An Uncertain Precedent: United States v. Santos and the Possibility of a Legislative Remedy

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NOTE

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INTRODUCTION .................................................. 191
I. THE MONEY LAUNDERING CONTROL ACT ............... 193
   A. The Nexus Linking Organized Crime, Drug
      Trafficking, and Money Laundering ............... 193
   B. Legislation and the War on Drugs ................. 195
II. UNITED STATES V. SANTOS ................................ 198
   A. Interpreting the Term "Proceeds" .................. 198
   B. The "Merger" Issue ................................ 199
   C. An Uncertain Precedent ............................ 201
   D. Reaction of the Lower Courts ..................... 202
III. POSSIBLE REMEDIES ........................................ 207
   A. A Judicial Solution? ................................. 207
   B. A Case for Legislation .............................. 209
   C. Congressional Intent ............................... 211
   D. Formats for Legislation ............................ 214
CONCLUSION ...................................................... 218

INTRODUCTION

The Money Laundering Control Act of 1986¹ prohibits an individual from conducting or attempting to conduct a financial transaction involving the "proceeds" of a specified unlawful activity.² In United States v. Santos,³ the Supreme Court in a split decision defined the term "proceeds" in the federal money-laundering statute to mean "profits" rather than "receipts" of a criminal enterprise in a prosecution where the predicate offense is illegal gambling.⁴ There are ap-

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⁴ See id. at 2023–25 (plurality opinion).
proximately 250 predicate offenses for money laundering, but the impetus behind the adoption of the Money Laundering Control Act was Congress's desire to target what it viewed as the problem of money laundering related to organized crime and the sale of drugs. Using a "profits" definition, a prosecutor must prove that the funds represent "the excess of returns over expenditure in a transaction or series of transactions."

The law regarding money laundering is now in disarray. The precedential effect of Santos on prosecutions for money laundering is unclear, and Justice Scalia and Justice Stevens openly disagreed about what precedent the case set down. Santos seems to invite disparity among the lower courts. The decision can be interpreted in several ways, and the lower courts are already adopting a variety of approaches to its effect on money-laundering prosecutions. One of the most important questions is how this decision will affect prosecutions for money laundering by organized crime and drug traffickers. When Congress decided to address the problem of money laundering, this area of criminal enterprise lay at the core of congressional concern.

Using a "profits" definition of "proceeds" places a heavier burden on a prosecutor seeking a conviction under the money-laundering statute.

This Note examines the Court's decision in Santos and its effect on the lower courts and argues that a legislative remedy is best suited to the issue of definition. Part I examines the relationship between organized crime, drug trafficking, and money laundering, and the concerns that led to the creation of the Money Laundering Control Act. Part II examines the Court's decision in Santos, the different approaches taken by the Justices, and the reactions of the lower courts interpreting the decision. Part III, which examines possible remedies

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5 See § 1956(c)(7).
8 See Santos, 128 S. Ct. at 2031 (plurality opinion) ("[T]he narrowness of [Justice Stevens's] ground consists of finding that 'proceeds' means 'profits' when there is no legislative history to the contrary. That is all that our judgment holds. It does not hold that the outcome is different when contrary legislative history does exist."); id. at 2034 n.7 (Stevens, J., concurring) ("[T]he plurality speculates about the stare decisis effect of our judgment and [mis]interprets my conclusion . . . . That is not correct; my conclusion rests on my conviction that Congress could not have intended the perverse result that the dissent's rule would produce . . . .") (citation omitted).
9 See infra Part II.D.
10 See infra Part I.A.
11 See generally Pamela A. MacLean, Prosecutors Dealt a Setback: Drug Sale Laundering Charge Must Involve Profits, Nat'l L.J., Sept. 22, 2008, at 4 (discussing higher burden on prosecutors). Justice Scalia noted in his opinion that a "profits" definition places a higher burden on a prosecutor, but he did not think the burden unbearable. See Santos, 128 S. Ct. at 2028-29 (plurality opinion).
that could achieve an outcome consistent with Congress’s original intent and address criticisms of the Act, concludes that a legislative remedy is the most workable solution and discusses possible formats such a remedy might take.

I

THE MONEY LAUNDERING CONTROL ACT

A. The Nexus Linking Organized Crime, Drug Trafficking, and Money Laundering

In order to enjoy the fruits of their illegal activities, criminals need to find a way to “clean” their illegally acquired funds. As commonly understood, “[m]oney laundering is ‘the process by which one conceals the existence, illegal source, or illegal application of income, and disguises that income to make it appear legitimate.’”12 Money laundering is generally a three-step process: (1) the illegal funds are placed in a legitimate enterprise, (2) the funds are layered through various transactions to obscure their source, and (3) the laundered funds are integrated into the legitimate financial world.13 The criminal can then enjoy the fruits of his criminal enterprise or invest the funds in order to continue or expand his business activities. The ways to launder money are too numerous to count and are usually determined by the type of illegal enterprise.14

Money laundering is often referred to as the “life blood” of organized crime and narcotics trafficking.15 Those involved in organized criminal activities learned from the fate of Al Capone that to avoid prison, the proceeds of criminal activity must appear legitimate.16 Organized crime and drug trafficking generate income largely in the form of cash, and to carry on these enterprises, criminals must find a way to convert their funds into legitimate currency.17 For example, a successful drug trafficker may have to deal

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13 See id. at 770.


16 See Patrick J. Ryan, Organized Crime: A Reference Handbook 16–17 (1995) (discussing the Internal Revenue Service’s proving that Capone’s assets were greater than his reported income and that without a legitimate source the extra money was “dirty”).

with hundreds of pounds of cash and normally needs to turn large numbers of small bills into more readily negotiable instruments.\textsuperscript{18}

Criminal organizations are often quite creative in crafting schemes to launder money. In the Pizza Connection case, for instance, "La Cosa Nostra members [including members of the Bonanno crime family] distributed heroin imported from Southeast Asia's Golden Triangle through pizza parlors in the United States . . . ."\textsuperscript{19} Couriers were used to transfer small bills out of the United States, and the cash was then transferred to Swiss and Bermudan banks, from which it could be sent to suppliers in Italy and used to buy more heroin.\textsuperscript{20} A Baltimore drug trafficker used an Atlantic City casino to launder drug profits.\textsuperscript{21} The trafficker's associates used drug profits to open an account at the casino, stayed a few days without gambling, and then removed the cash to use in other enterprises after having the casino write them a check payable to a third party.\textsuperscript{22} The Hell's Angels used "front men" to purchase failed businesses and real estate in an attempt to make their profits from methamphetamine trafficking appear legitimate.\textsuperscript{23}

The so-called Bank Secrecy Act of 1970 (BSA)\textsuperscript{24} was the original legislation designed to deal with money laundering by organized crime, drug traffickers, tax evaders, and white-collar criminals.\textsuperscript{25} By the 1980s it appeared that the BSA was failing to stem the tide of

\begin{thebibliography}{99}
\bibitem{Note1} See H.R. Rep. No. 99-746, at 17 ("[T]here are problems, especially for the large drug trafficking network which has to put volumes of cash generated from street sales of drugs into something more negotiable than boxes of ten, twenty and fifty dollar bills."); Cuéllar, \textit{supra} note 17, at 326 ("If a drug trafficker and the people he supervises sell $1 million worth of heroin in Chicago, they must transport and distribute about twenty-two pounds of heroin. Yet the sale of $1 million can produce over 250 pounds of currency." (footnote omitted)).
\bibitem{Note2} \textit{CASH CONNECTION}, \textit{supra} note 12, at viii.
\bibitem{Note3} See \textit{id.} at 33.
\bibitem{Note4} \textit{id.} at 10–11.
\bibitem{Note5} Id. at 11.
\bibitem{Note6} Id.
\end{thebibliography}
money laundering by criminal organizations. Under the original Act, the government required reports whenever banks engaged in domestic transactions of currency or its equivalent that amounted to more than $10,000, whenever monetary instruments valued at more than $10,000 were taken out of or into the United States, and whenever a person had an interest or signature authority over foreign bank accounts with more than $10,000 in funds.

