Determining "Reasonableness" without a Reason? Federal Appellate Review Post–*Rita v United States*

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INTRODUCTION

Two centuries ago Chief Justice John Marshall famously wrote that discretionary choices should not be left to a court's "inclination, but to its judgment; and its judgment is to be guided by sound legal principles."[1] Unfortunately, for the next 177 years, federal criminal sentencing would be largely devoid of the substantive law and procedural rules necessary to guide judicial discretion.[2] Congress passed the Sentencing Reform Act of 1984[3] (SRA) in response to increasing concern over unwarranted sentencing disparities in federal courts,[4] thus creating the first real opportunity for the federal judiciary to develop a common law of sentencing. The SRA established the United States Sentencing Commission ("Commission").[5] The Commission is charged with developing and promulgating regulations governing federal sentencing that would emphasize fairness, consistency, punishment (retribution), incapacitation, and deterrence.[6] To that end, the Commission designed the United States Sentencing Guidelines ("Guidelines"), which consisted of a set of mandatory narrow sentencing ranges for each defendant. The introduction to the *Guidelines Manual* outlines three congressionally mandated objectives of sentencing reform: ho-

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1 *United States v Burr*, 25 F Cases 30, 35 (Cir Ct Va 1807).

2 Douglas A. Berman, *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 Stan L & Policy Rev 93, 94–95 (1999); Marvin E. Frankel, *Criminal Sentences: Law without Order* 7–8 (Hill and Wang 1973).

3 Sentencing Reform Act of 1984 ch II, Pub L No 98-473, 98 Stat 1987, codified as amended at 18 USC § 3551 et seq (2000 & Supp 2008), and 28 USC § 991 et seq (2000 & Supp 2008).

4 Comprehensive Crime Control Act of 1983, S Rep No 225, 98th Cong, 1st Sess 59–60 (1983), reprinted in 1984 USCCAN 3242–43 ("Senate Report"). See also United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* ("Commission Report") 12 (Nov 2004), online at http://www.ussc.gov/15_year/15year.htm (visited Aug 29, 2008).

5 SRA, 98 Stat at 2017, codified at 28 USC § 991 (2000).

6 28 USC § 991(b)(1) (2000 & Supp 2004). See also 18 USC § 3553(a)(2) (2000 & Supp 2004). Rehabilitation receives much lower priority than other sentencing goals under the SRA and the Guidelines; nonetheless, judges are required to assess each defendant's need for treatment or training when they decide to impose any special conditions of parole or specialized release. See Commission Report at 13 (cited in note 4).

nesty, uniformity, and proportionality.[7] Honesty was intended to reduce sentencing disparity between time sentenced and time served, and to clarify the sources actually used to inform sentencing; uniformity was designed to reduce significantly interjudge disparity in sentencing for offenders with similar criminal histories and conduct; and proportionality was concerned with sentencing defendants in a manner consistent with the severity of their particular conduct.[8]

The Guidelines provided limited ranges in which judges were permitted to impose sentences based on a defendant's prior criminal history, the crime, and specific offense characteristics. The sentencing judge could make an upward or downward adjustment from the applicable sentencing range upon finding that there were circumstances in the case that the Guidelines had not adequately taken into account.

Eighteen years after the Guidelines took effect, the Supreme Court in *United States v Booker*[9] held that the Sixth Amendment requires juries to determine, beyond a reasonable doubt, any fact that the law makes essential to punishment, save a prior conviction.[10] The Court also struck down the provisions of the SRA requiring (1) federal district judges to impose sentences within the Guidelines range; and (2) federal appellate courts to review sentences imposed outside the Guidelines range under a de novo standard.[11] The Court concluded that, in order to comport with the Constitution, the Guidelines must be deemed advisory and the federal courts of appeals should review criminal sentences for "reasonableness."[12] Unfortunately, the Court did not clearly define what "reasonableness" review would entail. This ambiguity quickly resulted in a split among the circuits as to how to determine the reasonableness of a sentence.

Two years later, in *Rita v United States*,[13] the Supreme Court attempted to clarify how the federal appellate courts should conduct post-*Booker* appellate review, ultimately holding that a sentence within the Guidelines range may be presumed "reasonable."[14] The Court also explained that, depending on the particular circumstances, a brief statement by the trial judge of the reasons for a particular sentence, pursuant to § 3553(c), was legally sufficient.[15] Almost immediately after the *Rita* ruling, the circuits split over the level of specificity re-

7 USSG Ch 1, Pt A, intro comment 3.
8 Id.
9 543 US 220 (2005).
10 Id at 241–44.
11 See id at 259.
12 Id at 259–61.
13 127 S Ct 2456 (2007).
14 See id at 2462.
15 See id.

quired for a judge's statement of reasons. This Comment explores the circuits' conflicting readings of the *Booker* and *Rita* rulings with respect to the adequacy of judges' sentencing explanations and argues that a sentence is procedurally reasonable only when the appellate court can follow, recreate, and assess the district court's basis for the sentence. Not only is this conclusion supported by *Booker* and *Rita*'s emphasis on the importance of thoroughly reasoned sentencing opinions for the evolution of the Guidelines, but also by the SRA's focus on increased transparency and rationality in the sentencing process.

This Comment proceeds in five parts. Part I discusses the structure and mechanics of the Guidelines. Part II analyzes the Supreme Court's recent decision in *Booker* and its impact on sentencing. Part III examines the Supreme Court's recent ruling in *Rita* that attempts to clarify federal appellate review in the post-*Booker* regime. Part IV discusses the current circuit split over the interpretation of *Rita* as it pertains to § 3553(c), the provision of the SRA requiring sentencing judges to openly state their reasons for imposing a particular sentence. Part V discusses the centrality of explicit and thoroughly reasoned sentencing explanations to SRA's vision of the federal judiciary's role in the development of sentencing policy and procedures. It proposes that the First and Sixth Circuits' reading of *Rita*—that a sentence is procedurally unreasonable when neither the context nor the record clearly reveals the district court's consideration of relevant § 3553(a) factors and the reasoning for imposing the sentence—most closely comports with both the purpose and text of the SRA, and with meaningful sentencing reform more generally.

I. SENTENCING GUIDELINES PRE-*BOOKER*

The initial guidelines adopted by the Commission became effective on November 1, 1987. The centerpiece of the Guidelines is a grid containing 258 cells.[16] The grid's vertical axis consists of forty-three offense levels, reflecting a base severity score for the crime committed.[17] The grid's horizontal axis consists of six criminal history categories and provides adjustments based on the offender's past conviction record.[18] The Guidelines instruct judges on how to calculate both "offense level" and "criminal history." In determining the defendant's offense level, the judge chooses the offense guideline corresponding to the defendant's conviction, determines the base level from the guideline, and adjusts the offense level for specific offense characteristics and special in-

16 USSG Ch 5, Pt A.
17 USSG Ch 5, Pt A, comment (n 1).
18 Id.

structions contained in the section.[19] After determining the offense level, the judge determines the defendant's criminal history category. The judge then identifies the cell at which the two factors intersect; this cell lists the range within which the judge may sentence the defendant. The judge may depart from the applicable Guidelines range when the defendant's criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood of recidivism.[20] The range within each cell is relatively small, with the highest point typically 25 percent greater than the lowest point, thereby limiting judicial sentencing discretion in that range.[21]

The Guidelines also permit judges to depart from the specified sentencing range upon a finding of aggravating or mitigating circumstances of a kind not adequately taken into consideration by the Commission.[22] Depending on the nature of the circumstance, either an upward or downward variance may be justified or required. Section 3553(c) of the SRA requires judges to state the specific reasons for imposing a sentence:

> The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—
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> (1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or
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> (2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described . . . .[23]

Congress believed these § 3553(c) sentencing statements would enable judges to draw upon their unique experiences and develop a dialogue about sentencing law and policy.[24]

II. SENTENCING GUIDELINES POST-*BOOKER*

In *Booker*, the Court held that the Guidelines violated defendants' Sixth Amendment right to trial by jury by allowing judges, rather than juries, to make factual findings necessary to increase a de-

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19 Id at § 1B1.1.

20 Id at § 4A1.3(a) policy statement.

21 28 USC § 994(b)(2) (2000 & Supp 2004).

22 USSG § 5K2.0(a)(2) policy statement. See also *Koon v United States*, 518 US 81, 98 (1996) (explaining that a district court's decision to depart will usually be given substantial deference since district courts have the institutional advantage over appellate courts in evaluating factual circumstances).

23 See 18 USC § 3553(c) (2000 & Supp 2004).

24 Senate Report at 61 (cited in note 4). See also Part V.A.

fendant's sentence beyond the statutory maximum.[25] The Court salvaged the Guidelines to a large extent, however, by holding that they were permissible if viewed as advisory rather than mandatory.[26] The Guidelines were to be consulted by judges imposing a sentence, and such sentences would be upheld upon appeal as long as they were not "unreasonable."[27] To make the Guidelines advisory instead of mandatory, the Court severed and excised two statutory provisions of the SRA: § 3553(b)(1), which required that the trial judge impose a sentence within the Guidelines range, and § 3742(e), which mandated de novo review of departures.[28] The Court reasoned that the excision of § 3742(e) was not "a critical problem for the handling of appeals" post-*Booker* because the SRA implied "a practical standard of review already familiar to appellate courts: review for unreasonableness."[29] In *Booker*, Justice Stephen Breyer called on Congress to amend the SRA to conform to the Court's constitutional requirements;[30] however, to date, Congress has made no such effort.[31] The Court subsequently noted that *Booker* failed to include an elaborate discussion of the reasonableness standard,[32] and would later remark that "[s]imply stated, *Booker* replaced the *de novo* standard of review required by [§ 3742(e)] with an abuse-of-discretion standard that [the Court referred to as] 'reasonableness review.'"[33]

Booker also indicated that part of reasonableness review requires the appellate court to consider whether the district court accounted for relevant § 3553(a) factors and "[t]hose factors in turn will guide [the] appellate court[] . . . in determining whether a sentence is unreasonable."[34] Under the now-advisory Guidelines, the Commission remains in place to collect and study information about actual district court sentencing decisions as well as appellate court decisionmaking, amending the Guidelines in light of its findings.[35] According to the Court, "These features of the remaining system, while not the system

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25 543 US at 243–44. The *Booker* ruling reaffirmed the Court's earlier positions in *Apprendi v New Jersey*, 530 US 466, 490 (2000), and *Blakely v Washington*, 542 US 296, 303–04 (2004).

