “poor man’s atomic bomb”—can be created and used. *Id.* at 5–7.

D. *The Lack of Data in the Commission’s “Case Review” of IEEPA Violations*

The Commission supposedly creates and revises the Guidelines on the basis of empirical sentencing data.¹¹⁰ However, as this Subsection will show, this data is often insufficient and incomplete. By its own estimation, the Commission Team surveyed all cases sentenced under the statutes referenced in the Sense of Congress during the years 1991–1999 in creating the WMD Report.¹¹¹ However, the Commission Team had virtually no data about how courts applied section 2M5.1 to basic embargo violations under IEEPA in deciding whether to enhance the Guideline’s base offense level. Therefore, the Commission’s process in reviewing and revising section 2M5.1 with respect to IEEPA was flawed. As Part III argues, these flaws in the Commission’s process provide ample justification under *Kimbrough* for courts to vary categorically from the Guideline when applying it to IEEPA violations.

The 1996 Sense of Congress cited four statutes as being applicable to embargo violations.¹¹² The Commission found a total of 226¹¹³ cases sentenced under the statutes, which it acknowledged as “very little data”¹¹⁴ that provided “no significant statistical model for the Sentencing Commission to use.”¹¹⁵ Of those cases, 190 involved a statute corresponding to Guideline section 2M5.2 rather than section 2M5.1.¹¹⁶ Another twenty cases involved 50 U.S.C. app. § 2410, which set out general export control provisions.¹¹⁷ A third referenced statute did not result in any sentencing decisions.¹¹⁸

¹¹⁰ See U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. 1.3 (2013) (describing the Commission’s empirical approach).

¹¹¹ WMD REPORT, *supra* note 59, at 7.

¹¹² See National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 1423(a), 110 Stat. 2422, 2725 (1996) (codified at 50 U.S.C. § 2332 (2012)) (citing 22 U.S.C. § 2156a(c), 22 U.S.C. § 2778, 22 U.S.C. § 2780, 50 U.S.C. § 1701 *et seq.*, and 50 U.S.C. app. § 2410).

¹¹³ WMD REPORT, *supra* note 59, at 7. Although the report claims to have found 226 pertinent cases, the sum total of the cases discussed under each of the four statutes is only 218. See *infra* text accompanying notes 116–119 (showing these figures). The report does not explain this discrepancy.

¹¹⁴ WMD REPORT, *supra* note 59, at 7.

¹¹⁵ *Id.* at 14.

¹¹⁶ See *id.* at 10 (examining cases involving 22 U.S.C. § 2778, part of the Arms Export Control Act).

¹¹⁷ See *id.* at 7–9 (examining cases involving Section 11 of the Export Administration Act of 1979, 50 U.S.C. app. § 2410). This section is incorrectly identified in the report as 50 U.S.C. § 2410 rather than 50 U.S.C. app. § 2410. WMD REPORT, *supra* note 59, at 7.

¹¹⁸ The statutory provision was Section 309(c) of the Nuclear Non-Proliferation Act of 1978, 42 U.S.C. § 2139a, which required certain procedures regarding exports “of significance for nuclear explosive purposes.” WMD REPORT, *supra* note 59, at 13. As the Com-

IEEPA constituted the fourth statute referenced by the Sense of Congress, and the Commission Team had very little information regarding how it operated in practice. The Commission Team examined only eight cases that were prosecuted and sentenced under § 1701, the statutory provision for IEEPA.¹¹⁹ Of those eight, six applied section 2M5.1.¹²⁰ The Commission Team did not provide any case studies on sentencing decisions applying § 1701.¹²¹ In other words, the Commission Team created the WMD Report with virtually no data about how IEEPA might be used by prosecutors.

Surprisingly, the Commission Team did not refer to or discuss any case in which a violation of IEEPA involved a non-military export. For example, the Commission did not consider *United States v. McKeeve*, in which the defendant violated IEEPA by exporting computer equipment to Libya and received a sentence of fifty-one months under section 2M5.1(a)(1)'s heightened base offense level of twenty-two.¹²² One possible explanation for the oversight, though unsatisfying, is that the WMD Report only refers to IEEPA provision 50 U.S.C. § 1701, whereas *McKeeve* mainly discusses § 1702, and thus did not show up in the Commission Team's search.¹²³ If this is true, this oversight would indicate that the Commission Team—and, by extension, the Commission and Congress, neither of whom corrected the

mission discovered, that Act did not actually include a penalty provision. *Id.* The fact that this Act was included in the Sense of Congress, despite its lack of statutory penalties, is an additional sign that Congress acted with a significant lack of expertise when it passed the National Defense Authorization Act for Fiscal Year 1997.

¹¹⁹ WMD REPORT, *supra* note 59, at 13.

¹²⁰ *Id.*

¹²¹ *Id.* at 12–13.

¹²² 131 F.3d 1, 14 (1st Cir. 1997). The Commission Team also did not discuss *United States v. Shetterly*, 971 F.2d 67 (7th Cir. 1992), in which the defendant was convicted of violating 50 U.S.C. app. § 2410 for exporting controlled microwave amplifiers to the Soviet Union without a license and sentenced under section 2M5.1(a)(1). *Id.* at 67–68. Nor did they discuss *United States v. Harb*, 111 F.3d 130, 1997 WL 173230, at *2 (4th Cir. Apr. 11, 1997) (unpublished disposition), *United States v. Abulfeilat*, 89 F.3d 846, 1996 WL 355564, at *1 n.3 (9th Cir. June 25, 1996) (unpublished disposition), or *United States v. Min*, No. 99 CR 875 KTD, 2000 WL 1576890, at *2 (S.D.N.Y. Oct. 23, 2000), all of which followed the broad interpretation of section 2M5.1(a)(1) applied in *McKeeve* and *Shetterly*.