Criminal organizations proved more than adept at evading the requirements of the Bank Secrecy Act. Criminals seeking to avoid reporting requirements began to engage in a process dubbed "smurfing," whereby a runner would go to several financial institutions and convert "dirty" money into negotiable instruments in amounts less than $10,000. Using this technique, a group of middle-aged women known as the "Grandma Mafia" laundered more than $25 million in banks in Miami and Los Angeles for a Colombian drug cartel. Sloppy monitoring by banks served only to assist the endeavors of criminal organizations. At the time of the enactment of the Money Laundering Control Act, the House Committee on Banking, Finance and Urban Affairs noted that nineteen banks were assessed civil penalties in the millions of dollars for violations of the Bank Secrecy Act. In a number of circumstances, bank employees even assisted criminals with money-laundering activities.

B. Legislation and the War on Drugs

In the 1980s, the public became concerned with what appeared to be America's growing problem with crime and drugs, and the Reagan administration began to escalate the war on crime. On July 28, 1983, President Reagan established the Commission on Organized

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26 See id. at 15 (stating in reference to the Bank Secrecy Act that "a major law enforcement tool has been rendered a virtual nullity by an industry that didn't seem to care and by a regulatory structure that proved to be ineffective").
27 See id. at 18 (discussing original reporting requirements under the BSA).
28 See id.
29 See John M. Broder, Smurf-Buster Role Makes Banks Edgy in Conflict over Campaign to Stop Money Laundering, L.A. TIMES, May 12, 1985, at V1 ("The bank has tipped the IRS to several instances of suspected smurfing and allowed an undercover agent to operate out of a Hollywood branch to help break up the $25-million 'Grandma Mafia' cash-cleaning ring run by a group of smartly dressed, middle-aged grandmothers."). See generally Liz Balmaseda, 'Grandma Mafia' Found Guilty in Drug, Money-Laundering Case, MIAMI HERALD, May 4, 1983, at 7A (discussing the career of Barbara Mouzin, the leader of the "Grandma Mafia").
31 See CASH CONNECTION, supra note 12, at 39-49 (detailing cases of complicity by banks and bank employees).
Crime with the mandate that it make recommendations on legislative changes to combat organized crime. The result was the Commission’s 1984 report, *The Cash Connection: Organized Crime, Financial Institutions, and Money Laundering.* The report detailed the growing relationship between money laundering, organized crime, and drug crime and outlined a series of administrative and legislative proposals. In particular, the report noted:

> The existence of modern, sophisticated, often international services of financial institutions has contributed to the frightening financial successes of organized crime in recent years, particularly in the narcotics trade. Without the means to launder money, thereby making cash generated by a criminal enterprise appear to come from a legitimate source, organized crime could not flourish as it now does.

One estimate at the time found the illegal drug trade to be larger and more profitable than all but one Fortune 500 company. The payments gained from concealing the profits of criminal enterprise were so large that a new class of professional money launderers emerged.

The Commission on Organized Crime made a number of recommendations for alterations to the Bank Secrecy Act that would strengthen the requirements of the Act and its enforcement, but the Commission’s primary recommendation was that Congress amend Title 18 of the United States Code to explicitly deal with money laundering. The Commission felt that such an amendment, combined with its other recommendations, would prevent the money-laundering activities necessary for the continued success of criminal organizations. Recommended legislation titled "The Financial Institutions Protection Act" was submitted to the President and the Attorney General.

Congress passed the Money Laundering Control Act as part of the Anti-Drug Abuse Act of 1986. The influence of the Commission’s report is clear from the House Committee on Banking, Finance

35 *See id.*
36 *Cash Connection, supra note 12, at 3.*
38 *See id. at 16-17.*
39 *See Cash Connection, supra note 12, at 52-61.*
40 *See id. at 62.*
41 *See id. at 63 ("If money laundering is the keystone of organized crime, these recommendations can provide the financial community and law enforcement authorities with the tools needed to dislodge that keystone, and thereby to cause irreparable damage to the operations of organized crime.").
42 *See id. at 65–82.*
and Urban Affairs’ discussion of the Act. The Senate Committee on the Judiciary not only referred to the Commission’s report but also stated that “[money-laundering] schemes themselves have grown in magnitude and intricacy in recent years, outstripping the ability of [f]ederal law enforcement agencies to keep pace with effective prosecution under the existing law.” The Committee noted that the Senators felt that effective money-laundering legislation was crucial to the fight against money laundering.

The legislative record indicates a conviction that money laundering is essential to the growth of criminal enterprise and refers to it as a “corollary of the spread of profitable illegal enterprises.” The House Committee noted that once criminal funds left the United States destined for countries with more hospitable bank-secrecy laws, the funds could be effectively hidden from law enforcement, and the money could then reenter the United States disguised as legitimate funds, allowing criminal organizations to avoid prosecution. The Committee stated that “[w]ithout access to the American financial system, drug dealers are crippled and their activities are laid open to law enforcement agencies.”

The central provision of the Money Laundering Control Act is § 1956. That provision makes it a crime for “[w]hoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, [to] conduct[,] or attempt[,] to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity . . . with the intent to promote the carrying on of specified unlawful activity.” The term “financial transaction” is defined broadly. The term “specified unlawful activity” refers to approximately 250 predicate offenses, which include organized crime and drug trafficking but also a number of unrelated offenses.

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46 See id. at 9 (“As Chairman Thurmond noted, ‘Creation of a money laundering offense is imperative if our law enforcement agencies are to be effective . . . .’ Senator Biden stated, ‘We cannot afford to waste any time. We need this weapon against drug traffickers and organized criminals, and we need it now.’”).
47 Id. at 2.
49 Id. at 16.
51 Id. § 1956(a)(1)(A)(i).
52 See id. § 1956(c)(4).
53 Id. § 1956(c)(7) (including offenses such as murder, fraud, bribery, and smuggling).
A. Interpreting the Term “Proceeds”

_United States v. Santos_ addressed the definition of the term “proceeds” as used in the Money Laundering Control Act.\(^{54}\) Without guidance from Congress as to the definition of the term, the lower courts originally used dictionaries when attempting to define it.\(^{55}\) This approach did not lead to uniformity of meaning, and the lower courts came up with various definitions of the term.\(^{56}\) In _United States v. Scialabba_, the Seventh Circuit defined “proceeds” as the net profit rather than gross receipts of an unlawful activity.\(^{57}\) Before their case reached the Supreme Court, the _Santos_ defendants appealed to the Seventh Circuit their convictions for money laundering based on the _Scialabba_ court’s definition of the term “proceeds,” and the Seventh Circuit vacated their convictions.\(^{58}\)