26 See *Booker*, 543 US at 259.

27 Id at 260–61.

28 Id at 265.

29 Id at 260–61.

30 See 543 US at 265 ("Ours, of course, is not the last word: The ball now lies in Congress' court. The National Legislature is equipped to devise and install, long term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice.").

31 Linda Greenhouse, *Justices to Revisit Thorny Issue of Sentencing Guidelines in First Cases after Recess*, NY Times A15 (Feb 20, 2007).

32 *Cunningham v California*, 127 S Ct 856, 867 & n 13 (2007).

33 *Rita*, 127 S Ct at 2470–71.

34 543 US at 261.

35 Id at 263–64.

Congress enacted, nonetheless continue to move sentencing in Congress' preferred direction."[36]

Following *Booker*, a majority of the circuit courts has endorsed a two-stage approach to sentencing:[37] (1) calculate the applicable pre-*Booker* Guidelines range, including a determination as to whether a departure is appropriate; and (2) examine factors specified in § 3553(a)[38] to determine whether a sentence outside the range is warranted.[39] In contrast, the Seventh Circuit has held that *Booker* made the determination of departures "obsolete."[40]

Seven circuits have also held that the advisory-Guidelines range is presumptively reasonable if it was properly calculated and the sentencing court considered the other § 3553(a) factors.[41] Even prior to the

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36 Id at 264–65.

37 *United States v Jimenez-Beltre*, 440 F3d 514, 518–19 (1st Cir 2006) (en banc); *United States v Crosby*, 397 F3d 103, 111–13 (2d Cir 2005); *United States v Cooper*, 437 F3d 324, 330 (3d Cir 2006); *United States v Hughes*, 401 F3d 540, 546–47 (4th Cir 2005); *United States v Mares*, 402 F3d 511, 518–19 (5th Cir 2005); *United States v Buchanan*, 449 F3d 731, 734 (6th Cir 2006); *United States v Haack*, 403 F3d 997, 1002–03 (8th Cir 2005); *United States v Menyweather*, 447 F3d 625, 630 (9th Cir 2006); *United States v Talley*, 431 F3d 784, 786 (11th Cir 2005).

38 Section 3553 states:

> (a) The court, in determining the particular sentence to be imposed, shall consider—
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> . . .
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> (2) the need for the sentence imposed—
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> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
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> (B) to afford adequate deterrence to criminal conduct;
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> (C) to protect the public from further crimes of the defendant; and
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> (D) to provide the defendant with needed educational or vocation training, medical care, or other correctional treatment in the most effective manner.

18 USC § 3553(a)(2).

39 The appellate courts generally do not require district courts to specify how each § 3553(a) factor is taken into account. See, for example, *United States v Lopez-Flores*, 444 F3d 1218, 1222 (10th Cir 2006). But see *United States v Miranda*, 505 F3d 785, 792 (7th Cir 2007). The *Miranda* court acknowledged that a district judge need not entertain arguments obviously lacking in merit. See id. However, it did require that a judge explain why a sentence imposed is appropriate in light of § 3553(a) factors when a defendant makes a nonfrivolous argument challenging a within-Guidelines sentence as unreasonable. See id.

40 See *United States v Laufle*, 433 F3d 981, 986–87 (7th Cir 2006) (analyzing that since *Booker* rendered the Guidelines advisory and district courts now have much broader authority to sentence outside the recommended range, departures are "beside the point").

41 See *United States v Dorcely*, 454 F3d 366, 376 (DC Cir 2006); *United States v Cage*, 451 F3d 585, 591 (10th Cir 2006); *United States v Johnson*, 445 F3d 339, 341 (4th Cir 2006); *United States v Williams*, 436 F3d 706, 707–08 (6th Cir 2006); *United States v Mykytiuk*, 415 F3d 606, 608 (7th Cir 2005); *United States v Lincoln*, 413 F3d 716, 717 (8th Cir 2005); *Mares*, 402 F3d at 519. But see *Talley*, 431 F3d at 788 (holding that although a sentence within the Guidelines range is not per se reasonable, the party challenging the sentence bears the burden of establishing unreasonableness). Later the Supreme Court would state, "The fact that we permit courts of appeals to adopt a presumption of reasonableness does not mean that courts may adopt a presumption of unreasonableness." *Rita*, 127 S Ct at 2467.

Rita ruling, however, several circuits noted that a sentence imposed outside the Guidelines range is not presumptively unreasonable.[42]

In sum, all the members of the *Booker* Court recognized that there would be no constitutional problem with mandatory sentencing guidelines if the facts serving as the basis for upward departures were required to be submitted to the jury and proven beyond a reasonable doubt.[43] By making the Guidelines advisory, the Court allowed judges to retain discretion in applying upward and downward departures without additional jury factfinding beyond a reasonable doubt.[44] Although the second part of the *Booker* opinion (the remedial decision) appears to be somewhat in tension with the first part of the decision, which held the Guidelines unconstitutional,[45] several circuits have held that the exercise of such discretion after *Booker* is constitutionally permissible.[46]

Twenty-two months after the *Booker* decision, the Supreme Court granted certiorari in two cases—*United States v Claiborne*[47] and *United States v Rita*[48]—in order to clarify the "reasonableness" standard of appellate review.[49] In *Claiborne*, a case from the Eighth Circuit, the Court was asked to decide whether a sentence below the correctly calculated Guidelines range is reasonable and whether a sentence that substantially varies from the Guidelines range must be justified by extraordinary circumstances.[50] The Eighth Circuit's holding in *Claiborne*, however, was vacated as moot after the petitioner, Mario Clai-

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42 See *United States v Howard*, 454 F3d 700, 703 (7th Cir 2006); *United States v Myers*, 439 F3d 415, 417 (8th Cir 2006); *United States v Moreland*, 437 F3d 424, 433–34 (4th Cir 2006); *United States v Foreman*, 436 F3d 638, 644 (6th Cir 2006).

43 543 US at 233.

44 Id at 251 (explaining that the Court's earlier decisions permitted the judge to rely on facts unproven by the jury beyond a reasonable doubt for sentencing purposes), citing *United States v Watts*, 519 US 148, 157 (1997).

45 Douglas A. Berman and Stephanos Bibas, *Making Sentencing Sensible*, 4 Ohio St J Crim L 37, 53 (2006) ("The dual rulings in *Booker* reflect two divergent conceptual and procedural models competing for dominance.").

46 See, for example, *United States v Welch*, 429 F3d 702, 704–05 (7th Cir 2005); *United States v Chau*, 426 F3d 1318, 1323–24 (11th Cir 2005); *United States v Edwards*, 424 F3d 1106, 1108 (DC Cir 2005); *United States v Bothun*, 424 F3d 582, 587–88 (7th Cir 2005); *United States v Ameline*, 409 F3d 1073, 1077–78 (9th Cir 2005) (en banc).

To be sure, there remains disagreement among legal scholars and practitioners as to what the holding in *Booker* actually is, because the remedial opinion lends itself to different interpretations. Although several lower courts have interpreted the Guidelines as nonbinding, they have tended to base their reasonableness determination on whether the sentence conforms to the Guidelines. And as noted earlier, there is disagreement among the lower courts as to how much weight should be accorded to the Guidelines. See note 39.

47 *United States v Claiborne*, 429 F3d 479 (8th Cir 2006).

48 *United States v Rita*, 177 Fed Appx 357 (4th Cir 2006), reversed and remanded in *Rita v United States*, 127 S Ct 2456 (2007).

49 *Claiborne v United States*, 127 S Ct 551 (2006); *Rita v United States*, 127 S Ct 551 (2006).

50 See *Claiborne*, 127 S Ct 551.

borne, died on May 30, 2007.[51] In *Rita*, the Court was asked to determine whether a sentence that was within the correctly calculated guidelines was presumptively reasonable and whether the sentencing judge must still examine factors that would justify a lesser sentence if the sentence was within the Guidelines range.[52] The Court rendered its decision in *Rita* on June 21, 2007, but less than two months later the circuits again were split over the appropriate manner in which to conduct appellate review under the post-*Booker* framework. The next Part discusses the *Rita* decision and its impact on appellate review.

III. *RITA* AND APPELLATE REVIEW IN THE POST-*BOOKER* ERA

A. *Rita*'s Road to the Supreme Court

Victor Rita was convicted in the United States District Court for the Western District of North Carolina.[53] Pursuant to § 3552(a), a probation officer prepared a presentence report (PSR) describing offense characteristics, offender characteristics, other matters deemed relevant to sentencing, and factors potentially relevant to a departure from the guidelines.[54] According to the PSR, the Guidelines specified a sentence from thirty-three to forty-one months of imprisonment.