¹²³ See *McKeeve*, 131 F.3d at 10–11 (discussing § 1702). Although *McKeeve* involves a violation of IEEPA, including § 1701, its headnotes only refer to § 1702. *Id.* at 1–5. IEEPA actually spans 50 U.S.C. §§ 1701–1707. A sentencing decision might reference any of the seven sections (though § 1705 actually contains the penalty provisions). The Sense of Congress instructed the Commission Team to study §§ 1701 *et seq.* 50 U.S.C. § 2332(b) (2012). Of course, it is possible that the omissions of the Commission Team were deliberate, or the result of some behind-the-scenes political machinations. *Cf.* Bowman, *Failure*, *supra* note 27, at 1333 (describing a lack of “institutional balance” in the Guidelines system); STITH & CABRANES, *supra* note 14, at 65–66 (describing concerns about the charged political atmosphere of the original Commission). Without further evidence, this Note will simply refer to this omission as an oversight.

error—never considered the impact of a WMD-driven sentencing enhancement on non-WMD IEEPA cases like *McKeeve*. Overall, the WMD Report was created based on insufficient and incomplete data. It also did not consider cases involving basic, non-military embargo violations. Nevertheless, as described below, the flawed report formed the foundation of the Commission’s decision to enhance the base offense level of section 2M5.1(a)(1).

E. The Commission’s Excessive Deference to Congress and the Executive in Enhancing Penalties Under Section 2M5.1

Despite the apparent lack of data, the Commission Team complied with the Sense of Congress and proposed options for revising the Guidelines in the WMD Report. In doing so, the Commission Team “requested [the Department of Justice’s] input regarding the inadequacy of the guidelines” and stated that the “policy concerns of [the Department of Justice] . . . are especially relevant because there is so little data to guide the Commission’s discussion.”¹²⁴ Despite also lacking information on which to form an informed judgment, the Department of Justice “related to the team . . . that the current guideline ranges as applied [to violations of all four statutes] (the median sentences range from 10 to 13.5 months of imprisonment) do not provide a sufficient sentence to deter these offenses, compared with the guideline sentences for other national defense offenses.”¹²⁵

The first option proposed by the Commission Team was an increase in all implicated base offense levels “by four levels to be in line with several other national security offenses that have 10 year maximum sentences.”¹²⁶ Notably, however, they remark that “[i]f DOJ information indicates that their specific concern is primarily the import or export of [nuclear, biological, and chemical] weapons and materials, the Commission may want to create an alternate Base Offense Level 26 for those offenses only.”¹²⁷ The actual revision of section 2M5.1 closely resembles this option. Instead of creating a new offense level, the Commission took section 2M5.1(a)(1) (a guideline which the Commission believed to be only applicable to nuclear weapons), raised the base offense level from twenty-two to twenty-six,

¹²⁴ WMD REPORT, *supra* note 59, at 14.

¹²⁵ *Id.* The Commission did not solicit or reference any feedback from anyone in the position of defending against the Guidelines. This, too, demonstrates the Commission’s unbalanced decisionmaking process. *See supra* notes 27–28 (citing to the works of Frank Bowman III, who eloquently articulates this criticism).

¹²⁶ WMD REPORT, *supra* note 59, at 14.

¹²⁷ *Id.*

and added language to include chemical and biological weapons within the purview of the Guideline.¹²⁸

Thus, although the 2001 amendment added 50 U.S.C. § 1701 to the statutory provisions for which section 2M5.1 applied, it did so without considering either the breadth of conduct IEEPA encompasses¹²⁹ or the manner in which courts had interpreted IEEPA to automatically trigger the enhanced penalty of section 2M5.1(a)(1).¹³⁰ Further amendments in 2002¹³¹ and 2011¹³² failed to correct this oversight.

¹²⁸ See Sentencing Guidelines for United States Courts, 66 Fed. Reg. 7961, 8009–10 (Jan. 26, 2001) (explaining 2001 amendment to Guideline section 2M5.1). Other options suggested by the Commission Team focused on amending section 2M5.2 regarding conventional arms and not on weapons of mass destruction or any other imports or exports. See WMD REPORT, *supra* note 59, at 15 (evaluating these options).

¹²⁹ See *supra* note 79 (noting the broad scope of IEEPA). As of March 2014, a simple Westlaw search reveals that IEEPA is referenced in two thousand regulations through § 1701 and that more than seven hundred regulations reference § 1705.

¹³⁰ The WMD Report does not discuss the differences between (a)(1) and (a)(2), nor does it attempt to rectify the apparent confusion among sentencing courts regarding when “national security controls” have been “evaded” under (a)(1). U.S. SENTENCING GUIDELINES MANUAL § 2M5.1(a)(1) (2013). Instead, the Sentencing Commission was completely preoccupied with weapons of mass destruction and merely increased the penalties in (a)(1).

¹³¹ The 2002 amendment to section 2M5.1 added “Financial Transactions with Countries Supporting International Terrorism” to the title. It also added section (a)(1)(B), applicable if “the offense involved a financial transaction with a country supporting international terrorism,” and added 18 U.S.C. § 2332d to the “Commentary” and “Appendix A” lists of statutes to which section 2M5.1 applies. Sentencing Guidelines for United States Courts, 67 Fed. Reg. 37,475, 37,477, 37,479 (May 29, 2002). 18 U.S.C. § 2332d prohibits “engag[ing] in a financial transaction with the government” of a “country supporting international terrorism.” 67 Fed. Reg. at 37,482. The simultaneous addition of language and statutory reference suggests that section 2M5.1(a)(1)(B) was created solely for the purpose of sentencing the crime defined in 18 U.S.C. § 2332d. The Federal Register notice regarding the amendment states that the Commission “amends § 2M5.1 (Evasion of Export Controls) to incorporate 18 U.S.C. § 2332d The amendment provides a base offense level of level 26 for these offenses.” Sentencing Guidelines for United States Courts, 67 Fed. Reg. at 37,482. No other offenses seem to have been contemplated by the amendment.