In _Santos_, defendant Efrain Santos “operated a lottery in Indiana that was illegal under state law.”\(^{59}\) The gambling operation involved payments to winners, runners, and collectors, one of whom included Santos’s codefendant Benedicto Diaz.\(^{60}\) These payments formed the basis of a ten-count indictment by the federal government, which in addition to a number of other offenses, charged the defendants with money laundering under § 1956(a)(1)(A)(i).\(^{61}\) The Court turned to the common meaning of the term “proceeds” and found that under either a “profits” or “receipts” reading, the terms of the statute remained consistent.\(^{62}\) Finding the statute ambiguous, the Court stated: “Under a long line of our decisions, the tie must go to the defendant. The rule of lenity requires ambiguous criminal laws to be interpreted

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\(^{56}\) See, e.g., United States v. Morelli, 169 F.3d 798, 805 (3d Cir. 1999) (“Proceeds are ‘[t]hat which results, proceeds, or accrues from some possession or transaction.’” (alteration in original) (quoting _BLACK’S LAW DICTIONARY_ 1204 (6th ed. 1990))); United States v. Akintobi, 159 F.3d 401, 403 (9th Cir. 1998) (“[W]hile the term ‘proceeds’ may refer to something of value, the term has the broader meaning of ‘that which is obtained . . . by any transaction.’” (quoting _THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY_ 2311 (1971 & Supp. 1985))); United States v. Haun, 90 F.3d 1096, 1101 (6th Cir. 1996) (“‘Proceeds’ is a commonly understood word in the English language. It includes ‘what is produced by or derived from something (as a sale, investment, levy, business) by way of total revenue.’” (quoting _WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY_ 1807 (1971))).

\(^{57}\) 282 F.3d 475, 477 (7th Cir. 2002).

\(^{58}\) Santos v. United States, 461 F.3d 886, 887–88 (7th Cir. 2006).


\(^{60}\) See id. at 2022–23.

\(^{61}\) See id.

\(^{62}\) Id. at 2025.
in favor of the defendants subjected to them." The Court therefore affirmed the Seventh Circuit's decision to vacate the defendants' convictions for money laundering.

Using a "profits" definition of the term "proceeds" increases the burden on a federal prosecutor looking to obtain a money-laundering conviction. Even Justice Scalia, who authored the plurality opinion, recognized that using a "profits" definition makes the job of a prosecutor more difficult. He argued, however, that the increased burden is not that heavy and noted that "to establish the proceeds element under the 'profits' interpretation, the prosecution needs to show only that a single instance of specified unlawful activity was profitable and gave rise to the money involved in a charged transaction." In his dissent, Justice Alito argued that Justice Scalia's interpretation ignored the reality of money-laundering operations, which often do not involve discrete criminal acts but rather numerous criminal acts that produce lump funds for laundering. Justice Alito pointed out that proving the profitability of criminal enterprises may not be as easy as the plurality opinion made it seem. He argued that financial transactions are infinitely more complicated than the plurality and Justice Stevens in his concurrence suggested, and it may be difficult for a prosecutor to determine whether a financial outlay, even payments to employees, is to cover an "expense" or represents the profits of a criminal enterprise.

B. The "Merger" Issue

Both Justice Scalia and Justice Stevens were motivated by worries about what they deemed the "merger" problem. The concern was that using a "receipts" definition allows the government to obtain money-laundering convictions based on criminals paying the operating expenses of their illegal enterprises rather than on separate crimi-
nal conduct. Justice Scalia gave the most comprehensive examination of the problem, stating that, under a “receipts” definition, “nearly every violation of the illegal-lottery statute would also be a violation of the money-laundering statute, because paying a winning bettor is a transaction involving receipts that the defendant intends to promote the carrying on of the lottery.”

Justice Stevens argued that “[a]llowing the Government to treat the mere payment of the expense of operating an illegal gambling business as a separate offense is in practical effect tantamount to double jeopardy . . . .”

Both Justices also linked a “receipts” definition to troubling sentencing disparities, and Justice Scalia argued that a “receipts” definition could allow prosecutors to use their discretion as a weapon to induce plea bargains. In Santos, a conviction for money laundering could have added an additional twenty years to the five-year sentence ordinarily received for an illegal-gambling conviction. Justice Scalia argued that there is no evidence that “Congress would have wanted a transaction that is a normal part of a crime it had duly considered and appropriately punished elsewhere in the Criminal Code to radically increase the sentence for that crime.” Justice Stevens also pointed out that the U.S. Sentencing Commission’s guidelines on ranges for money-laundering convictions are different than those for the predicate offense, a difference that can lead to substantial sentencing enhancements when the defendant has a significant criminal history.

The dissenting Justices made the case that the discretion that the federal sentencing guidelines already grant to the sentencing judge allows for correction of any possible injustice in sentencing.

72 See id. at 2027 (plurality opinion) (“Generally speaking, any specified unlawful activity, an episode of which includes transactions which are not elements of the offense and in which a participant passes receipts on to someone else, would merge with money laundering.”).

73 Id. at 2026.

74 Id. at 2033 (Stevens, J., concurring).

75 See id. at 2026–27 (plurality opinion); id. at 2033 (Stevens, J., concurring).

76 See id. at 2026 (plurality opinion) (“Prosecutors, of course, would acquire the discretion to charge the lesser lottery offense, the greater money-laundering offense, or both—which would predictably be used to induce a plea bargain to the lesser charge.”); see also U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: SENTENCING POLICY FOR MONEY LAUNDERING OFFENSES, INCLUDING COMMENTS ON DEPARTMENT OF JUSTICE REPORT 14–15 (1997) [hereinafter 1997 SENTENCING POLICY FOR MONEY LAUNDERING] (discussing the Sentencing Commission’s concern regarding the Department of Justice using threatened money-laundering charges to obtain pleas to other offenses).

77 See Santos, 128 S. Ct. at 2026 (plurality opinion).

78 Id. at 2027.

79 See id. at 2033 (Stevens, J., concurring).

80 See id. at 2035 (Breyer, J., dissenting) (“Finally, if the ‘merger’ problem is essentially a problem of fairness in sentencing, the Sentencing Commission has adequate authority to address it. Congress has instructed the Commission to ‘avoi[d] unwarranted sentencing disparities’ among those ‘found guilty of similar criminal conduct.’” (emphasis added by Breyer, J.) (citing 28 U.S.C. § 991(b)(1)(B)); id. at 2044 (Alito, J., dissenting) (“[T]he so-
C. An Uncertain Precedent

Beyond its application to illegal gambling, the impact of Santos is unclear. Justice Scalia recognized that Justice Stevens's concurrence rested on the narrowest grounds. The rule established in Marks v. United States requires the holding of Santos to be limited accordingly. Justice Stevens's concurrence, which is controlling, leaves open the possibility that, for predicate offenses other than illegal gambling, a "receipts" rather than "profits" definition of "proceeds" might be possible. According to Justice Stevens, "this Court need not pick a single definition of 'proceeds' applicable to every unlawful activity, no matter how incongruous some applications may be." Justice Stevens argued that Congress possibly intended the term "proceeds" to have a meaning that could vary with the nature of the predicate offense, and that it is the Court's job to determine the intended definition.