During the sentencing hearing, both Rita and the government offered their sentencing arguments, referencing the probation officer's PSR. Rita sought a sentence lower than the recommended Guidelines range of thirty-three to forty-one months based upon § 3553(a) because of his physical condition, his likely vulnerability in prison due to his work in government service, and his military experience.[55] Rita pre-

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51 See *Claiborne v United States*, 127 S Ct 2245 (2007). The Supreme Court granted certiorari in two new cases, *United States v Kimbrough*, 174 Fed Appx 798 (4th Cir 2006), and *United States v Gall*, 446 F3d 884 (8th Cir 2006), to address below-Guidelines sentences. *Kimbrough v United States*, 127 S Ct 2933 (2007); *Gall v United States*, 127 S Ct 2933 (2007). On December 10, 2007, the Court rejected the Eighth Circuit's requirement of "extraordinary" circumstances to justify a sentence outside the Guidelines range, ruling that "[r]egardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard." *Gall v United States*, 128 S Ct 586, 597 (2007). Recall that the Court in *Booker* referred to the abuse-of-discretion standard as "reasonableness review." See text accompanying note 33. On the same day, the Court also held that although *Booker* requires district courts to give respectful consideration to the Guidelines, sentencing judges are permitted to particularize sentences in light of other § 3553(a) factors. See *Kimbrough v United States*, 128 S Ct 558, 574–75 (2007) (emphasizing the sentencing judge's greater familiarity with the individual case and defendant).

52 See *Rita*, 127 S Ct 2456.

53 Rita was convicted of perjury, obstruction of justice, and making false statements. *Rita*, 177 Fed Appx at 358.

54 *Rita*, 127 S Ct at 2460–61.

55 The Court acknowledged that in sentencing Rita, the judge had considered that "Rita had previously worked in the immigration service where he had been involved in detecting

sented evidence and arguments related to the three aforementioned factors, after which the trial judge asked questions about each factor before making his ruling.[56] After hearing the arguments from both Rita and the government, the trial judge concluded that the PSR's suggested range was appropriate and sentenced Rita to thirty-three months.[57]

Rita appealed his sentence to the Fourth Circuit, arguing that (1) his sentence was unreasonable because it was greater than necessary to comply with the purposes of sentencing set forth in § 3553(a)(2);[58] and (2) the trial judge did not adequately take into account his unique history and characteristics. On appeal, the Fourth Circuit issued a per curiam decision, affirming Rita's sentencing and concluding that a sentence imposed within the properly calculated Guidelines range is presumptively reasonable.[59] Following affirmation of his sentence Rita petitioned for a writ of certiorari, noting that the circuits were split over the appropriateness of the use of a presumption of reasonableness for within-Guidelines sentences. The Supreme Court subsequently granted Rita's petition.

At the time *Rita* was argued before the Supreme Court, the Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and DC Circuits had adopted a presumption of reasonableness for within-Guidelines sentences.[60] In contrast, the First, Second, Third, and Eleventh Circuits had declined to adopt the presumption.[61]

B. Substantive Reasonableness

With respect to Rita's first argument, the Court approved the presumption of reasonableness that several circuits applied when reviewing sentences within the recommended guidelines. The Court found that this presumption comports with both the SRA and the Sixth Amendment right to trial by jury.[62] In particular, the Court held that (1) the presumption is in harmony with the SRA's goal of having the sentencing court subject the defendant's sentence to thorough adversarial testing;

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criminal offenses" and that he had served in the military for more than twenty-five years and had received thirty-five medals, awards, and nominations. Id at 2469.

56 Id at 2462.

57 Id.

58 See note 38.

59 *Rita*, 177 Fed Appx at 358.

60 See note 41 and accompanying text.

61 See *United States v Jimenez-Beltre*, 440 F3d 514, 518 (1st Cir 2006) (en banc); *United States v Fernandez*, 443 F3d 19, 27 (2d Cir 2006); *United States v Cooper*, 437 F3d 324, 331 (3d Cir 2006); *United States v Talley*, 431 F3d 784, 788 (11th Cir 2005).

Subsequent to the *Rita* decision, the Ninth Circuit declined to adopt the presumption. See *United States v Carty*, 2008 WL 763770, *6 (9th Cir) (en banc) (explaining that a "presumption [of reasonableness] carries baggage as an evidentiary concept that [the en banc panel] prefer[s] not to import").

62 See *Rita*, 127 S Ct at 2463–68.

and (2) the Sixth Amendment is not violated since the presumption applies at the appellate level and does not require the sentencing judge to impose a certain sentence.[63] The Court disagreed that the presumption of reasonableness had recreated the mandatory pre-*Booker* scheme.[64] According to the Court, a sentence imposed by the trial court is permissible so long as it is reasonable in relation to the general sentencing goals articulated in the enacted portions of the SRA.[65] The Court also commented that the presumption had the benefit of employing a rule of law with which the courts were already familiar.[66] Nevertheless, the Court was clear to point out that although adopting this presumption was permissible, it was not required.[67] Justice David Souter, dissenting, cautioned that the majority's ruling would encourage trial judges simply to impose a sentence within the Guidelines range rather than go through the factfinding necessary to justify a sentence outside the range.[68]

C. Procedural Reasonableness

Rita's second argument was that his sentence was procedurally unreasonable.[69] Recall that after hearing Rita's and the government's arguments at the sentencing hearing, the trial judge simply remarked that the PSR's suggested range was not inappropriate.[70] The Court acknowledged that the trial judge's statement was not the legal standard for the imposition of a sentence, but reasoned that, given the context of the entire sentencing hearing, the judge understood Rita's arguments.[71] The Court held that the district court's statement of reasons,

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63 See id.

64 See id at 2465. But see Paul J. Hofer, *Empirical Questions and Evidence in* Rita v. United States, 85 Denver U L Rev 27, 31–32 (2007) (discussing empirical evidence revealing that within-Guidelines sentences are nearly always upheld as substantively reasonable).

65 See *Rita*, 127 S Ct at 2465.

66 See id at 2470–71 (Stevens concurring).

67 See id at 2463.

68 See id at 2488 (Souter dissenting). See also Nancy Gertner, Rita *Needs* Gall—*How to Make the Guidelines Advisory*, 85 Denver U L Rev 63, 71 (2007) (arguing that the presumption of reasonableness approved by *Rita* "will, once again, slide to 'mandatory,' or something short of that: namely, 'Guidelines-Lite'"); Berman and Bibas, 4 Ohio St J Crim L at 70 (cited in note 45) (cautioning that a presumptive or default system might harden into a mandatory one if the default system serves as safe harbor against appellate reversal).

69 See *Rita*, 127 S Ct at 2462. See also id at 2482–83 (Scalia concurring) (explaining that *Booker*'s "creation of reasonableness review gave appellate courts the necessary means to reverse a district court that appears not to have considered § 3553(a); considers impermissible factors; selects a sentence based on clearly erroneous facts; or does not comply with § 3553(c)'s requirement for a statement of reasons" and that "this procedural review will indirectly produce, over time, reduction of sentencing disparities").

70 Id at 2469.

71 Id.

while brief, was "legally sufficient" and instructed that "[t]he sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decision-making authority."[72] The Court also recognized that the thoroughness of the explanation required depends on the circumstances, and noted that a brief explanation would suffice even when the defendant or the government put forth "nonfrivolous reasons" for imposing a non-Guidelines sentence. "We cannot read the statute (or our precedent) as insisting upon a full opinion in every case."[73] Nonetheless, "Where the defendant or prosecutor presents nonfrivolous reasons for imposing a different sentence . . . the judge will normally go further and explain why he has rejected those arguments."[74] Although the Court concluded the district court's § 3553(c) statement was permissible, the Court recognized that "the judge might have said more."[75]

Notwithstanding the Court's particular holding in Rita's case, Justice Antonin Scalia, in his concurrence (which was joined by Justice Clarence Thomas), emphasized the importance of the statement of reasons for appellate review.[76] Similarly, the majority stressed that "[j]udicial decisions are reasoned decisions. Confidence in a judge's use of reason underlies the public's trust in the judicial institution."[77] And "[b]y articulating reasons, even if brief, the sentencing judge not only assures reviewing courts (and the public) that the sentencing process is a reasoned process but also helps that process evolve."[78] Perhaps the Court's most important statement with respect to § 3553(c) statements and their relationship to sentencing reform was the following:

> The sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals court. That being so, his reasoned sentencing judgment, resting upon an effort to filter the Guidelines' general advice through § 3553(a)'s list of factors, can provide relevant information to both the court of appeals and ultimately the [ ] Commission. The reasoned responses of these latter institutions to the sentencing judge's explanation should help the Guidelines constructively evolve over time, as both Congress and the Commission foresaw.[79]

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72 Id at 2468.
73 *Rita*, 127 S Ct at 2468.
74 Id.
75 Id at 2469.
76 See id at 2482–83 (Scalia concurring).
77 *Rita*, 127 S Ct at 2468 (majority).
78 Id at 2469.
79 Id.

This discussion reflects the Court's belief that the statement of reasons provided by the trial judge plays a central role in the evolution of the Guidelines.[80]

In his concurrence, Justice Scalia suggested that reasonableness review could only be procedural;[81] nonetheless, procedural review would have both a direct and indirect impact on uniformity.[82] The procedural provisions established in *Booker* gave appellate courts the direct means to reverse a district court.[83] Procedural review would also indirectly impact uniformity through the requirement that judges explain their decisions. These explanations, as Justice Scalia argued, would help the Commission tweak the Guidelines to reflect the desirable sentencing practices of the district courts and "further[] the congressional purpose of ironing out sentencing differences, and avoiding excessive sentencing disparities."[84] According to Justice Scalia, the Commission's modifications of the Guidelines would help achieve further uniformity because district courts would have no reason to depart from the Guidelines range.[85]

D. Ambiguities and Inconsistencies in *Rita*

The *Rita* opinion has been criticized for raising more questions than it answers.[86] The circuit split over the standard of review for procedural reasonableness that emerged less than two months after *Rita* was, therefore, foreseeable.[87] "The opinions in *Rita* reveal[] not only that the Court is still struggling with its Sixth Amendment jurisprudence, but also that the Justices have divergent views on many other dynamic issues raised by the *Booker* remedy of an advisory guideline system."[88] In fact, several scholars have opined that *Rita* did very little,

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80 See, for example, *Blakely v Washington*, 542 US 296, 326–37 (2004) (Kennedy dissenting) ("Constant, constructive discourse between our courts and our legislatures is an integral and admirable part of the constitutional design. . . . Sentencing guidelines are a prime example of this collaborative process.").