Some courts have used the “financial transaction” subsection (a)(1)(B) as an alternate basis for applying Base Offense Level 26 to basic embargo violations. *E.g.*, *United States v. Groos*, No. 06 CR 420, 2008 WL 5387852, at *3 (N.D. Ill. Dec. 16, 2008). In many countries, including Iran, all or most financial institutions are owned by the government, making any transaction that passes through a bank in those countries likely to be considered a “financial transaction with the government.” *Id.* However, this application of the 2002 amendment is plagued by the same lack of empirical support and reasoned decisionmaking that afflicts the application of (a)(1)(A) to non-military embargo violations.

¹³² The 2011 amendment to section 2M5.1 added 50 U.S.C. § 1705, IEEPA’s penalty provision, to the “Commentary” and “Appendix A” references and deleted 50 U.S.C. § 1701 “as unnecessary.” Notice of Submission to Congress of Amendments to the Sentencing Guidelines Effective November 1, 2011, 76 Fed. Reg. 24,960, 24,968 (May 3, 2011). The Commission reasoned that § 1705 contains the “criminal offense,” while § 1701 “contains no criminal offense.” *Id.* To the extent that the 2011 amendment changes the above analysis at all, it provides additional evidence that the Commission did not fully consider

III
DIRECTLY ADDRESSING THE COMMISSION'S SYSTEMIC
FAILURES BY APPLYING *KIMBROUGH* TO
SENTENCING UNDER GUIDELINE
SECTION 2M5.1

As demonstrated above, the Commission applied the enhanced sentencing provision of section 2M5.1(a)(1) to IEEPA violations without sufficient consideration of the conduct covered by the enhancement or of the policies animating the statute. *Booker* and *Kimbrough* allow courts to rectify the Commission's errors by examining the history of those errors and relying on that examination to justify categorical policy disagreements with the Guidelines. Unfortunately, courts have not sufficiently scrutinized the history and policy of section 2M5.1(a)(1).

The Northern District of Illinois has issued a pair of decisions on the application of Guideline section 2M5.1(a)(1) to non-military-related embargo violations, one before and one after *Kimbrough*.¹³³ Both decisions come close to stating a policy disagreement with the Commission, but they still generally couch their variances in terms of the individual characteristics of the offense and the offender. A more

the complexities of IEEPA when it added § 1701 to the Guidelines' statutory Appendix A in 2001—not only is it a statute that contains no criminal offense, but it was of so little import to the Commission that they forgot to cross-reference it in the “Commentary” section following the text of section 2M5.1. Compare U.S. SENTENCING GUIDELINES MANUAL application A (2001), available at http://www.ussc.gov/Guidelines/2001_guidelines/2001_manual.cfm (listing § 1701 as applicable to section 2M5.1), with U.S. SENTENCING GUIDELINES MANUAL § 2M5.1 cmt. (2001), available at http://www.ussc.gov/Guidelines/2001_guidelines/2001_manual.cfm (not mentioning IEEPA).

The 2011 amendment facially rectifies both mistakes. However, the Commission gave no sign that it considered the deeper confusion of its 2001 WMD Report—namely, the unaddressed distinction between sections 2M5.1(a)(1) and (a)(2)—or that it considered any of the embargo cases that have been decided under section 2M5.1 since 2001. *E.g.*, *United States v. Elashyi*, 554 F.3d 480 (5th Cir. 2008); *Groos*, No. 06 CR 420, 2008 WL 5387852, at *5; *United States v. Hanna*, 661 F.3d 271 (6th Cir. 2011); *United States v. Sevilla* (*Sevilla II*), No. 04 CR 0171, 2006 WL 3486872 (N.D. Ill. Nov. 29, 2006); see also U.S. DEP'T OF JUSTICE, SUMMARY OF MAJOR U.S. EXPORT ENFORCEMENT, ECONOMIC ESPIONAGE, TRADE SECRET AND EMBARGO-RELATED CRIMINAL CASES (2012) [hereinafter MAJOR CASE LIST], available at <http://www.pmdtc.state.gov/compliance/documents/OngoingExportCaseFactSheet112013.pdf> (summarizing recent embargo-related cases, including sentence lengths). Rather, the adjustment to the section 2M5.1 IEEPA reference was tacked on to the end of a notice about firearms exports, which almost exclusively discussed amendments to section 2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services). See Notice of Proposed Amendments to Sentencing Guidelines, Policy Statements, and Commentary, 76 Fed. Reg. 3193, 3198 (Jan. 19, 2011) (discussing the adjustment's addition to section 2M5.2 amendments); Notice of Submission to Congress of Amendments to the Sentencing Guidelines Effective November 1, 2011, 76 Fed. Reg. 24,960, 24,968 (May 3, 2011) (same).

¹³³ *Groos*, 2008 WL 5387852; *Sevilla II*, 2006 WL 3486872.

explicit policy disagreement, based on an evaluation of the Commission's process in creating Guideline section 2M5.1(a)(1) and conducted under a separate procedural step of analysis,¹³⁴ would better expose the problem with the guideline and point the way for further reforms.

This Part uses the Northern District of Illinois decisions to explain the courts' current sentencing procedure. It then suggests and applies an alternative procedure in which courts explicitly evaluate the Commission's decisionmaking process in their sentencing decisions. Finally, this Part demonstrates the superiority of the alternative procedure, particularly as applied to obscure sentencing guidelines.

A. *Current Practice: The Individualized Gall Two-Step Procedure*

In *United States v. Sevilla*, the district court issued two sentencing decisions: *Sevilla I*¹³⁵ and, on reconsideration, *Sevilla II*.¹³⁶ Defendant pled guilty to an IEEPA violation¹³⁷ involving the attempted export of a Computer Inclusive Hydraulic Floor Model Testing Machine and related software to Iran, for a total value of just over \$50,000.¹³⁸ In *Sevilla I*, the court determined that the testing machine itself was not "a product that threatened national security controls or controls relating to the proliferation of nuclear, biological, or chemical weapons."¹³⁹ The court then applied section 2M5.1(a)(2) for a base offense level of fourteen.¹⁴⁰ On the government's motion for reconsideration, the court concluded that, in light of the national security justification for the embargo against Iran, the appropriate guideline was section 2M5.1(a)(1), resulting in a base offense level of twenty-six regardless of the nature of the good exported.¹⁴¹ However, based on the totality of the circumstances, the court then found sufficient reasons to depart from the base offense level to reach a final offense level

¹³⁴ See Michelman & Rorty, *supra* note 12, at 1084 (arguing that an additional procedural step will "ensure faithfulness to *Kimbrough* and due consideration of each facet of the sentencing court's discretion").