Neither the plurality nor the dissent agreed with Justice Stevens's assertion that the meaning of the term "proceeds" could vary. Justice Scalia found Stevens's interpretation inconsistent with Court precedent. Recognizing the controlling effect of Stevens's concurrence, he argued that Stevens's opinion should be limited solely to mean that "proceeds" is to be interpreted as "profits" when there is no legislative history to the contrary, and not that the outcome will be different when such a history exists. Scalia pointed out that Justice Stevens's interpretation failed to truly address the Court's decision in Clark v. Martinez that the "meaning of words in a statute cannot change with the statute's application." Justice Alito's dissent echoed Justice Scalia's arguments in that it disagreed with Stevens's assertion that the called merger problem is fundamentally a sentencing problem, and the proper remedy is a sentencing remedy. . . . [T]hese statutes do not require a judge to increase a defendant's sentence simply because the defendant was convicted of money laundering as well as running a gambling business.

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81 See id. at 2031 (plurality opinion).
83 See id. at 193 ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (plurality opinion))).
84 Santos, 128 S. Ct. at 2032 (Stevens, J., concurring).
85 See id.
86 See id. at 2031 (plurality opinion).
87 See id.
89 Santos, 128 S. Ct. at 2030 (plurality opinion) (citing Martinez, 543 U.S. at 378). Justice Stevens stated that his opinion was not inconsistent with Martinez and asserted that, in this case, the merger problem or "perverse result" that would be produced by the dissent's rule makes it clear that Congress intended that the term "proceeds" be given varying definitions. See Santos, 128 S. Ct. at 2034 n.7 (Stevens, J., concurring).
meaning of "proceeds" could vary with the nature of the illegal activity.90

However, the precedential effect of Santos is more complicated for money-laundering prosecutions when the predicate offense relates to drug trafficking or organized crime. Justices Stevens and the four dissenting Justices all indicated that when the predicate offense for money laundering relates to drug trafficking or the operation of organized crime syndicates related to the sale of drugs, they would read "proceeds" to mean "receipts" rather than "profits."91 Writing for the dissenters, Justice Alito contended that the problem of using a "profits" definition is "especially acute in the very cases that money-laundering statutes principally target, that is, cases involving large-scale criminal operations that continue over a substantial period of time, particularly drug cartels and other organized crime syndicates."92 He pointed out that the legislative record indicates that Congress was principally concerned with such activity when drafting the statute.93 He argued that, in crafting the statute, Congress would not have intended a definition of "proceeds" that would hinder such prosecutions.94 Justice Stevens agreed that the legislative history of §1956 clearly indicates that Congress intended a "receipts" definition be used for the term "proceeds" when the predicate offense is related to drug trafficking or the activities of organized crime related to the sale of drugs.95 Justice Alito indicated that he agreed with Justice Stevens's approach insofar as it applies to those predicate offenses for money laundering.96 He also pointed out that in regard to the stare decisis effect of the case, five Justices agreed on that particular issue.97

D. Reaction of the Lower Courts

Three directions for the precedential value of United States v. Santos are emerging among the lower courts. The first approach taken by the lower courts is to apply a "profits" definition to the approximately

90 See id. at 2044 (Alito, J., dissenting) ("And contrary to the approach taken by Justice Stevens, I do not see how the meaning of the term 'proceeds' can vary depending on the nature of the illegal activity that produced the laundered funds.").
91 See id. at 2032 (Stevens, J., concurring); id. at 2035–36 (Alito, J., dissenting).
92 Id. at 2039 (Alito, J., dissenting).
93 See id. at 2040 ("The Commission found that 'narcotics traffickers, who must conceal billions of dollars in cash from detection by the government, create by far the greatest demand for money laundering [schemes]' . . . ." (quoting CASH CONNECTION, supra note 12, at 7)).
94 See id. at 2039–40.
95 See id. at 2032 (Stevens, J., concurring) ("As Justice Alito rightly argues, the legislative history of §1956 makes it clear that Congress intended the term 'proceeds' to include gross revenues from the sale of contraband and the operation of organized crime syndicates involving such sales.").
96 See id. at 2035–36 (Alito, J., dissenting).
97 See id. at 2035 n.1.
250 predicate offenses for money laundering. This approach is based on Justice Scalia's view of the case and of Justice Stevens’s concurrence. After devoting a significant amount of consideration to this issue, in United States v. Hedlund, the District Court for the Northern District of California adopted this approach, stating: “[T]his Court believes that the Supreme Court in Santos has held that the word ‘proceeds’ in 18 U.S.C. § 1956(a)(1)(A)(i) means ‘profits,’ and that Clark v. Martinez requires that this meaning must apply to every [specified unlawful activity] listed in the statute.” In Hedlund, the defendant was charged with money laundering after he used money made from the illegal distribution of marijuana to make payments on the warehouse where the marijuana was cultivated. The court found the mortgage payments to be a business expense, rather than part of the business’s profits, and accordingly vacated the defendant’s money-laundering conviction.

This first approach seems to be the easiest to apply and is likely to produce the most consistency in defining the term “proceeds,” although it has several drawbacks. As there are approximately 250 predicate offenses for money laundering, the strength of this approach is that a bright-line rule may lead to greater consistency among the lower courts. Nevertheless, adopting such an approach ignores the fact that five Justices clearly stated that they believed that Congress intended a “gross profits” definition of “proceeds” to apply in cases involving drug trafficking or the related activities of organized crime. The second drawback is that this approach may encourage lower courts to define “profits” expansively to allow the government to continue to seek convictions under the money-laundering statute. Many lower courts already seem to be engaging in less-than-rigorous determinations about whether a particular financial transaction represents the profits of a criminal scheme rather than the receipts.

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98 See id. at 2031 (plurality opinion) (“[T]he narrowness of [Justice Stevens’s] ground consists of finding that ‘proceeds’ means ‘profits’ when there is no legislative history to the contrary. That is all that our judgment holds. It does not hold that the outcome is different when contrary legislative history does exist.”).
100 Id. at *6.
101 See id. at *5.
102 See id.
103 See id. at *6.
The second approach is to adopt the reasoning of Justice Stevens and allow the meaning of the term "proceeds" to vary with the underlying offense. Under this variation, "proceeds" would mean "receipts" as applied to money laundering where the predicate offense is drug trafficking or the operation of crime syndicates related to the sale of drugs.107 "Proceeds" would be defined as "profits," however, for illegal-gambling offenses.108 For other predicate offenses, the definition would vary depending on whether a "profits" definition would create a "merger" problem.109 In United States v. Fleming,110 the Third Circuit considered money laundering by a narcotics-trafficking organization.111 Relying on the fact that five Justices believed a "receipts" definition to be appropriate in narcotics cases,112 the court went on to conclude that "even if the government did not show that the money involved in Fleming's money laundering conviction was profits from the drug sales, his conviction on this count must stand because . . . the term 'proceeds' includes gross revenues for drug sales."113 This is the closest lower court decision to the approach advocated by Justice Stevens.