81 *Rita*, 127 S Ct at 2476 (Scalia concurring). See also Jeffrey S. Sutton, *An Appellate Perspective on Federal Sentencing after* Booker *and* Rita, 85 Denver U L Rev 79, 83–85 (2007).

82 *Rita*, 127 S Ct at 2482–83 (Scalia concurring).

83 See note 69 and accompanying text.

84 *Rita*, 127 S Ct at 2482 (Scalia concurring).

85 Id at 2483 n 7.

86 Douglas A. Berman, Rita*, Reasoned Sentencing, and Resistance to Change*, 85 Denver U L Rev 7, 8 (2007). The *Rita* decision failed to produce a coherent vision of the Court's sentencing jurisprudence. Although *Rita* was decided 8-1, with Justice Souter providing the lone dissent, four separate opinions were written. Justice Breyer wrote for the majority, with Justices Scalia and Stevens writing concurring opinions. Justices Scalia and Thomas only joined Part III of the majority opinion, and Justice Thomas joined Justice Scalia's concurring opinion. Justice Ginsburg joined all but Part II of Justice Stevens's concurring opinion.

87 See Part IV.

88 Berman, 85 Denver U L Rev at 8 (cited in note 86).

if anything, to change the status quo.[89] The Court approved the appellate courts' adoption of a presumption of reasonableness, while also approving others circuits' choice to not adopt the presumption. *Rita* provides considerable discussion (and endorsement)—in the form of dicta[90]—of statements of reasons in support of sentencing determinations, while holding that these statements may be brief when judges impose "conceptually simple"[91] sentences.

Rita's procedural reasonableness holding failed to clarify how the lower federal courts should (1) determine when conceptually challenging issues require "the judge to write more extensively"; and (2) craft common law sentencing doctrines under the advisory system.[92] This failure is particularly troubling given *Booker*'s assurance that, in the advisory-Guidelines era, the Commission's collection and analysis of district courts' sentencing determinations and appellate decisionmaking with respect to these determinations would "move sentencing in Congress' preferred direction."[93] To be sure, thoroughly reasoned sentencing statements were important components of Congress's objectives of clarifying the sources used to inform sentencing (honesty) and sentencing defendants in accordance with their level of culpability (proportionality).[94] *Rita* appears to have failed at keeping *Booker's* promise to honor the SRA.[95]

IV. THE CIRCUIT SPLIT OVER "PROCEDURAL REASONABLENESS" POST-*RITA*

Both the *Booker* and *Rita* rulings underscored the importance of reasoned decisions by the district courts for the evolution of the Guidelines.[96] Nonetheless, *Rita* concluded that neither the SRA nor Supreme Court precedent "insist[s] upon a full opinion in every case."[97] Very shortly after the *Rita* ruling, the lower appellate courts

89 See, for example, id at 22. According to Professor Berman, "With the *Rita* decision appearing to bless the existing post-*Booker* universe, it is hardly surprising that nearly every major circuit decision after *Rita* concludes that the Supreme Court's work is a ratification of that circuit's pre-*Rita* jurisprudence." Id.

90 See id at 14.

91 See id at 17, citing *Rita*, 127 S Ct at 2469.

92 Berman, 85 Denver U L Rev at 17. See also *Rita*, 127 S Ct at 2482 (Scalia concurring).

93 See *Booker*, 543 US at 264. See also *Rita*, 127 S Ct at 2483 (Scalia concurring).

94 See Part V.A.

95 Consider Berman, 85 Denver U L Rev at 22 (cited in note 86) (explaining how courts have applied *Rita* such that the outcomes of most cases do not differ from the outcome under pre-*Rita* jurisprudence).

96 See Parts II and III.C.

97 *Rita*, 127 S Ct at 2468.

were divided over the level of specificity required from the district courts with respect to § 3553(c) statements.

Rather than a clear dichotomy emerging among the circuits, these appellate court rulings fall along a spectrum: some requiring very little, if any, explanation of sentencing determinations and others requiring thoroughly reasoned and fact-specific sentencing opinions. At one end of the spectrum are the Seventh and Tenth Circuits' holdings in *United States v Gammicchia*[98] and *United States v Cereceres-Zavala*,[99] respectively. These two circuits held that conclusory sentencing opinions are procedurally reasonable for within-Guidelines sentences and judges need not discuss parties' specific sentencing arguments.[100] The First and Sixth Circuits' decisions in *United States v Cirilo-Muñoz*[101] and *United States v Thomas*,[102] respectively, are at the other end of the spectrum. These circuits hold that a district court's sentences are procedurally unreasonable if sentencing judges' consideration of § 3553(a) factors and reasoning for imposing the sentence are unclear from the context and record.[103] In between these positions is the Eighth Circuit's decision in *United States v Jones*.[104] In *Jones*, the Eighth Circuit ruled that district courts' sentencing determinations will be considered procedurally reasonable when the record demonstrates that the sentencing judge "heard and acknowledged" the parties' sentencing arguments.[105]

Complicating matters even further is an intracircuit conflict that has emerged in the Seventh Circuit. In *Gammicchia*, the Seventh Cir-

98 498 F3d 467 (7th Cir 2007).

99 499 F3d 1211 (10th Cir 2007).

100 See *Gammicchia*, 498 F3d at 469 (holding the sentencing judge's statement that he weighed the competing § 3553(a) factors was sufficient); *Cereceres-Zavala*, 499 F3d at 1217 (holding that, although the sentencing judge provided no direct response to Cereceres's requests for departure, his citation to the PSR's calculation method and recitation of the Guidelines range was sufficient for § 3553(c) purposes).

101 504 F3d 106 (1st Cir 2007) (per curiam). The First Circuit panel issued three separate opinions. Judge Juan Torruella voted for remand because the sentence was both substantively and procedurally unreasonable. Judge Kermit Lipez voted for remand because the sentence was procedurally unreasonable. Judge Sandra Lynch dissented.

102 498 F3d 336 (6th Cir 2007).

103 See *Cirilo-Muñoz*, 504 F3d at 123, 126 (Torruella concurring); *Thomas*, 498 F3d at 341. The Second Circuit, in *United States v Baker*, 2007 WL 4006103 (2d Cir), concluded that nonfrivolous arguments made by a party for a non-Guidelines sentence, at minimum, required the district court to clearly articulate why it did not consider or choose a non-Guidelines sentence. See id at *2. The court noted that a district court's statement that it had considered the § 3553(a) factors is insufficient when "there is nothing in the record [that] show[s] that the district court actually complied." Id. *Baker*, however, was a ruling by summary order and therefore has no precedential effect. See Second Circuit Rule 0.23(b). Nevertheless, under Federal Rule of Appellate Procedure 32.1(a) and Second Circuit Rule 0.23(c)(1), citation to summary orders filed after January 1, 2007, is permitted.

104 493 F3d 938 (8th Cir 2007).

105 See id at 941.

cuit affirmed a district court's within-Guidelines sentence and did not require that the judge explain how he accounted for the § 3553(a) factors.[106] Slightly over two months later, a different Seventh Circuit panel, in *United States v Miranda*,[107] held that a district court must explain how it considered § 3553(a) factors and why the sentence imposed is appropriate when a party challenges a within-Guidelines sentence as unreasonable.[108] Though *Miranda* has not explicitly overruled *Gammicchia*, the two opinions have taken contradictory positions regarding what constitutes "procedural reasonableness."[109] Parts IV.A and IV.B explore how the circuits have interpreted the Supreme Court's "procedural reasonableness" requirement differently.

A. Seventh and Tenth Circuits: Discussion of Specific § 3553(a) Factors Is Not Required

Neither the Seventh Circuit nor the Tenth Circuit require the sentencing judge to specifically articulate how the § 3553(a) factors were considered for within-Guidelines sentences. In *Cereceres-Zavala*, the Tenth Circuit reasoned that a within-Guidelines sentence is procedurally reasonable even when the trial judge neither mentions nor expressly rules on a party's motion for a sentence variance.[110] The court explained that, when a sentence falls within the Guidelines range, a district court need only provide "a general statement of the reasons for its imposition of the particular sentence"[111] and "nothing in Section 3553(c) requir[es] a specific explanation."[112] According to the court, its holding comports with *Rita* because "[a]lthough the sentencing court provided no direct response at all to Cereceres's requests for departure, its citation of the PSR's calculation method and recitation of the suggested imprisonment range amply fulfilled § 3553(c)'s requirement of a general statement noting the appropriate Guidelines range and how it was calcu-

106 See 498 F3d at 469.

107 505 F3d 785 (7th Cir 2007).

108 See id at 791–92.

109 The *Miranda* opinion does not mention *Gammichia* and was not part of an en banc rehearing. See generally id. Courts citing *Miranda* have not commented on its apparent conflict with *Gammichia* and have instead cited the case for different propositions. See, for example, *United States v Padilla*, 520 F3d 766, 773 (7th Cir 2008) (citing *Miranda* for the proposition that judges should first calculate the advisory-Guidelines range before considering § 3553(a) factors). Thus, the Seventh Circuit's current position with respect to appellate review in this area is, at best, unsettled. This confusion is compounded by the fact that some lower courts have cited *Miranda* as the basis for justifying very sparse sentencing statements that seem more consistent with *Gammichia*. See, for example, *United States v Castaldi*, 2007 WL 4198215, *4 (ND Ind).