¹³⁵ *United States v. Sevilla (Sevilla I)*, No. 04 CR 0171, 2006 WL 1710139 (N.D. Ill. June 13, 2006).

¹³⁶ *Sevilla II*, 2006 WL 3486872.

¹³⁷ *Sevilla I*, 2006 WL 1710139, at *1.

¹³⁸ *Id.*

¹³⁹ *Id.* at *4. The machine at issue tested tensile strengths of metal and plastic materials. See Bureau of Industry and Security, Order Denying Export Privileges, 73 Fed. Reg. 4519, 4519 (Jan. 25, 2008) (explaining the purpose of a Computer Inclusive Hydraulic Floor Model Testing Machine).

¹⁴⁰ *Sevilla I*, 2006 WL 1710139, at *4.

¹⁴¹ *Sevilla II*, 2006 WL 3486872, at *2-3.

of ten.¹⁴² The defendant ultimately received a sentence of five years of probation.¹⁴³

In reaching the downward variance, the *Sevilla II* court noted that the defendant had “no . . . criminal or terroristic intent” and the exported machine was “not a product that threatened controls relating to the proliferation of nuclear, biological, or chemical weapons.”¹⁴⁴ Although the court characterized these factors as specific to the case before it, the court’s rationale can be viewed as a categorical disagreement with the guideline’s per se application of Base Offense Level 26 to non-military embargo offenses. Section 2M5.1 says nothing about the defendant’s intent, nor does it differentiate between nuclear proliferation offenses and violations of any other “national security controls.”¹⁴⁵ The *Sevilla II* court’s reliance on these distinctions demonstrates its categorical disagreement with the Guidelines’ policy decision. As *Sevilla I* and *II* predate *Kimbrough*, the court may not have been entirely assured of its ability to vary based on policy disagreements alone.

Groos postdates *Kimbrough*, but still mainly follows the analysis and approach of *Sevilla II*—that is, the court deviated from the Guidelines based on policy reasons but failed to articulate the reasoning behind its policy disagreement. The defendant pled guilty to an IEEPA violation for the export and attempted export of fire sprinkler equipment to a private company in Iran.¹⁴⁶ The *Groos* court applied the two-step sentencing procedure of *Gall*: It first calculated the sentencing range appropriate under the Guidelines and then applied the individualized sentencing factors of 18 U.S.C. § 3553(a) to determine

¹⁴² *Id.* at *4.

¹⁴³ See *United States v. Groos*, No. 06 CR 420, 2008 WL 5387852, at *7 (N.D. Ill. Dec. 16, 2008) (recounting the full sentence given to the defendant in *Sevilla II*, which also included conditions of home confinement, community service, and a fine).

¹⁴⁴ *Sevilla II*, 2006 WL 3486872, at *3.

¹⁴⁵ U.S. SENTENCING GUIDELINES MANUAL § 2M5.1(a)(1) (2013).

¹⁴⁶ *Groos*, 2008 WL 5387852, at *1–2. The defendant actually pled to all four counts of his indictment, which included IEEPA, 50 U.S.C. §§ 1701–1706, the Iranian Transactions Regulations, 31 C.F.R. § 560, and the Export Administration Regulations, 31 C.F.R. §§ 730–774, promulgated pursuant to the Export Administration Act, 50 U.S.C. app. §§ 2401–2420. *Id.* at *1. However, all counts appear to have been based on the same conduct. See *id.* (recounting only one course of conduct). For purposes of “real offense” sentencing, therefore, the number of actual counts to which the defendant pled is immaterial. See David Yellen, *Reforming the Federal Sentencing Guidelines’ Misguided Approach to Real-Offense Sentencing*, 58 STAN. L. REV. 267, 268 (2005) (“[R]eal-offense sentencing is the use in sentencing of any facts beyond those necessarily found by a jury in reaching a guilty verdict or admitted by a defendant as part of a guilty plea.”).

if departure from the Guidelines was warranted.¹⁴⁷ The *Groos* opinion did not mention *Kimbrough*.¹⁴⁸

As in *Sevilla II*, the *Groos* court began its analysis by applying section 2M5.1(a)(1), with a base offense level of twenty-six, rather than section 2M5.1(a)(2), with a base offense level of fourteen.¹⁴⁹ The *Groos* court then considered departing from base offense level twenty-six in light of the factors listed in section 2M5.1 Application Note 2 and found sufficient mitigating factors to warrant a downward departure.¹⁵⁰ The court found that the volume of commerce, the extent of planning or sophistication, and the number of occurrences involved in the offense all clearly pointed toward mitigation.¹⁵¹ Regarding the last factor, the degree to which the violation threatened a national security interest, the court found the presence of both aggravating and mitigating circumstances. While the defendant violated the embargo during a time of heightened security alert, in the aftermath of the September 11, 2001 terrorist attacks, the court found that the defendant did not intend to subvert national security and that the prohibited exports at issue—the fire sprinkler equipment—did not particularly implicate national security concerns.¹⁵²

Expanding on the *Sevilla II* court's approach, the *Groos* court also examined the history of section 2M5.1 in its analysis.¹⁵³ Specifically, it stated that “the amendment history of section 2M5.1 lends credence to [defendant's] argument that the harshest punishment should be reserved for cases where weapons or military technologies are at issue and where the threat to national security is apparent.”¹⁵⁴ The court concluded that the history of section 2M5.1 and the guideline's Application Note 2 together warranted a downward departure from section 2M5.1(a)(1)'s base offense level of twenty-six.¹⁵⁵ The court granted a six level reduction for the three factors in Application

¹⁴⁷ See *Groos*, 2008 WL 5387852, at *2 (describing and applying the two-step procedure).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ See *id.* at *4–5 (listing and evaluating mitigating factors). For the full text of Application Note 2, as well as an explanation of the differences between departures and variances, see *supra* notes 98–101 and accompanying text.