What is noticeable, however, is that in the section of the case dealing with Santos, the Third Circuit entirely failed to address the conflict with Martinez.114 In Hedlund, the Government made the same argument that had proven successful in Fleming, to which the district court replied: "[T]he bottom line is that five Justices said that, but they did not vote that."115 The district court in Hedlund took into consideration the previous holding in Martinez and summarily rejected the Government's argument as inconsistent with prior precedent.116

There does not seem to be a way to resolve the conflict between Justice Stevens's approach and the holding of Martinez,117 nor is it
clear that such a resolution would in fact be desirable. The fact that seven Justices felt Stevens’s thinking to be inconsistent with the Court’s decision in *Martinez* suggests that pursuing such an approach would be ultimately unsuccessful.\(^{118}\) In his concurrence, Justice Stevens argued that the Court “previously recognized that the same word can have different meanings in the same statute.”\(^{119}\) He cited *General Dynamics Land Systems, Inc. v. Cline*,\(^{120}\) but the Court decided that case a year before *Martinez*. Justice Stevens’s attempt to address the concerns of the plurality and the dissent can only be classified as cryptic and unhelpful. He merely asserted, “Clark v. *Martinez* poses no barrier to [my] conclusion. In *Martinez* there was no compelling reason—in stark contrast to the situation here—to believe that Congress intended the result for which the Government argued.”\(^{121}\) The “compelling reason” Justice Stevens referred to is the “merger” problem. Unless this approach can be reconciled with *Martinez*, it is unlikely to prove successful on a larger scale. Even if reconciliation is possible, such an approach creates the real danger of encouraging disparities among the lower courts. There are over 200 other remaining predicate offenses for money laundering.\(^{122}\) Requiring the lower courts to determine which definition of “proceeds” to use based on the extent of the “merger” problem for the predicate offense at issue\(^{123}\) seems to invite confusing and contradictory case law.\(^{124}\)

The third approach is to limit *Santos’s* holding to money-laundering offenses for which the predicate offense is illegal gambling. In *United States v. Orosco*,\(^{125}\) the District Court for the District of Colorado adopted this approach. It argued that the *Marks* rule regarding plu-

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\(^{118}\) Justice Scalia scathingly referred to Stevens’s opinion as “original with him” and stated: “Not only have we never engaged in such interpretive contortion; just over three years ago, in an opinion joined by Justice Stevens, we forcefully rejected it.” United States v. Santos, 128 S. Ct. 2020, 2030 (2008) (plurality opinion). Justice Alito also rejected the idea that a meaning of the term could vary depending on the nature of the predicate offense. See id. at 2035–36 (Alito, J., dissenting). Justice Thomas did not take part in Part IV of the plurality opinion.

\(^{119}\) Id. at 2032 (Stevens, J., concurring).

\(^{120}\) 540 U.S. 581, 595 (2004) (holding that the term “age” has varying meanings within the Age Discrimination in Employment Act of 1967).

\(^{121}\) *Santos*, 128 S. Ct. at 2034 n.7 (Stevens, J., concurring) (citation omitted).


\(^{123}\) See *Santos*, 128 S. Ct. at 2034 n.7 (Stevens, J., concurring).

\(^{124}\) The Sixth Circuit recently hypothesized that Stevens’s approach could lead to a “cottage industry of *Santos* litigation” and went on to note that “‘proceeds’ remains an ambiguous term, but it is now one that the lower courts will place in one camp or the other based on an offense-by-offense inquiry that even the most law-abiding, prescient and law-erly citizen would find hard to predict.” United States v. Kratt, Nos. 08-5831, 08-5832, 2009 WL 2767152, at *5 (6th Cir. Sept. 2, 2009).

\(^{125}\) 575 F. Supp. 2d 1214 (D. Colo. 2008).
rality opinions applies only when one opinion can be viewed as a logical subset of the others, and without such a connection, there is no narrowest opinion to voice the common denominator of the Court's reasoning. The district court found Justice Stevens's opinion not to be a logical subset of the plurality's, and the Santos holding was therefore limited to illegal gambling. The district court thus found itself free to use a "receipts" definition as the controlling standard for any predicate offense other than illegal gambling. In United States v. Prince, the District Court for the Western District of Tennessee adopted the same approach to the precedential effect of Santos. Since the defendant was charged with health care fraud rather than illegal gambling, the court felt free to continue to apply a "receipts" definition of proceeds. Other lower courts have also followed the trend of limiting the holding of Santos to illegal gambling. In United States v. Brown, the Fifth Circuit also expressed concerns about the divisive effects of the Court on Santos's precedential value but declined to decide the issue.

Such an approach might make it easier to define "proceeds" as gross profits where the predicate offense relates to drug trafficking or organized crime, but it would essentially leave the lower courts in the same position as if Santos were never decided, except in cases involv-

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126 See id. at 1217-18. In Hedlund, the District Court for the Northern District of California specifically rejected limiting Santos to illegal gambling offenses. See United States v. Hedlund, No. CR-06-346-DLJ, 2008 WL 4183958, at *6 (N.D. Cal. Sept. 9, 2008) ("This decision came about in a case where the [specified unlawful activity] was gambling, but the Supreme Court did not hold that their decision applied 'only' to gambling cases.").

127 See Orosco, 575 F. Supp. 2d at 1217-18.

128 See id.

129 See id. at *8 ("This Court concludes that the narrow holding of Santos is that 'proceeds' means 'profits' where the specified unlawful activity is the operation of an illegal gambling business.").

130 See id.

131 See id.

132 See, e.g., Engle v. Eichenlaub, No. 08-cv-271, 2009 WL 2634206, at *1 (N.D. Fla. Aug. 24, 2009) ("The narrowest view that supports the Santos result is that the 'proceeds' of an illegal lottery—that is, an illegal gambling operation—are its profits. This helps Mr. Engle not at all; his conviction had nothing to do with an illegal gambling operation."); Bull v. United States, Nos. CV 08-4191 CAS, CR 04-402 CAS, 2008 WArL 5105227, at *8 (C.D. Cal. Dec. 3, 2008) ([G]iven Justice Stevens' opinion that 'proceeds' means 'profits' only for the purposes of laundering funds from an illegal gambling business, the Court cannot conclude that Santos announces a 'new rule' defining the term 'proceeds' to mean 'profits' in all statutes.").

133 553 F.3d 768 (5th Cir. 2008).

134 See id. at 783 ("Ordinarily, a Court thus divided is considered to have ruled on the 'narrower' grounds on which five justices actually agreed, but that ground of agreement is not apparent in this case.").

135 See id. at 784 ("We need not decide these thorny issues."). In United States v. Redd, the Fifth Circuit again expressed the sentiment that the law is now far from clear in the wake of Santos. See United States v. Redd, No. 06-60806, 2009 WL 348831, at *8 (5th Cir. Feb. 12, 2009) (citing Brown, 553 F.3d 768).
ing illegal gambling offenses. Each circuit would be free to apply its own definition of the term “proceeds” to the remaining predicate offenses for money laundering. This result is not only confusing, but it is also potentially unfair. Under the federal sentencing guidelines, a money-laundering charge can lead to stiff penalties. It is not improbable that defendants committing essentially the same offense could end up serving extremely different sentences based merely on the jurisdiction in which they happened to conduct their illegal activity. By allowing the lower courts to apply their own definition of “proceeds” to every predicate offense for money laundering other than illegal gambling, such an outcome also effectively violates the Court’s decision in Martinez that the meaning of a term in a statute cannot vary with the statute’s application.