110 See *Cereceres-Zavala*, 499 F3d at 1217–18.

111 Id at 1217.

112 Id.

lated."[113] The court also explained that the absence of a thorough explanation by the district court reveals that the judge "must have believed there was not much more to say."[114]

Taking a slightly different approach from the Tenth Circuit, which held that a within-Guidelines sentence is procedurally reasonable even when the judge does not mention that she considered § 3553(a) factors, the Seventh Circuit (in *Gammicchia*) emphasized that the procedural reasonableness of the appellant's sentence was based upon the fact that the district court claimed to have considered the § 3553(a) factors.[115] The absence of any discussion of the specific factors that were considered and how these factors were weighed did not render the appellant's sentence procedurally unreasonable. Writing for the court, Judge Richard Posner noted:

> The [§ 3553(a)] factors are intangibles, "weighable" only in a metaphorical sense, that the sentencing judge is in a better position than the appellate judges to place in the balance with competing considerations. The sentencing judge in this case said he did that and we have no reason to doubt that he did.[116]

Thus, the court concluded that appellate review of (properly calculated) within-Guidelines sentences is necessarily "very limited"[117] because (1) the within-Guidelines sentence already "reflects the confluence of the judgments of the Sentencing Commission and the sentencing judge";[118] and (2) the § 3553(a) factors are "vague and nondirectional."[119]

B. First, Sixth, and Seventh Circuits: Discussion of Specific § 3553(a) Factors Is Required

In the three months following the Seventh Circuit's *Gammicchia* ruling, the First, Second, and Sixth Circuits ruled that a sentence is procedurally unreasonable when the trial record does not make clear the district judge's consideration of the relevant § 3553(a) factors, including the reasoning for imposing the sentence.[120] In *Miranda*, de-

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113 Id.

114 *Cereceres-Zavala*, 499 F3d at 1217, quoting *Rita*, 127 S Ct at 2469.

115 See 498 F3d at 469.

116 Id at 469.

117 Id at 468.

118 Id. In *Miranda*, however, the court noted that the Guidelines only reflect general considerations and the district court must focus on § 3553(a) factors as they apply to the particular defendant. 505 F3d at 796.

119 *Gammicchia*, 498 F3d at 468–69.

120 See *Cirilo-Muñoz*, 504 F3d at 123; *Baker*, 2007 WL 4006103 at *2; *Thomas*, 498 F3d at 341. As discussed in note 103, the Second Circuit's *Baker* decision lacks precedential effect because it was a summary order.

cided a mere few months after *Gammicchia*, the Seventh Circuit also went against its statements in *Gammicchia* and required that a district court explain the reasoning for imposing a sentence.[121]

In one of the clearest articulations for the need to provide reasons for sentencing determination, the Sixth Circuit stated that the *Rita* decision

> reinforces [the] conclusion that reasonableness review requires [an inquiry] into both the length of the sentence and the factors evaluated and the procedures employed by the district court in reaching its sentencing determination. *Rita* exhorts the sentencing judge to satisfy the procedural requirement of [setting] forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority.[122]

Based on its reading of *Rita*, the Sixth Circuit reasoned that proper appellate review requires the court to examine the sentencing transcript to determine whether (1) the judge adequately considered the relevant § 3553(a) factors and clearly stated his reasons for imposing the chosen sentence; and (2) the sentence imposed was substantively reasonable.[123] While recognizing that the *Rita* decision made clear that the amount of reasoning required varies according to context, the Sixth Circuit emphasized that the appellate courts must vacate a sentence when the trial judge's reasoning is not clear from the context and record.[124]

Similarly, the First Circuit emphasized that the duty of the courts of appeals in determining the reasonableness of a particular sentence is to conduct an "analysis of the sentence and the reasons given by the sentencing court in reaching its conclusions, tested against the record of the case to determine whether the reasoning is supported by the record, and ultimately, whether the sentence is reasonable."[125] Accord-

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121 See *Miranda*, 505 F3d at 796.

122 *Thomas*, 498 F3d at 339–40 (quotation marks and citations omitted), quoting *United States v Liou*, 491 F3d 334, 338 (6th Cir 2007).

123 *Thomas*, 498 F3d at 340, quoting *Liou*, 491 F3d at 339.

124 *Thomas*, 498 F3d at 340, quoting *Liou*, 491 F3d at 338, 339 n 4. The court acknowledged that the district court's statements bore some resemblance to the statement of reasons approved by the Supreme Court in *Rita* but distinguished the case at hand. 498 F3d at 341. Whereas the record in *Rita* made clear that the trial judge considered Rita's arguments before rejecting them, the record in *Thomas* failed to provide such clarity. See id.

The dissent in *Thomas* noted that a "ritual incantation of the factors" by the trial judge was not required to affirm a sentence. See 498 F3d at 342 (Forester dissenting). The majority pointed out, however, that it was the dissent, and not the district court, that summarized many of defendant's arguments for a reduced sentence and put forth reasons why these arguments may have been rejected by the district court. See id at 341 n 3 (majority). The majority asserted that it was not the duty of the appellate court to supply reasons for the imposed sentence. See id.

125 *Cirilo-Muñoz*, 504 F3d at 118 (Torruella concurring).

ing to the court, *Rita* underscored that: (1) thoroughly reasoned sentencing statements are crucial in assisting appellate courts in conducting reasonableness review and furthering the "weighty goals of transparency and credibility for the justice system";[126] (2) the district court's rationale for a sentencing determination "offers the defendant, the government, the victim, and the public a window into the decision-making process[,] . . . promot[ing] respect for the adjudicative process, by demonstrating the serious reflection and deliberation that underlies each criminal sentence";[127] and (3) the district court's focus on the Guidelines range, rather than the rationale for the sentence, "is utterly at odds with the requirements of § 3553(c) and the important public goals served by the sentencing explanation."[128] The First Circuit also stressed that the heavy workload of the district courts was no excuse for inadequate explanations because nothing district courts do is more important than sentencing decisions[129] and "[t]he requirement that a statement of reasons be given is hardly . . . a mere formalism."[130]

Shortly after *Gammicchia*, a different Seventh Circuit panel, in *Miranda*, held that "[w]hen a defendant challenges a within-[G]uidelines sentence as unreasonable, the judge must explain why the sentence imposed is appropriate in light of the section 3553(a) factors."[131] The *Miranda* court further stated that "a rote statement that the judge considered all of the relevant factors will not always suffice."[132] While acknowledging that some circumstances will only require brief explanations, and arguments that are clearly without merit can "be passed over in silence,"[133] the court cautioned that "when a court gives little or no attention to the defendant's principal [nonfrivolous] argument . . . we cannot have confidence that the judge adequately considered the section 3553(a) factors."[134] Furthermore, when the judge fails to comment, she "is likely to have committed an error or oversight."[135] According to

126 Id at 132 (Lipez concurring).

127 Id.

128 Id at 133. See also *Rita*, 127 S Ct at 2468 (Scalia concurring) ("Confidence in a judge's use of reason underlies the public's trust in the judicial institution. A public statement of those reasons helps provide the public with the assurance that creates that trust.").

129 *Cirilo-Muñoz*, 504 F3d at 132 (Lipez concurring).

130 Id at 135–36. According to Judge Juan Torruella, the district court's statement was procedurally unreasonable because it provided too little insight into its reasoning. Id at 123 (Torruella concurring).

131 *Miranda*, 505 F3d at 792.

132 Id at 796, citing *United States v Cunningham*, 429 F3d 673, 679 (7th Cir 2005). See also *United States v Cooper*, 437 F3d 324, 329 (3d Cir 2006).

133 *Miranda*, 505 F3d at 792. "If anyone acquainted with the facts would have known without being told why the judge had not accepted the argument, then the judge need not specifically comment on that argument." Id.

134 Id at 792.

135 Id.

the Seventh Circuit, the ultimate test of whether a sentencing judge's explanation is sufficient for the purposes of *Rita* is if the appellate court can tell whether the district court made an individualized analysis of the party's factually and legally supported sentencing arguments under § 3553(a).[136]

C. Eighth Circuit: § 3553(a) Factors Need Only Be "Heard and Acknowledged"

Less than three weeks after the Supreme Court's ruling in *Rita*, the Eighth Circuit ruled that under *Rita*, a simple statement of reasons would satisfy § 3553(c) when it is obvious from the record that the sentencing judge considered the evidence and arguments.[137] In *Jones*, the court concluded that the record sufficiently demonstrated that the district court "heard and acknowledged" the arguments from both Jones and the government. The court also explained that it had "not held that the brevity of the record alone gives rise to a claim of per se unreasonableness."[138] *Jones* recognized that a prior Eighth Circuit ruling "urge[d] each district court to make a clear record of its reasons for imposing a particular sentence with explicit reference to § 3553(a),"[139] but the court also noted that "[i]t is not necessary for the district court to provide a mechanical recitation of the § 3553(a) factors so long as it is clear from the record that the court considered them."[140]

D. Summary

The circuits disagree over the proper standard for determining procedural reasonableness after the Supreme Court's ruling in *Rita*. The Tenth Circuit and one Seventh Circuit panel (in *Gammicchia*) have held that district courts are not required to discuss how they considered and weighed specific § 3553(a) factors when imposing within-Guidelines sentences. In contrast, the First and Sixth Circuits, as well as a different Seventh Circuit panel (in *Miranda*), ruled that sentencing judges must specifically address parties' nonfrivolous sentencing arguments, and that the reasoning for a particular sentence must be clear from the trial record. In the middle of these positions is the Eighth Circuit's holding in *Jones*. Similar to the First and Sixth Circuits, the *Jones* court emphasized the importance of context and record in determining the adequacy of § 3553(c) statements. But *Jones*

136 Id at 796.
137 *Jones*, 493 F3d at 941.
138 Id at 940.
139 Id at 941.
140 Id.

did not go as far as *Thomas* or *Cirilo-Muñoz* in underscoring the importance of identifying and understanding the trial judge's reasoning behind imposing a particular sentence. The *Jones* court held that a sentence was reasonable if the record demonstrates that the district court has "heard and acknowledged" the parties claims.[141] *Jones* also did not go as far as the Seventh Circuit in *Gammicchia*, which stated that such appeals were frivolous. Rather, *Jones* was satisfied with the district court's conclusory statement regarding its consideration, and ultimate rejection, of the appellant's § 3553(a) claims.