¹⁵¹ See *Groos*, 2008 WL 5387852, at *4–5 (discussing mitigating factors).

¹⁵² See *id.* at *4 (noting these facts).

¹⁵³ See *id.* at *5 (discussing legislative history).

¹⁵⁴ *Id.* The court concluded that the 2001 amendment reflected “congressional concerns over insufficient sentences for certain offenses involving the importation and exportation of nuclear, chemical, and biological weapons, materials or technologies,” which were not implicated by defendant's violation. *Id.*

¹⁵⁵ *Id.*

Note 2 whose absence favored mitigation.¹⁵⁶ The court also gave a three level reduction for acceptance of responsibility.¹⁵⁷ Ultimately, the court calculated the appropriate base offense level under the Guidelines to be seventeen.¹⁵⁸

Under the second step of the *Gall* framework, the *Groos* court considered whether to vary from the Guidelines sentencing range based on the 18 U.S.C. § 3553(a) factors.¹⁵⁹ The court compared the facts before it with similar cases involving embargo violations.¹⁶⁰ Although in some such cases defendants received relatively lengthy sentences,¹⁶¹ the *Groos* court concluded that “courts generally do not impose harsh punishment on embargo crimes that involve non-military goods.”¹⁶² Ultimately, the court imposed a sentence of sixty days in prison plus probation and a fine—a significantly less punitive sentence than the Guidelines’ recommended range of twenty-four to thirty months of imprisonment.¹⁶³

The court’s distinction between embargo violations involving non-military goods versus other types of embargo violations suggests a categorical disagreement with the Guidelines’ blanket application of the same base offense level to all embargo violations.¹⁶⁴ The court’s reasoning in departing from the Guidelines is suggestive of *Kimbrough*’s approach: The court found section 2M5.1 itself not wholly appropriate because its amendment history gives greater weight to serious threats to national security and because violations

¹⁵⁶ *Id.* at *5 n.5. The court did not state the basis for its decision that two levels per factor would be the appropriate departure rate.

¹⁵⁷ *Id.* at *6.

¹⁵⁸ *Id.* Criminal History Category I and Base Offense Level 17 combine to give a Guidelines sentencing range of twenty-two to thirty months. *Id.*

¹⁵⁹ See *id.* (applying § 3553(a) factors to the case to determine whether a variance was justified). For the relevant text of 18 U.S.C. § 3553(a) and how it applies to allow courts to vary from the Guidelines, see *supra* notes 43–44 and accompanying text.

¹⁶⁰ *Groos*, 2008 WL 5387852, at *6–8. The court did not have many points of comparison available and noted that “[r]esearch discloses a dearth of comparable published (or even unpublished) cases concerning sentences pursuant to § 2M5.1 . . .” *Id.* at *8.

¹⁶¹ For example, *United States v. Quinn*, 537 F. Supp. 2d 99 (D.D.C. 2008), involved a defendant who received a sentence of thirty-nine months for exporting forklift parts to Iran. *Id.* at 103. The *Groos* court did not rely on this decision, however, because Quinn received a new trial due to false statements made by a key witness. *Groos*, 2008 WL 5387852, at *8 n.9; see *Quinn*, 537 F. Supp. 2d at 121–22 (granting new trial).

¹⁶² *Groos*, 2008 WL 5387852, at *8.

¹⁶³ *Id.* at *10. The court also found the presence of other mitigating factors, including the “substantial and troublesome” seven-year delay in filing charges, and the publication of defendant’s prosecution and sentence on the publicly maintained MAJOR CASE LIST, *supra* note 132. *Groos*, 2008 WL 5387852, at *9.

¹⁶⁴ See *Groos*, 2008 WL 5387852, at *8 (comparing cases involving non-military violations with a case in which the defendant allegedly attempted to sell the names of CIA agents).

involving non-military goods do not implicate these concerns.¹⁶⁵ However, the court did not engage in an explicit analysis of the Commission's process in creating the guideline's policy. Instead, the court framed its deviation from the Guidelines as an *individualized* determination of the appropriateness of a downward departure in that particular case. As explained below, courts would better serve the sentencing system by clearly justifying their policy disagreements with the Guidelines through an explicit *Kimbrough*-style analysis of the history of the Guidelines.

B. Suggested Practice: Explicit Policy Disagreements and the Kimbrough/Gall Three-Step Procedure

As the Supreme Court has not given guidance on how *Kimbrough*'s guideline history and policy analysis¹⁶⁶ fit within *Gall*'s two-step procedure for individualized determinations,¹⁶⁷ sentencing judges have dealt with the issue in different ways. Courts' procedural approaches fall into three general categories: (1) folding policy disagreements into the general individualized analysis and varying from the Guidelines based on "all the circumstances,"¹⁶⁸ as did the courts in *Sevilla II* and *Groos*; (2) implicitly invoking a policy disagreement by giving the Guidelines "less deference"¹⁶⁹ in the individualized analysis (though not rejecting the Guidelines outright); or (3) applying a separate *Kimbrough* procedural step to articulate a policy disagreement and to recalculate the appropriate initial sentencing range based on that disagreement, before determining the appropriateness of further individualized variances.¹⁷⁰

Scholars Michelman and Rorty advocate that courts adopt the third approach in most circumstances.¹⁷¹ The current *Gall*-style sentencing procedure calls for two steps: (1) determine the appropriate Guidelines range and (2) determine any appropriate variance from that range according to the characteristics of the offense and the offender presented in 18 U.S.C. § 3553(a).¹⁷² Michelman and Rorty call on courts to conduct an intermediate step: determine any appro-

¹⁶⁵ *Id.* at *5.

¹⁶⁶ See *supra* notes 47–63 and accompanying text (discussing *Kimbrough*).