III
Possible Remedies

A. A Judicial Solution?

One possible solution is for the Supreme Court to itself correct the problem by again addressing the Money Laundering Control Act. Assuming a case dealt with money laundering and the predicate offense relates to drug trafficking or the related activities of organized crime, at least five Justices would vote for a “receipts” rather than “profits” definition of “proceeds.” This is assuming Justice Stevens would adopt the reasoning of Justice Alito, making the dissenters the majority. The Court would then have several options: First, it could carve out an exception to Santos that applied only to prosecutions for organized crime and money laundering. Second, it could leave open the possibility of additional offenses falling under this exception as long as they do not result in a “merger” problem. Lastly, assuming the Justices could reconcile this action with Clark v. Martinez, the Court could explicitly limit Santos to prosecutions for illegal gambling.

136 See U.S. SENTENCING COMM’N, GUIDELINES MANUAL § 2S1.1 (2008) (instructing sentencing judge on calculating offense level for money laundering); Cuellar, supra note 17, at 406 (“Criminal penalties for money laundering are severe. Sections 1956 and 1957 . . . provide for a maximum of twenty years and ten years imprisonment, respectively, as well as steep fines.”).
138 See United States v. Santos, 128 S. Ct. 2020, 2032 (2008) (Stevens, J., concurring) (“As Justice Alito rightly argues . . . Congress intended the term ‘proceeds’ to include gross revenues from the sale of contraband and the operation of organized crime syndicates involving such sales.”).
139 Justice Stevens’s concurrence alludes to this possibility, as he vaguely stated: “In other applications of the statute not involving such a perverse result, I would presume that the legislative history summarized by Justice Alito reflects the intent of the enacting Congress.” Id. at 2034 n.7.
There are advantages to having the Court address this question rather than seeking a legislative remedy. The first is that the Court could address the problem in a more timely fashion than Congress. Legislative action would require agreement among the House of Representatives, the Senate, and the President. A second advantage is that the Court might be able to fashion the most workable remedy for the problem. New legislation could open up as many problems for courts as it solves. The Court's reviewing a single term in the statute might lead to fewer problems for the lower courts than a legislative revision.

However, a number of factors hint that achieving such an advantageous outcome might be implausible. The most obvious is that the Court would have to choose to hear such a case. Given the small number of cases the Court hears every year, that possibility might not arise without significant disagreement among the lower courts as to the interpretation of Santos. A more important issue is that, even if the Court agreed to take the case, there is no guarantee that at least five Justices would favor a "receipts" definition. In United States v. Brown, the Fifth Circuit discussed one possible outcome if the Supreme Court were to again address the meaning of "proceeds" in the context of contraband. The Brown court opined:

Thus the outcome could be that in a future case in the contraband realm, Justice Stevens would switch his definition to receipts, but one or more Santos dissenter would join the majority in holding that "proceeds" means profits—not because they have changed their minds about what Congress intended, but because principles of stare decisis and statutory interpretation demand that "proceeds" in this statute be interpreted consistently.

Another judicial decision on the issue leaves open the possibility of creating another fractured opinion, or that a "receipts" definition will be more definitively extended to drug-trafficking offenses.

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142 According to its own numbers, the Supreme Court receives petitions to hear more than 10,000 cases per term, grants plenary review in approximately 100 cases, and issues formal written opinions in eighty to ninety cases. Supreme Court of the U.S., The Justices' Caseload, http://www.supremecourts.gov/about/justicecaseload.pdf (last visited Sept. 26, 2009).
143 553 F.3d 768 (5th Cir. 2008).
144 Id. at 784. The Fifth Circuit also made the interesting observation that prescription drugs, which are illegal only if dispensed illegally, might form a distinct category of contraband. See id.
B. A Case for Legislation

Seeing as a judicial solution is unlikely, the next question at hand is whether a legislative remedy would be the best way to deal with the issues raised by Santos. One factor that favors maintaining the status quo is that the case’s effect on the lower courts is not pervasive enough to require legislative action. Although a number of courts pay lip service to Santos, almost every court that has examined a challenge to a money-laundering conviction found that the defendant had laundered the “profits” of his criminal enterprise. Several courts have also already limited the precedential impact of Santos to prosecutions for illegal gambling, which could signal a developing trend. Defendants in only a few cases have successfully challenged a conviction for money laundering based on the Court’s decision in Santos.

Another possibility is that the Santos decision simply hamstrings a statute that is attractive to prosecutors because it allows them a substitute charge when the predicate offense is more difficult to prove than money laundering. In the past, courts tended at nearly every turn to resolve the problems presented by the vague terms in the Money Laundering Control Act in favor of prosecutors. Another argument against a legislative remedy is that critics have highlighted a number of negative consequences stemming from the war on drugs. In light of this information, Congress may perhaps no

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145 See, e.g., id. ("We hold that even if the Santos plurality’s more stringent reading of the statute governs in this case, the appellants lose. Records introduced at trial demonstrate that they were buying hydrocodone for considerably less than they were selling it for."); United States v. Yusuf, 536 F.3d 178, 190 (3d Cir. 2008) (finding “proceeds” of mail fraud to be “profits” of mail fraud); United States v. Bohuchot, No. 3:07-CR-167-L, 2008 WL 4849324, at *6 (N.D. Tex. Nov. 10, 2008) (“The jury could have reasonably concluded that the cash and gifts provided to Bohuchot and his family members by Wong, in light of the other evidence that establishes Bohuchot’s role in the awarding of contracts, were his ‘profits’ from his role in the bribery scheme.”); United States v. Baker, No. 06-CR-20663, 2008 WL 4056998, at *4 (E.D. Mich. Aug. 27, 2008) (finding defendants laundered “profits” when using funds from drug sales to purchase cars, homes, and jewelry); United States v. Everett, No. CR 06-795-PHX-JAT, 2008 WL 3843831, at *7 (D. Ariz. Aug. 14, 2008) (finding defendant laundered profits in a scheme to defraud the Bankruptcy Court where it was “unlikely that Defendant incurred any expenses in making the false declarations on the bankruptcy petition.”); United States v. Poulsen, 568 F. Supp. 2d 885, 912–15 (S.D. Ohio 2008) (finding defendants laundered profits by making unsecured loans to financially un sound healthcare providers they partially owned).


148 See Cuellar, supra note 17, at 348–49.

149 See id. at 348–51 (describing the numerous tools that prosecutors have in bringing about a money-laundering charge).

150 See, e.g., Eric Blumenson & Eva S. Nilsen, How to Construct an Underclass, or How the War on Drugs Became a War on Education, 6 J. GENDER RACE & JUST. 61 (2002) (describing the
longer feel the same overriding concern about drug trafficking and organized crime clearly demonstrated in the 1980s.

Of course, there are drawbacks to maintaining the status quo. The first is that no consistent approach to the precedential value of the case has emerged among the lower courts, although the development of a consistent approach will perhaps require more time. Another argument in favor of a legislative remedy is that although the Money Laundering Control Act is not immune to abuse by prosecutors, there is a significant likelihood of unfair outcomes if the lower courts do not develop a consistent way to approach the definition of the term. In addition, now that Congress has seen the money-laundering statute in action, it is in a better position to curb abuses than before. Another argument in favor of a legislative remedy is that, despite the failings of the war on drugs, narcotics trafficking continues, and the need to launder money still exists.