V. ASSESSING THE CIRCUIT SPLIT

Circuits on both sides of the split highlight language in the *Rita* opinion as supporting their interpretation of the procedural reasonableness requirement. Recall that the Seventh (in *Gammicchia*), Eighth, and Tenth Circuits note that the Supreme Court refuses to read the SRA or prior case law as insisting that district courts provide thorough explanations of sentencing determinations when parties present nonfrivolous arguments requesting a non-Guidelines sentence. The First, Sixth, and Seventh (in *Miranda*) Circuits focus on *Rita*'s lengthy discussion of the importance of the district court clearly demonstrating how it considered the parties' sentencing arguments. Also recall that the Second Circuit, in a ruling lacking precedential effect, interprets *Rita* as requiring the district court to clearly state why it did not consider or choose a non-Guidelines sentence when a party makes a nonfrivolous argument.[142] Given the obvious inconsistencies and ambiguities in *Rita*'s procedural reasonableness holding, it is somewhat surprising that the circuits fail to explicitly and thoroughly harmonize their reading of *Rita* with *Booker* and the SRA in order to buttress their reasoning.[143] Such an analysis is critical to understanding and clarifying the procedural component of reasonableness review in the advisory-Guidelines era.

Which circuits read *Rita* correctly and why? How can these various readings be reconciled with the SRA and *Booker*? Part V.A discusses the considerable power that the SRA gave the federal judiciary to devel-

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141 *Jones*, 493 F3d at 941.

142 See note 103.

143 In his concurrence in *Cirilo-Muñoz*, Judge Lipez emphasized the importance of sentencing explanations to the overall sentencing scheme and the increased importance of district courts' sentencing explanations in the post-*Booker* world. 504 F3d at 131–32 (Lipez concurring). Judge Lipez also noted that sentencing explanations "further[] the weighty goals of transparency and credibility for the justice system." Id at 132. However, while Judge Lipez explicitly addressed these issues, his treatment cannot be considered "thorough" because he neglected to specifically draw from the language in *Booker* and the text and legislative history of the SRA to fully support and justify his reasoning. Moreover, Judge Lipez failed to discuss the considerable power and influence that Congress gave the federal judiciary to develop and shape sentencing practices and policy.

op and shape sentencing policy and how this power was meant to operate primarily through judges' reasoned sentencing opinions. Part V.B argues that the First, Sixth, and Seventh (in *Miranda*) Circuits' reading of *Rita* is most consistent with both the SRA's and *Booker*'s emphasis on transparency and rationality in the sentencing process.

A. The SRA and the Judiciary's Intended Role in Sentencing Reform

The SRA requires that judges play a central role in developing better-reasoned, uniform sentencing. The SRA attempted to make it easier for judges to determine how and why other judges ruled in similar situations by providing them with the necessary language and tools to describe the qualities—offense and offender facts—that make offenders similar to or dissimilar from one other.[144] Under the SRA, the federal judiciary retains considerable power to develop a common law of sentencing and shape the content and direction of federal sentencing law.[145] This influence operates primarily through judges' reasoned opinions, which allow judges to contribute their insights and wisdom to the development of rules governing federal sentencing.[146] As this Part discusses, both the text of the SRA and the legislative history reveal that Congress expected judges to have an influential role in the sentencing process.[147]

The SRA focuses on clarifying the sources used to inform sentencing (transparency) and sentencing defendants in a manner consistent with the severity of their particular conduct (rationality). This focus on transparency and rationality made careful judicial reasoning, demonstrated through § 3553(c) statements, central to the Guidelines.[148] These

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144 See Senate Report at 59–60 (cited in note 4).

145 See id. The Senate Report explains that a judge's statement of reasons for imposing a particular sentence can be used by each participant in the criminal justice system, including appellate courts reviewing sentences, to assist in the development of a consistent sentencing philosophy. See also Berman, 11 Stan L & Policy Rev at 99 (cited in note 2).

146 See Berman, 11 Stan L & Policy Rev at 103–04 (cited in note 2).

147 See Kate Stith and Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 Wake Forest L Rev 223, 244 (1993):

> Critics of the idea of an administrative sentencing commission expressed the fear that its sentencing guidelines might unduly limit the discretion of the sentencing court. . . . As if to respond to this concern, the measure approved by the Senate Judiciary Committee in late 1977 deliberately granted the sentencing judge significant discretion to depart from the relevant guideline sentence.

148 Commission Report at 12 (cited in note 4). "The guidelines impose a logical and rational order on most federal offenses and clarify the ambiguities that result from having a superfluity of sections describing virtually identical conduct. . . . In short, the guidelines have helped to rationalize the federal criminal law." Id at 136. "Transparency was advanced by requiring each judge to state in open court the reason for its imposition of the particular sentence and to provide a written record of these reasons." Id at 12 (quotation marks omitted).

statements by trial judges, combined with appellate review, were key to the dialogues within the judiciary and between the judiciary and the Commission, which was designed to help "develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing."[149] The Senate Report supporting the SRA states:

> The [SRA] requires the sentencing judge to announce how the guidelines apply to each defendant and to give his reasons for the sentence imposed. The judge is also required to give the reason for imposing sentence at a particular point within the guidelines or, if the sentence is outside the guidelines, specific reasons for imposing a sentence of a different kind or length than recommended in the guidelines.
>
> The statement of reasons can be used by each participant in the Federal criminal justice system charged with reviewing or implementing a sentence. It will assist the appellate courts in reviewing the reasonableness of a sentence outside the guidelines, and in determining whether a sentence within the guidelines is the result of correct or incorrect application of the guidelines.[150]

Congress believed these carefully contemplated and thoroughly justified sentencing determinations would enable judges to contribute their own insights, experiences, and wisdom to a common law dialogue about sentencing policy and practice.[151] The Guidelines encourage both moral judgment and moral reasoning, and judges are expected to "pronounce and defend in a principled fashion the way in which [broad normative concerns] find expression in specific sentencing outcomes."[152] In upholding the constitutionality of the SRA in *Mistretta v United States*,[153] the Supreme Court commended Congress's effort to capitalize on the "uniquely judicial view on the uniquely judicial subject of sentencing."[154]

Pursuant to 28 USC § 994(o)–(p), the Commission periodically reviews and revises previously promulgated Guidelines and submits these amendments to Congress no later than the first day of May each year. On July 31, 2007, the Commission published a notice of policy priori-

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149 28 USC § 991(b)(2). See also Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 Cal L Rev 1, 17, 22 (1991).

150 Senate Report at 59–60 (cited in note 4) (citations omitted); See also Commission Report at 12 (cited in note 4).

151 See Senate Report at 60 (cited in note 4). See also Norval Morris, *Towards Principled Sentencing*, 37 Md L Rev 267, 274–75 (1977) (arguing that judges are better suited than legislatures to consider "the subtleties of crime-to-criminal relationships essential to just sentencing").

152 Berman, 11 Stan L & Policy Rev at 103–04 (cited in note 2).

153 488 US 361 (1989).

154 Id at 408.

ties identifying nine objectives.[155] Of particular relevance to the current discussion concerning the centrality of § 3553(c) statements in sentencing reform was the third objective:

> Continuation of [the Commission's] work with the congressional, executive, and judicial branches of the government and other interested parties on appropriate responses to *United States v. Booker* and *United States v. Rita* including any appropriate amendments to the guidelines or other changes to the *Guidelines Manual* to reflect those decisions, as well as continuation of its monitoring and analysis of post-*Booker* federal sentencing practices, data, case law, and other feedback, *including reasons for departures and variances stated by sentencing courts*.[156]

Consistent with the SRA, the Commission emphasized the importance of monitoring and analyzing judicial reasoning in sentencing determinations. It is surprising, however, that the Commission seems to limit this focus to departures and variances when the Supreme Court has held otherwise.[157] *Booker* commands appellate courts to consider whether the district court accounted for relevant § 3553(a) factors,[158] and *Rita* makes clear that the rebuttability of the presumption of reasonableness for a sentence within the Guidelines range is "real" and that appellate courts must review sentences individually whether they are inside or outside that range.[159] When either party presents nonfrivolous reasons for imposing a non-Guidelines sentence, it must be clear from either the record or the § 3553(c) statement why the judge rejected those arguments.[160]

B. Honoring the SRA: Requiring Transparency and Rationality in Federal Sentencing Post-*Booker*

The SRA has always contained sections that invited subjectivity and potentially compromised consistency and predictability.[161] Although these provisions have been criticized for conflicting with the congres-

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155 See Commission, Sentencing Guidelines for United States Courts, 72 Fed Reg 41795 (2007).

156 Id (emphasis added).

157 But see Ilya Beylin, Comment, Booker*'s Unnoticed Victim: The Importance of Providing Notice Prior to Sua Sponte Non-Guidelines Sentences*, 74 U Chi L Rev 961, 976 (2007) ("The legal force of pre-*Booker* rules and doctrines applying the departure concept as established in [§ 3553(b)(1) has been] annihilated.").