¹⁶⁷ See *supra* notes 67–75 and accompanying text (discussing *Gall*).

¹⁶⁸ Michelman & Rorty, *supra* note 12, at 1103–04 (citation omitted).

¹⁶⁹ *Id.* at 1104 (citation omitted).

¹⁷⁰ See *id.* at 1103–06 (discussing and categorizing the different approaches of district courts in applying *Gall* and *Kimbrough*); *supra* note 43 and accompanying text (discussing § 3553(a) analysis).

¹⁷¹ Michelman & Rorty, *supra* note 12, at 1108–15.

¹⁷² *Gall v. United States*, 552 U.S. 38, 49–50 (2007); Michelman & Rorty, *supra* note 12, at 1097.

appropriate variance from the Guidelines range “based on the type of policy grounds approved in *Kimbrough*.”¹⁷³

This Subpart describes how the three-step analysis, employing an intermediate policy-process analysis, could have been applied in *Groos* and *Sevilla II*. Subpart III.C elaborates on the benefits of using the three-step analysis.

The *Groos* and *Sevilla II* opinions could have used the three-step procedure as follows. The first step, involving the initial calculation of the appropriate Guidelines sentencing range, would remain the same.¹⁷⁴ This step would continue to adjust the sentencing range pursuant to the factors listed in Application Note 2.¹⁷⁵

The second step would be a *Kimbrough*-style analysis, in which the sentencing court considers whether a policy disagreement warrants departure from the guideline at issue. Under this step, courts would consider the information regarding the history of the guideline presented in Part II. The court might find that the Commission failed to consider the broad application of the heightened base offense level of section 2M5.1(a)(1) to non-military embargo violations when it raised the offense level from twenty-two to twenty-six.¹⁷⁶ Likewise, the court might find that the Commission failed to justify its decision to punish all embargo violations—both military and non-military—at the same base offense level.¹⁷⁷ Either way, the court should explicitly state its findings about the Commission’s shortcomings in creating this guideline. Under *Kimbrough*, this finding would then justify the court’s independent policy determination that, contrary to the plain meaning of the guideline, violations of “controls relating to the proliferation of nuclear, biological, or chemical weapons or materials” should be punished at a higher level than non-military embargo violations.¹⁷⁸ The court would thus vary from the Guidelines-recom-

¹⁷³ Michelman & Rorty, *supra* note 12, at 1108; *see also* Adelman & Deitrich, *supra* note 5 (advocating for a similarly explicit policy examination of the Guidelines by district courts).

¹⁷⁴ *See supra* Subpart III.A (discussing step-one analysis).

¹⁷⁵ *See supra* Subpart III.A (same).

¹⁷⁶ The WMD Report’s lack of acknowledgement of *McKeeve*—and more generally of the fact that courts have applied section 2M5.1(a)(1) to non-WMD-related exports—could support this inference. *See supra* Part II.C. The court may also consider the haphazard manner in which IEEPA was eventually added to the section 2M5.1 statutory cross-references and decide that the Commission simply never studied the issue. *See supra* text accompanying notes 129–132.

¹⁷⁷ Alternatively, the court could disagree with the Commission’s policy decision even if it found the decisionmaking process adequate. Either approach would support a policy disagreement under *Kimbrough v. United States*, 552 U.S. 85 (2007).

¹⁷⁸ U.S. SENTENCING GUIDELINES MANUAL § 2M5.1(a)(1)(A) (2013). The court may also find gradations along the spectrum of military and non-military embargo violations, for example by applying intermediate severity for industrial components that have both

mended sentencing range before applying any of the individualized sentencing factors under 18 U.S.C. § 3553(a).

Under the intermediate *Kimbrough* step, the court has discretion in choosing the appropriate sentencing range to substitute in place of section 2M5.1(a)(1). For example, the court might decide that, despite the textual analysis that determines that section 2M5.1(a)(2) should virtually never be applied,¹⁷⁹ the fact that the Commission created the alternative base offense level of fourteen makes that level a good starting point of analysis. Alternatively, the court might substitute its own empirical analysis by examining sentences of similarly situated defendants.¹⁸⁰ Whatever the sentencing level the court decides to use at this point, the explicit determination of the Commission's faults in creating the guideline ensures that the new starting point will be untethered from the Commission's initial oversights.

Only after this separation from the Commission's faulty decision-making process should the court proceed to step three: the individualized consideration of the § 3553(a) factors.¹⁸¹ In essence, this analysis is the same as the § 3553(a) analysis currently conducted by courts.¹⁸² However, this framework ensures that any variances under the

civil and military applications. In addition, more care may be taken for non-military items of particularly sensitive status in light of United States foreign policy, such as items supporting the petroleum industry in Iran. *See, e.g.*, Exec. Order No. 13,622, 77 Fed. Reg. 45,897 (Aug. 2, 2012) (authorizing additional sanctions with respect to Iran); Exec. Order No. 13,590, 76 Fed. Reg. 72,609 (Nov. 23, 2011) (authorizing imposition of certain sanctions with respect to provision of goods, services, technology, or support for Iran's energy and petrochemical sectors). The court may find other distinguishing factors, such as the defendant's intent or level of knowledge, to be helpful in sorting out the most egregious of those cases in a similar kind of policy analysis.

¹⁷⁹ *See supra* notes 81–85 and accompanying text (discussing broad application of section 2M5.1(a)(1)'s heightened base offense level rather than section 2M5.1(a)(2)).

¹⁸⁰ The court should only consider sentences issued post-*Booker*, of course, as pre-*Booker* decisions were constrained by the then-mandatory Guidelines. Unfortunately, the lack of available sentencing data and written sentencing opinions makes this type of analysis difficult. However, the *Groos* court referenced the defendant's submission of a table of similar cases. United States v. Groos, No. 06 CR 420, 2008 WL 5387852, at *7 & n.7 (N.D. Ill. Dec. 16, 2008). The best source of such information specific to export violations at the moment is the MAJOR CASE LIST, *supra* note 132, which unfortunately is lacking in detail and not designed for empirical study. However, if more courts issue written opinions applying the three-step procedural analysis outlined above, this informational void may become filled. If empirical analysis is not feasible, the court might conduct a case-by-case comparison to the policy factors in the few published decisions, similar to how the *Groos* court examined the *Sevilla II* and *Shetterly* opinions. *Groos*, 2008 WL 5387852, at *7–8.