158 See 543 US at 261.

159 See 127 S Ct at 2473–74 (Stevens concurring).

160 Id at 2468.

161 Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 Hofstra L Rev 1, 13–14 (1988).

sional objectives of honesty, uniformity, and proportionality,[162] both Congress and the Supreme Court believe that such disciplined discretion is integral to the proper functioning and evolution of the Guidelines.[163] Transparency and rationality in the sentencing process, facilitated through "thoughtful, dynamic, sophisticated and purposeful sentencing opinions,"[164] were important components of this desired evolution.[165] As discussed in Part II, the Supreme Court, in *Booker*, assured Congress that the advisory-Guidelines system would retain many important features of the SRA that would "continue to move sentencing in Congress' preferred direction."[166]

Despite the subjectivity of sentencing decisions, district courts must clearly explain the reasoning for their sentencing decisions to enable appellate courts to conduct the proper type of review.[167] Congress and the Supreme Court require federal appellate courts to give appropriate deference to district courts' sentencing determination. *Rita* also clarified that the new standard of review in the advisory-Guidelines era would be abuse of discretion, replacing the de novo review standard for non-Guidelines sentences in the pre-*Booker* era. Deference to a sentencing determination, however, requires that the appellate court understand the basis for that determination.[168] This logic is supported in the recent decision, *Gall v United States*,[169] in which the Court underscored the fact that an appellate court must clearly demonstrate that the district court abused its discretion based on the sentencing judge's reasoned decision.[170] The Court explained that the circuit court's analysis of what it believed to be different errors in the district court's reasoning "more closely resembled *de novo* review."[171]

Similarly, the de facto mandatory system likely to result from appellate courts adopting a presumption of reasonableness for within-Guidelines sentences but not requiring clear reasons for such sentences would be in tension with *Booker* and *Rita* as well.[172] As *Booker* and *Rita*

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162 See Paul J. Hofer and Mark H. Allenbaugh, *The Reason behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 Am Crim L Rev 19, 75–80 (2003).

163 See the discussion in Parts II and V.A.

164 Berman, 11 Stan L & Policy Rev at 106 (cited in note 2).

165 See Commission Report at 12 (cited in note 4).

166 *Booker*, 543 US at 264.

167 Although *Rita* does not articulate a clear legal standard for the procedural component of reasonable review, the Court requires that district courts subject defendants' sentences "to the thorough adversarial testing contemplated by federal sentencing procedure." 127 S Ct at 2465.

168 See *Cirilo-Muñoz* 504 F3d at 132 ("In short, [appellate courts] cannot do [their] job of appellate review if [they] must guess at the reasons underlying the district court's sentence.").

169 128 S Ct 586 (2007).

170 See id at 600–02.

171 Id at 600.

172 See Berman and Bibas, 4 Ohio St J Crim L at 70 (cited in note 45).

underscored, and *Gall* reiterated, while the Guidelines are advisory, the application of § 3553(a) is mandatory.[173] Thus, the most important task of the appellate courts is to ensure that the district court gave the § 3553(a) factors meaningful consideration, regardless of whether the sentence imposed is inside or outside the Guidelines range. Furthermore, district courts must demonstrate that they truly treated the Guidelines as advisory in order for their sentences to comport with *Booker*.[174] Under the framework established by the SRA, courts demonstrate their independent determination of a defendant's sentence by providing carefully reasoned sentencing opinions.[175]

The Commission referred to the increased transparency and rationality in federal sentencing as "the most basic achievement of sentencing reform . . . so fundamental that it can easily be taken for granted."[176] The remainder of this Comment argues that thoroughly reasoned judicial opinions remain key components of this "basic achievement" sentencing reform as envisioned by the SRA, and that the approach of the First, Second, Sixth, and Seventh (in *Miranda*) Circuits is most consistent with these objectives.

1. Transparency.

Transparency in sentencing greatly increases congressional and judicial understanding of the reasons for variation in sentencing.[177] Such transparency remains necessary to "dispel concerns that sentences vary arbitrarily among judges, or that irrelevant factors, such as race or ethnicity significantly affect sentencing."[178] Moreover, transparency "facilitate[s] debate and evaluation of the merits of particular policies" as well as assists in the anticipation of the effects of changes in sentencing policy.[179] Perhaps more importantly, transparency "reduces the possibility of surprise and confusion regarding the reasons for the sentence ultimately imposed."[180] Transparent sentencing opinions also facilitate the development and maintenance of "the richest sources of information that have ever been assembled on federal

173 See *Rita*, 127 S Ct at 2463.

174 See 543 US at 251. *Booker* addressed the Sixth Amendment concerns raised in *Apprendi* by permitting judges to find sentencing facts to increase defendants' Guidelines range so long as the Guidelines are treated as advisory.

175 See Part V.A.

176 Commission Report at 136 (cited in note 4).

177 Id at 137.

178 Id.

179 Id.

180 Commission Report at 12 (cited in note 4).

crimes, federal offenders, and sentences imposed, and are invaluable resources for policy research."[181]

Rita emphasized that the district judges should "set forth enough [detail] to satisfy the appellate court that [they] ha[ve] considered the parties' arguments and ha[ve] a reasoned basis for exercising [their] own legal decision-making authority."[182] The First, Sixth, and Seventh (in *Miranda*) Circuits understand *Rita* unambiguously to require the courts of appeals to inquire about the "factors evaluated and the procedures employed by the district court in reaching its sentencing determination."[183] This interpretation ensures that the context and record leave no doubt about "the district court's consideration of the relevant § 3553(a) factors and its reasoning for imposing the sentence that it did."[184]

While acknowledging that the extent of the reasoning required from the district court varies with context, the First, Sixth, and Seventh (in *Miranda*) Circuits require that the sentencing judge make her reasoning clear in either the trial transcript or official sentencing statement. These rulings honor the flexibility established in *Rita* of examining the totality of the circumstances surrounding the district court's sentencing determination, but refuse to infer a rationale that is not readily identifiable from the context and record.[185] Conversely, the Seventh (in *Gammicchia*), Eighth, and Tenth Circuit rulings allow district courts' sentencing determinations to remain rather opaque, save their reference to the now-advisory Guidelines. The Tenth Circuit condoned the district court's failure to directly respond to either of the defendant's motions for a sentencing reduction based on § 3553(a) factors, reasoning that the context and record of the sentencing hearing made the judge's rationale clear. However, in defending the outcome, the court was unable to identify anything other than the district court's reliance on the PSR's calculation of the suggested Guidelines range.[186] Slightly less disturbingly, the Eighth Circuit understands *Rita*'s procedural reasonableness requirement to be satisfied when the record reveals that the

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181 Id at 137.

182 127 S Ct at 2468.

183 *Thomas*, 498 F3d at 339–40, quoting *United States v Liou*, 491 F3d 334, 338 (6th Cir 2007). See also *Miranda*, 505 F3d at 796; *Cirilo-Muñoz*, 504 F3d at 135; *Baker*, 2007 WL 4006103 at *2.

184 *Thomas*, 498 F3d at 341.

185 See *Cirilo-Muñoz*, 504 F3d at 132; *United States v Cunningham*, 429 F3d 673, 679 (2005). Section 3553(c)(1), the provision of the SRA requiring district courts to provide specific reasons for within-Guidelines sentences when the Guidelines range exceeds twenty-four months lends further support to the First and Sixth Circuits' reading of *Rita*—both *Thomas*'s (210 to 262 months) and *Cirilo-Muñoz*'s (324 to 405 months) Guidelines ranges well exceeded that threshold. In *Baker*, the nonbinding Second Circuit ruling, the sentencing range also exceeded twenty-four months (108 to 135 months).

186 See *Cereceres-Zavala*, 499 F3d at 1217.

district court "heard and acknowledged" the parties' arguments,[187] although the *Rita* ruling emphasized the importance of "reasoned" decisions by judges.[188] Similarly, the Seventh Circuit (in *Gammicchia*) is satisfied with a district judge's simple assertion that the defendant's arguments were considered.[189]

Granted, the Seventh (in *Gammicchia*), Eighth, and Tenth Circuits note that *Rita* allowed brief sentencing explanations when judges impose "conceptually simple" sentences, but these circuits fail to articulate why the sentences in these particular circumstances were conceptually simple other than stating that the sentences were within the properly calculated Guidelines range.[190] These circuits also largely ignore *Rita*'s considerable discussion and endorsement of thoroughly reasoned sentencing decisions to promote public trust in the federal judiciary, proper appellate review, and the evolving rationality of the sentencing process.[191]

2. Rationality and evolution of the Guidelines.

The SRA was initially part of a larger project to revise the federal criminal code.[192] Although that overarching project ultimately was abandoned, the Guidelines were intended to bring order and structure to the criminal code. In particular, the Guidelines were developed—through the systematic classification of offenders and offenses and through the establishment of specific adjustments for aggravating and mitigating circumstances—to permit the proper tailoring of punishment bases of the unique characteristics of a case.[193] The SRA also sought to advance rationality by requiring the Commission to "develop policies and practices that reflect . . . advancement in knowledge of human behavior as it relates to the criminal justice process."[194]

According to the SRA, the rationality of sentencing evolves through judges contributing their insights, experiences, and wisdom to sentencing policy and practice, and through judges defending in a principled manner how the congressional objectives "find expression in

187 See *Jones*, 493 F3d at 941.

188 The *Jones* ruling also appears in tension with Eighth Circuit precedent emphasizing that district courts must "elucidate their reasoning when sentencing defendants in order to assist reviewing courts and to avoid needless appeals." *United States v Myers*, 439 F3d 415, 418–19 (8th Cir 2006).

189 See Part IV.A.

190 Moreover, § 3553(c)(1)'s requirement of specific reasons for sentences in Guidelines ranges exceeding twenty-four months suggests that Congress did not believe that within-Guideline sentences were inherently "conceptually simple." See note 185.

191 See Part III.C.

192 Commission Report at 2, 136 (cited in note 4).

193 Id at v.

194 Id at 12.

specific sentencing outcomes."[195] Moreover, the SRA intended for § 3553(c) statements to be used by each participant in the criminal justice system charged with reviewing and implementing a sentence.[196] It is therefore necessary that district courts clearly spell out their reasoning for sentencing determinations in order for appellate courts and the Commission to fulfill their obligations to intelligently interpret and evaluate the district courts' reasons for imposing sentences in each case.[197]

To be sure, judges will often provide contradictory (and sometimes only marginally relevant) information and there likely always will remain a certain degree of unpredictability, but the rationalizing and evolutionary import of these sentencing explanations is not diminished by this fact. As mentioned above, the Commission continuously collects and analyzes these data to detect trends—both subtle and obvious—in punishment as it relates to specific attributes of offenders and offenses.