¹⁸¹ This is the second step mandated by *Gall v. United States*, 552 U.S. 38, 49–50 (2007).

¹⁸² *See, e.g.*, *Groos*, 2008 WL 5387852, at *6–9 (providing an example of § 3553 analysis). The only difference would be that, to the extent that the court's policy analysis overlaps with the 18 U.S.C. § 3553(a) factors—for example, “the nature and circumstances of the offense,” § 3553(a)(1), or “the need to avoid unwarranted sentence disparities,” § 3553(a)(6)—the court need not reconsider those issues. The extent to which the policy considerations will overlap with the § 3553(a) factors will necessarily depend on the guide-

§ 3553(a) factors will be applied to a defendant's sentence only after the Commission's faulty or poorly justified policy decisions have been fixed through a *Kimbrough*-style guideline adjustment.

C. Benefits of Explicit Policy Disagreements, Particularly for Obscure Guidelines

Justifying policy disagreements through an explicit analytical step, separate from individualized factors, has several advantages. It promotes transparency for defendants and the public, provides feedback to Congress and the Commission regarding the operation of the Guidelines, improves the fairness of sentencing decisions, and allows "more nuanced consideration" of both policy issues and individual circumstances.¹⁸³ This is especially true in the case of seldom-used guidelines such as section 2M5.1, which, due to their obscurity, have not received much publicity or attention from the Commission or Congress in the past.

Michelman and Rorty focus their attention on high-profile guidelines such as those related to the crack/powder disparity.¹⁸⁴ However, judicial scrutiny of policy issues actually may be more necessary for obscure and rarely used guidelines. The crack/powder disparity received a great deal of attention from Congress¹⁸⁵ and in academic commentary.¹⁸⁶ Political pressure was great enough that Congress eventually reduced the disparity,¹⁸⁷ in one of the only instances in which Congress reduced the severity of a statutory sentence.¹⁸⁸ Congress and the Commission are more likely to overlook the net-

line at issue and the manner in which the court disagrees with the underlying policy judgments.

¹⁸³ Michelman & Rorty, *supra* note 12, at 1108–15.

¹⁸⁴ *See id.* at 1109–11 (discussing crack-cocaine guidelines).

¹⁸⁵ *See Kimbrough v. United States*, 552 U.S. 85, 105–06 (2007) (summarizing attention Congress gave to the crack/powder disparity from 1995 through 2007).

¹⁸⁶ *See, e.g.,* Malaika K. Caldwell, *Trafficking from the Streets to the Borders: Why the Search for Justice Under the Fair Sentencing Act of 2010 Stopped on a Dead-End Street in the Black Community*, 5 S. REGION BLACK L. STUDENTS ASS'N L.J. 19 (2011) (discussing racial justice implications of the revised crack/powder disparity); LaJuana Davis, *Rock, Powder, Sentencing—Making Disparate Impact Evidence Relevant in Crack Cocaine Sentencing*, 14 J. GENDER RACE & JUST. 375 (2011) (same); David A. Sklansky, *Essay, Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283 (1995) (arguing that the original crack/powder disparity should have been held to violate equal protection); William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233 (1996) (examining the history of the crack/powder disparity and proposing a revision). The Sentencing Commission itself tried three times to change the disparity. *See Davis, supra*, at 389–91 (detailing the Commission's efforts).

¹⁸⁷ Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372, 2372 (codified at 21 U.S.C. § 841 (2012)).

¹⁸⁸ *Cf. Bowman, Failure, supra* note 27, at 1319–20 (describing the Guidelines as "a one-way upward ratchet").

widening¹⁸⁹ and other ratcheting-up measures resulting from obscure guidelines, which generally do not receive political or academic scrutiny. Therefore, there is an even greater need for courts to be vigilant in reviewing the underlying policies of such guidelines.

Transparency in sentencing is another goal of the Guidelines regime.¹⁹⁰ “Both individual defendants and the public are entitled to know the precise reasons for criminal sentences.”¹⁹¹ Separating out broad policy considerations from factors specifically relevant to the individual defendant provides important information to both the defendant and the public regarding the different degrees of punishment merited by different types of conduct. Judges, prosecutors, defense lawyers, defendants, and the public all benefit from increased transparency in the sentencing process. Transparent sentencing may be particularly useful for obscure guidelines, for which policy analysis by sentencing judges may provide the only source of such information.

Explicit policy analysis during sentencing also provides feedback on the operation of the Guidelines. Congress, the Commission, and the Department of Justice do not seem particularly interested in reforming the system they helped to create.¹⁹² Therefore, it falls on the courts to examine the policies underlying each guideline before applying it at sentencing.¹⁹³ Even if sentencing decisions are “incapable of creating precedent binding other courts,”¹⁹⁴ they can at least present explicated, alternative policy choices to the black box that constitutes the majority of the current Guidelines. If and when the Guidelines are formally revised by the Commission or Congress, this type of case-by-case review of the Guidelines’ real-world applicability will provide invaluable feedback. As Part II of this Note demonstrates, the Commission often lacks empirical data during its decision-making process.¹⁹⁵ For example, the Commission enacted the flawed

¹⁸⁹ Scholars use the term “net widening” to describe the phenomenon of intermediate-level sentences—designed to apply to intermediate or serious-level offenders (usually for the purpose of rehabilitation)—being applied to lower-level offenders who would otherwise have received more lenient sentences. See, e.g., Paul J. Hofer & Courtney Semisch, *Examining Changes in Federal Sentence Severity: 1980–1998*, 12 FED. SENT’G REP. 12, 15 (1999) (using “net widening” in this manner).