Along with several of their sister circuits, the First, Sixth, and Seventh (in *Miranda*) Circuit rulings recognize that § 3553(a) factors are, in fact, tangible, and appellate courts can assess whether the district court considered and applied these factors in a reasonable manner.[198] These circuits' rulings comport with the Commission's recently announced policy priority of "continu[ing] [ ] its monitoring and analysis of post-*Booker* federal sentencing practices . . . including reasons for departures and variances stated by sentencing courts."[199] This monitoring and analysis can only occur if judges provide clear explanations for their sentencing decisions.

Writing for the majority in *Gammicchia*, Judge Posner justifies the appellate court's acceptance of the district court's simple assertion that § 3553(a) factors were considered as procedurally reasonable on the grounds that such factors are "vague and nondirectional" and only weighable in a metaphorical sense.[200] Not only does this reasoning appear to be inconsistent with the SRA, *Booker*, and *Rita*, but it also appears to take a position inconsistent with Seventh Circuit's ruling less than two weeks earlier in *United States v Goldberg*,[201] for which Judge Posner also authored the court's opinion. In *Goldberg*, the court held that sentencing judges must "conscientiously consider the factors set forth in [§ 3553(a)]

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195 See Berman, 11 Stan L & Policy Rev at 104 (cited in note 2).

196 See Senate Report at 60 (cited in note 4).

197 See Breyer, 17 Hofstra L Rev at 7–8, 18 (cited in note 161). See also Part V.A.

198 See *Miranda*, 505 F3d at 792; *Cirilo-Muñoz*, 504 F3d at 118; *Thomas*, 498 F3d at 339–40. See also *Tomko*, 498 F3d at 163; *United States v Crisp*, 454 F3d 1285, 1290 (11th Cir 2006); *United States v Haack*, 403 F3d 997, 1004 (8th Cir 2005). These rulings underscore the belief that appellate courts are capable of assessing whether the district court adequately weighed the relevant factors.

199 72 Fed Reg at 41795 (cited in note 155).

200 *Tomko*, 498 F3d at 468–69.

201 491 F3d 668 (7th Cir 2007).

to guide sentencing" and found the district court's weighing of § 3553(a) factors "odd" and "unreasonable."[202] Granted, *Goldberg* involved an outside-Guidelines sentence, but that does not alter the fact that the court critiqued the sentencing judge's weighing of § 3553(a) factors. Moreover, both the *Booker* and *Rita* opinions clearly emphasize the significance of reasoned sentencing opinions to the evolution of the Guidelines.[203] It is unlikely that such an evolution is possible if *Rita* only requires judges to simply mention that certain § 3553(a) factors were considered without saying more for within-Guidelines sentences.[204]

3. Rebuttability of the presumption of reasonableness.

Rita makes clear that appellate courts must review sentences individually whether they are inside or outside the Guidelines range, irrespective of whether the reviewing court has adopted a presumption of reasonableness.[205] The Court noted that even when imposing a sentence within the Guidelines, district courts would normally explain the reasons for rejecting the arguments put forth by the parties requesting a different sentence.[206] It is unlikely that the Court intended for the district courts to completely ignore a party's nonfrivolous claims or deem such appeals frivolous merely because the trial judge imposed a sentence consistent with the advisory-Guidelines range and stated that she considered the § 3553(a) factors.[207]

The Seventh (in *Gammicchia*), Eighth, and Tenth Circuits, however, place considerable emphasis on the fact that the district court imposed a within-Guidelines sentence in their explanations of why the district courts' conclusory sentencing statements were acceptable. Recall that in Justice Souter's dissent in *Rita*, he predicted that sentencing judges would rather give a sentence in the Guidelines range than go through the factfinding necessary to justify a sentence outside the range.[208] But Justice Stevens, in his concurrence, suggested that Justice

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202 Id at 671, 673.

203 See Parts II and III.C. In *Rita*, Justice Breyer remarked that the trial judge's "reasoned sentencing judgment, resting upon an effort to filter the Guidelines' general advice through § 3553(a)'s list of factors, can provide relevant information to both the court of appeals and ultimately the [ ] Commission," and that "reasoned responses of these latter institutions to the sentencing judge's explanation should help the Guidelines constructively evolve over time." 127 S Ct at 2469.

204 See note 198. According to the circuits that have held § 3553(a) factors are tangible and weighable, the issue before the appellate court is not whether it has any reason to doubt the district judge's statement that § 3553(a) factors were considered, but whether the appellate court can follow, recreate, and assess the district court's basis for the sentence.

205 See 127 S Ct at 2473. See also note 41 and accompanying text.

206 See 127 S Ct at 2468. See also *Gall*, 128 S Ct at 596.

207 See *United States v Taylor*, 487 US 326, 336–37 (1988).

208 See note 68 and accompanying text.

Souter "overestimates the 'gravitational pull' towards the advisory Guidelines that will result from a presumption of reasonableness,"[209] as well as emphasized the fact that the presumption was strictly "appellate" and not available to the district courts.[210] Justice Stevens's view that Justice Souter's concerns are unwarranted is, of course, an empirical—rather than conceptual—matter. However, by allowing judges to merely state that § 3553(a) factors were considered without explicitly demonstrating how the calculus was made, it would be extremely easy—and perhaps even tempting—for district courts to impose within-Guidelines sentences that were not specifically tailored to defendants save for reference to the advisory Guidelines. This approach would undermine important objectives in the SRA as well as *Rita*'s refusal to allow the presumption of reasonableness for within-Guideline sentences to carry over to the choice of sentence by the district court.[211]

Moreover, as discussed above, a de facto mandatory system is likely to result if appellate courts adopt a presumption of reasonableness for within-Guidelines sentences without requiring district courts to provide clear and detailed statements of how § 3553(a) factors were considered. Such a system may violate *Apprendi* and *Booker* in those situations where a judge relies on facts not found by the jury beyond a reasonable doubt to enhance the Guidelines range. Under the post-*Booker* regime, sentencing statements perform the function of demonstrating to the appellate courts that the Guidelines are being used in an advisory, rather than a mandatory, manner.

Since the enactment of the Guidelines, many judges have complained about the time-intensive process of sentencing,[212] so it is incumbent upon the appellate courts to establish procedural rules that facilitate—if not compel—thoughtful, deliberative, and purposeful decisionmaking.[213] Some scholars suggest that judges' complaints about sentencing possibly reveal their general disinclination to devote the necessary resources toward improving the new sentencing system.[214] Professor Ronald Wright has argued that the most significant danger of overly routinized sentencing is "attitudinal assimilation" by judges.[215] Over-reliance on the Guidelines potentially numbs judges' sensitivity to potential conflicts between the Guidelines and statutory or constitutional require-

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209 127 S Ct at 2473 (Stevens concurring).

210 Id.

211 See Robert W. Sweet, D. Evan van Hook, and Edward V. Di Lello, *Towards a Common Law of Sentencing: Developing Judicial Precedent in Cyberspace*, 65 Fordham L Rev 927, 940 (1996).

212 Berman, 11 Stan L & Policy Rev at 106 (cited in note 2).

213 See *Rita*, 127 S Ct at 2482 (Scalia concurring in part and concurring in the judgment).

214 Berman, 11 Stan L & Policy Rev at 106 (cited in note 2).

215 Wright, 79 Cal L Rev at 43 (cited in note 149).

ments.[216] When this desensitization occurs, the judiciary has forfeited the independence that makes the office distinctive from an administrative agency.[217] Moreover, judges are less likely to take personal responsibility for imposing an appropriate sentence.[218] Professor Wright also believes that one of the strongest virtues of the federal judiciary is that judges are less susceptible to private influence and that some form of judicial review of the Commission could help remedy these shortcomings of overly routinized sentencing.[219] The Seventh (in *Gammicchia*), Eighth, and Tenth Circuits' over-reliance on the fact that sentences are within the Guidelines possibly reflect this attitudinal assimilation.[220]

CONCLUSION

Congress enacted the SRA with the express purpose of providing more predictability, less unwarranted judicial discretion, and greater transparency in federal sentencing.[221] Congress expected the judiciary to have an influential role in developing and shaping sentencing law and policy, operating primarily through sentencing judges' carefully reasoned judicial opinions and appellate review of these sentences.[222] The Commission sought to advance the SRA's objectives by creating the Guidelines that properly balance uniformity in sentencing with some limited flexibility for individualization when appropriate.[223] At least two of these congressionally mandated objectives—transparency and rationality—may have been undermined by the Supreme Court's recent ruling in *Rita*, which established the vague standard that the procedural reasonableness of a district judge's sentencing determination would vary according to the context and record. Almost immediately following the *Rita* decision, a split emerged among the circuits over the level of specificity required from the district courts with respect to these determinations. While the Seventh (in *Gammicchia*), Eighth, and Tenth Circuits have concluded that trial judges need not offer specific explanations for a within-Guidelines sentence, the First, Sixth, and Seventh (in *Miranda*) Circuits have disagreed, ruling that the district court must make clear its consideration of § 3553(a) factors and reasoning for imposing a particular sentence.

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216 Id.

217 Id. See also Harold Bruff, *Legislative Formality, Administrative Rationality*, 63 Tex L Rev 207, 237–38 (1984).

218 Wright, 79 Cal L Rev at 44 (cited in note 149).

219 Id.

220 See Berman, 85 Denver U L Rev at 19–22 (cited in note 86).

221 See Senate Report at 59–60 (cited in note 4).

222 Id.

223 Commission Report at 11 (cited in note 4).

This Comment argued that the statutory language and legislative history of the SRA, as well as the Supreme Court's recent rulings in *Booker* and *Rita*—underscoring the importance of reasoned decisions by the district courts and requiring meaningful consideration of § 3553(a) factors in sentencing determinations—are most consistent with the approach adopted by the First, Sixth, and Seventh (in *Miranda*) Circuits. At a more fundamental level, the First, Sixth, and Seventh (in *Miranda*) Circuits' approach is representative of the role the SRA intended for the judiciary to serve in the evolution of sentencing jurisprudence.