¹⁹⁰ U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. (2013).

¹⁹¹ Michelman & Rorty, *supra* note 12, at 1109.

¹⁹² See generally Bowman, *Failure*, *supra* note 27 (explaining the lack of incentives for sentencing reform from Congress, the Commission, and the Department of Justice).

¹⁹³ See Adelman & Deitrich, *supra* note 5, at 590 (“[I]f federal sentencing practices are to improve, courts will have to play a significant role.”).

¹⁹⁴ Bowman, *Nothing*, *supra* note 27, at 361.

¹⁹⁵ See also Adelman & Deitrich, *supra* note 5, at 578 (“[F]ew guidelines can be shown to be based on actual preguideline sentencing practice [W]hen the Commission drafted the original Guidelines it had limited data concerning past practice, and the data it did have was sketchy.”).

2001 amendment to section 2M5.1 despite minimal data regarding how the guideline was actually used.¹⁹⁶ Providing explicit policy disagreements in written decisions will help the Commission in future revisions of the Guidelines.¹⁹⁷

Applying a three-step procedure would also increase fairness in sentencing, as it would decouple sentencing decisions from unjustified “anchoring”¹⁹⁸ in the Guidelines and allow subsequent courts to follow the deliberative reasoning of previous sentencing opinions. Moreover, this approach would contribute to conformity in sentencing outcomes for similarly situated defendants. Even defendants sentenced to relatively short periods of incarceration, such as Groos, may deserve an even lesser alternative punishment—for instance probation, house arrest, or a rehabilitative program. Such alternative sentences are contemplated in the U.S. Code.¹⁹⁹ However, because the Guidelines focus almost exclusively on incarceration, using the Guidelines as the starting point of analysis may influence courts into overlooking appropriate alternatives that are far removed from the Guidelines sentencing range. Confronting the policy assumptions and oversights of the Guidelines in a separate step, before the individualized considerations, allows courts the intellectual distance to reject the Guidelines in some instances. Moreover, laying out the analysis in writing allows subsequent courts to follow the same process and reach consistent outcomes when sentencing similarly situated defendants.

As federal judge and former prosecutor John Gleeson has recognized:

¹⁹⁶ See *supra* Part II (discussing the Commission’s flawed process).

¹⁹⁷ Some may counter that courts are not suited to make policy determinations, or that this method would consume excessive judicial resources. However, courts have significant experience in making sentencing decisions—certainly more than Congress and potentially more than the Commission, given the lack of data available to the Commission and the number of sentencing decisions issued by courts on a daily basis. In addition, Congress and the Commission regularly fail to address obvious inequities in the Guidelines, such as the crack/powder disparity, whereas the courts have been more effective in addressing such problems. See, e.g., *Kimbrough v. United States*, 552 U.S. 85 (2007). Moreover, while it is true that conducting analysis of Guidelines policy in written opinions would impose an additional burden on the judicial system, it would be no more of a burden than other complex issues courts face daily. The *Groos* court, for instance, already examined some history of the Guidelines in its analysis. See *United States v. Groos*, No. 06 CR 420, 2008 WL 5387852, at *5 (N.D. Ill. Dec. 16, 2008) (referencing the amendment history of Guideline section 2M5.1). In that case, applying a three-step process would only require separating out and explicating the policy disagreement more distinctly. Moreover, each written opinion decreases the burden on the next court conducting a similar policy analysis.

¹⁹⁸ See *Michelman & Rorty, supra* note 12, at 1112 (describing social science research on the phenomenon of anchoring, in which individuals rely on initial values given to them when making numerical estimates).

¹⁹⁹ See, e.g., 18 U.S.C. § 3562 (2012) (providing for the imposition of probation sentences).

[T]he truth is that most of the time miscarriages of justice occur in small doses, in cases involving guilty defendants. This makes them easier to overlook. But when they are multiplied by the thousands of cases in which they occur, they have a greater impact on our criminal justice system than the cases you read about in the newspapers or hear about on *60 Minutes*.²⁰⁰

In the aggregate, even obscure guidelines may result in significant injustice and unfairness if they reflect flawed policy choices.²⁰¹

The three-step analytical procedure also provides an avenue for courts to revise pre-*Booker* practice for more obscure guidelines, such as section 2M5.1. The very nature of case-by-case adjudication leaves sentencing courts uniquely situated to identify issues with the Guidelines that the Commission failed to notice or to accommodate properly. By examining the history of each guideline as it applies to the case at hand, as demonstrated in Part II, courts can fulfill this role in the course of their regular sentencing duties.

CONCLUSION

Under *Kimbrough*, district courts have the power to review—and, if necessary, categorically reject—the policies underlying the federal Sentencing Guidelines on a case-by-case basis. This Note demonstrates how a court might do so using one obscure guideline, section 2M5.1, as applied to one type of offense, a non-military IEEPA violation. It examines the history of Guideline section 2M5.1 and finds that the Commission consistently overlooked the application of the guideline to non-military IEEPA violations. It concludes that courts would be justified in categorically varying from section 2M5.1(a)(1)(A) as applied to non-military IEEPA violations. It argues that courts should use an explicit procedural step to analyze the soundness of the Commission's decisionmaking process and policy choices. Courts should be especially meticulous in examining policies underlying obscure guidelines like section 2M5.1, which are more likely to have been overlooked by the Commission, Congress, other sentencing actors, and commentators. By stating their policy disagreements clearly in written sentencing opinions, courts can help promote transparency, feedback, and fairness in sentencing practice.

²⁰⁰ United States v. Vasquez, No. 09-CR-259 (JG), 2010 WL 1257359, at *1 (E.D.N.Y. Mar. 30, 2010).

²⁰¹ The Commission publishes data on how closely courts follow the Guidelines in the aggregate. See *Federal Sentencing Statistics*, U.S. SENT'G COMMISSION, http://www.ussc.gov/Research_and_Statistics/Federal_Sentencing_Statistics/index.cfm (last visited Jan. 25, 2014) (collecting information on federal sentencing decisions).