What may be a more persuasive argument in favor of a legislative remedy is that money laundering is now relevant to the continuing fight against terrorism. Congress's interest in money laundering does not appear to have waned, as it recently expanded the scope of legislation dealing with money laundering in the USA PATRIOT

negative effect the war on drugs has on education); Paul Finkelman, The Second Casualty of War: Civil Liberties and the War on Drugs, 66 S. CAL. L. REV. 1389 (1993) (arguing that the war on drugs has subordinated civil liberties); Kenneth B. Nunn, Race, Crime and the Pool of Surplus Criminality: Or Why the "War on Drugs" Was a "War on Blacks", 6 J. GENDER RACE & JUST. 381 (2002) (discussing the negative impact the war on drugs has on African American communities).

151 See supra Part II.D.
152 See supra Part II.D.
153 In a note for the Georgia State University Law Review, Teresa Adams makes the interesting point that due to the pressure exerted on Congress by the Reagan administration, the Anti-Drug Abuse Act and the Money Laundering Control Act may not have been subject to the extensive consideration that would ordinarily have accompanied the enactment of such legislation. Teresa E. Adams, Note, Tackling on Money Laundering Charges to White Collar Crimes: What Did Congress Intend, and What Are the Courts Doing?, 17 GA. ST. U. L. REV. 531, 549 (2000).
155 See Michael Levi & Peter Reuter, Money Laundering, 34 CRIME & JUST. 289, 325 (2006) ("The distinctive feature of terrorism is that it takes money both legitimately and criminally generated and converts it into criminal use. The sums of money involved are said to be modest: tens or hundreds of thousands of dollars rather than millions . . . ."). The U.S. government is still unable to find the source of the funds used by al Qaeda to finance the 9/11 attack on the Twin Towers. See THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 172 (2004).
Act. 156 "[The] legislation, which has been deemed 'the most significant anti-money-laundering legislation in more than 30 years,' is designed to prevent terrorists and others from using the U.S. financial system anonymously to move funds obtained from or destined for illegal activity." 157 Thus, not only is money laundering still relevant, but there is also no indication that Congress is uninterested in or unable to address that fact.

C. Congressional Intent

Legislative action appears to be the best way to curb the divisions that are now emerging in the wake of United States v. Santos. 158 The question that remains is whether the manner in which the Money Laundering Control Act has been applied is actually counter to the original intent of Congress. The legislative materials surrounding the creation of the Act 159 seem to bear out Justice Stevens's and Justice Alito's views on the definition of the term "proceeds," at least as to organized crime and drug trafficking.

What is obvious is that the conception of money laundering forming the basis of the Money Laundering Control Act is rooted in the practices of drug traffickers and organized crime. In a report on the Act, the House Committee on Banking, Finance and Urban Affairs takes its very definition of money laundering from the President's Commission on Organized Crime. 160 The report goes on to state that money laundering is "the hiding of the paper trail that connects income or money with a person in order for such person to evade the payment of taxes, avoid prosecution, or obviate any forfeiture of his illegal drug income or assets." 161 The money-laundering scheme the Committee uses to identify the nature and scope of the problem is rooted in the practices of a drug-trafficking organization. 162

This reading is consistent with the general tone of the events and documents surrounding the creation of the Money Laundering Control Act. As previously discussed, in crafting the Act, Congress was

156 See USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001); see also Cuellar, supra note 17, at 361 ("USAPA has substantially expanded regulatory authority in the name of the allegedly intertwined goals of fighting money laundering and disrupting terrorist financing. . . . [T]he basic theory [is] that regulators should get more authority to gather information and to close loopholes . . . ." (footnote omitted)).


158 See supra Part III.B.


161 Id.

162 See id. at 17.
spurred by the Bank Secrecy Act's failure to combat money laundering related to drug trafficking. In its definition of the term "specified unlawful activity," the Senate Report merely states that the term refers to "crimes most commonly associated with organized crime, drug trafficking, and financial misconduct." The term "financial misconduct" is quite vague, although several examples of covered crimes are listed. Although Congress does seem to have been concerned about money laundering in general, based on the content of its discussion and the information it relied on, there is no doubt that the focus of the Act was combating money laundering related to drug trafficking and organized crime, and not the kind of illegal gambling activity engaged in by the defendants in Santos. The references to money laundering by criminal organizations not related to drug trafficking are minimal and undeveloped.

The Money Laundering Control Act was also unquestionably intended to enhance the power of the federal prosecutor. The Act created a new federal crime for money laundering. The goal was to give prosecutors another tool in the form of a new charge to levy against defendants in combating criminal activity they were otherwise unable to properly address. In its influential report, the President's Commission on Organized Crime stated that it did not believe that the Bank Secrecy Act allowed for the appropriate prosecution and punishment of money launderers. The legislative history also demonstrates a clear desire on the part of Congress to increase the number of prosecutions for money laundering. Congress clearly intended to create stiff penalties for those engaged in money laundering. What the record does not indicate is that Congress anticipated or considered the possibility of a "merger" problem when crafting the

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163 See supra Part I.B.
165 See id. ("This last category includes crimes such as embezzlement, bank bribery, and illegal arms sales.").
166 See generally id. at 2–4 (discussing extensively the concerns about money laundering of drug proceeds and laundering by criminal organizations); H.R. Rep. No. 99-746, 13–17 (same).
167 Discussing the original measures dealing with financial misconduct, the Committee stated: "[T]he Committee on Banking, in its efforts to wage war on organized crime, drug traffickers, tax evaders, and various other white collar criminals, reported out what is commonly known as the Bank Secrecy Act." H.R. Rep. No. 99-746, at 15 (emphasis added). In the seizure and forfeiture section of the report, the Committee goes on vaguely to assert that "money laundering is also used for non-drug criminal activity." Id. at 21.
169 Cash Connection, supra note 12, at 52.
170 See S. Rep. No. 99-433, at 2–3 (discussing the small number of prosecutions under the Bank Secrecy Act and the need to reach more conduct).
171 See H.R. Rep. No. 99-855, at 16 ("The bill provides for substantial maximum penalties for these offenses . . . ."); S. Rep. No. 99-433, at 3 ("Several successful prosecutions under the [BSA], however, have also underscored the need for stiffer penalties . . . .").
There is no mention of the "merger" issue in the congres-
sional reports on the creation of the Act.\footnote{A House Judiciary Committee report dealing with the Act stated very simply: "This bill creates a new Federal crime of money laundering which will punish transactions that are undertaken with the proceeds of crimes or that are designed to launder the proceeds of crime." H.R. REP. NO. 99-855, at 7.}

The problems with sentencing under the Act did not take long to reveal themselves. The sentencing guidelines for money laundering were promulgated only six months after the primary money-laundering statutes took effect,\footnote{See id.; S. REP. NO. 99-433; H.R. REP. NO. 99-746 (1986).} and the U.S. Sentencing Commission developed the guidelines without the benefit of "actual prosecutorial experience or judicial guidance."\footnote{See 1997 SENTENCING POLICY FOR MONEY LAUNDERING, \textit{supra} note 76, at 3.} The penalties were based on the Commission’s understanding of Congress’s intent and information from the Department of Justice about its plans for application of the law.\footnote{Id.} As noted in the Commission’s report to Congress:

Therefore, the Commission originally set relatively high base of-
fense levels . . . to penalize . . .: 1) situations in which the "laun-
dered" funds derived from serious underlying criminal conduct such as a significant drug trafficking operation or organized crime; and 2) situations in which the financial transaction was separate from the underlying crime and was undertaken to either: a) make it appear that the funds were legitimate, or b) promote additional criminal conduct by reinvesting the proceeds in additional criminal conduct.\footnote{Id. at 4.}

These penalties were not originally tied to the seriousness of the underly-
ing crime.\footnote{See id.} After receiving varied criticism of the guidelines, the Commission began a multiyear study in which it concluded that the sentencing guidelines for money laundering were not being applied in a manner consistent with its original understanding of the Act.\footnote{See id. at 5–7 (discussing the Commission’s findings as to the increasingly broad application of the Money Laundering Control Act).} In 1995, the Sentencing Commission proposed an amendment that would tie the punishment received under the sentencing guide-
lines for money laundering to the seriousness of the underlying predi-
cate offense.\footnote{H.R. REP. NO. 104-272, at 11-12, 14–15 (1995).} The Sentencing Commission’s investigation noted issues that reflected the "merger" problem identified in \textit{Santos} and stated,
The typical money laundering defendant is not a specialized money launderer for some criminal enterprise such as a drug cartel or the mafia, but rather someone who conducted a financial transaction in connection with his own underlying offense—he spent, deposited or withdrew the stolen money. There is often no evidence that these transactions are made with the effort to conceal the illegal source of the funds or to promote additional criminal conduct.\(^1\)

The House Committee on the Judiciary rejected the Sentencing Commission's original amendment,\(^1\)\(^2\) but it did note that application of the guidelines could result in problematic outcomes.\(^1\)\(^3\) In a 1997 report to Congress, the Sentencing Commission specifically raised the "merger" issue.\(^1\)\(^4\) The Commission observed that, although the Department of Justice's reported policy was not to pursue money-laundering charges for "merged" transactions, the Commission still received documentation of money-laundering convictions in cases of "nearly complete identity between the money laundering and the underlying conduct."\(^1\)\(^5\) Although the current sentencing guidelines for money laundering were amended in 2001 to make the sentence for money laundering more proportionate to the underlying offense,\(^1\)\(^6\) no action was taken on the "merger" issue.

D. Formats for Legislation

The issue that remains is the approach to take in the wake of United States v. Santos. In light of the drawbacks of letting the situation continue uncorrected or relying on the Supreme Court to craft a remedy, legislation seems to be the best solution.\(^1\)\(^7\) There are a number of possible legislative remedies Congress could craft, although some are more workable than others. However, the concerns about the "merger" issue identified in Santos are real and should be addressed in any legislative remedy.

One approach is to avoid the "profits" versus "receipts" definitional quagmire and craft a solution that does not rely on defining the term "proceeds."\(^1\)\(^8\) Congress could simply adopt the Tenth Circuit's approach to the "merger" issue and amend the statute so as to punish

\(^{182}\) See H.R. REP. No. 104-272, at 11.
\(^{183}\) See id. at 14–15.
\(^{184}\) See 1997 SENTENCING POLICY FOR MONEY LAUNDERING, supra note 76, at 16.
\(^{185}\) Id. (footnote omitted).
\(^{186}\) See U.S. SENTENCING COMM’N, supra note 136.
\(^{187}\) See supra Part III.A–B.
conduct subsequent to and separate from the underlying criminal activity.\textsuperscript{189} In the words of Justice Breyer in his \textit{Santos} dissent, “[T]he money laundering offense and the underlying offense that generated the money to be laundered must be distinct in order to be separately punishable.”\textsuperscript{190} Theoretically, such an approach would solve the “merger” problem that was a decisive factor in \textit{Santos}. Nevertheless, the possibility remains that if an explicit definition of the term is not adopted, the same issues may reemerge. As previously mentioned, courts tend to resolve the vague terms in the statute in a manner most favorable to the government.\textsuperscript{191}

Another solution is to explicitly adopt Justice Scalia’s reasoning and approach to the definition and purpose of the term “proceeds” in the Money Laundering Control Act. A “profits” definition of the term “proceeds” would apply to all 250 predicate offenses for money laundering, including offenses related to drug trafficking or organized crime. Under this interpretation, the focus of the Act would not be to punish criminals for simply using funds derived from criminal activity but rather to prevent “the dangers of concealment and promotion.”\textsuperscript{192} The Act’s focus would therefore be on the expansion and growth of criminal enterprise. Prosecutors would concentrate on the “leveraging [of] one criminal activity into the next.”\textsuperscript{193}

There are a number of advantages to such an approach. The first is its simplicity. A single and explicit definition of a term is easier both to comprehend and to apply. Another advantage is that it would remedy the unfairness of the “merger” problem identified by both Justice Scalia and Justice Stevens. It would also be consistent with the understanding of the Act relied on by the Sentencing Commission when crafting the sentencing guidelines for money laundering.\textsuperscript{194} Such an action might also be an admission of what some critics perceive to be the shortcomings of the war on drugs discussed above.\textsuperscript{195} It would also impose a unified interpretation on the lower courts, preventing the definitional variation of the term “proceeds” that seems to be emerging.\textsuperscript{196}

A third possibility is to impose a “receipts” definition across the board and otherwise retain the current attributes of the Money Laundering Control Act. The positive aspects of this solution are that it would impose a unified definition and retain the power of the money-

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\textsuperscript{189} See United States v. Edgmon, 952 F.2d 1206, 1214 (10th Cir. 1991).
\textsuperscript{190} \textit{Santos}, 128 S. Ct. at 2035 (Breyer, J., dissenting) (citing \textit{Edgmon}, 952 F.2d at 1214).
\textsuperscript{191} See supra text accompanying note 149.
\textsuperscript{192} \textit{Santos}, 128 S. Ct. at 2026 (plurality opinion).
\textsuperscript{193} Id.
\textsuperscript{194} See supra text accompanying notes 182–85.
\textsuperscript{195} See sources cited supra note 150.
\textsuperscript{196} See supra Part II.D.
\end{flushleft}
laundering charge for federal prosecutors. However, this approach raises serious issues of fairness. These concerns were clearly represented in Santos. It is telling that neither of the dissenting Justices appeared to believe the current sentencing disparities to be fair.  

Even the House Committee on the Judiciary recognized that the current structure of the Act can lead to outcomes that are "problematic."  

Another possible solution is that the use of a "receipts" or "profits" definition should be contingent on the nature of the predicate offense charged. Money laundering by drug traffickers and those involved in organized crime would fall under a "receipts" definition. One reason to adopt this approach is that these types of activities do not lend themselves to a "profits" definition of the term "proceeds," and it is substantially harder for federal prosecutors to develop effective cases in such situations. Given the increasing interest in money laundering by terrorist organizations, a "receipts" definition could be applied to money-laundering prosecutions in that area. In regard to the other predicate offenses for money laundering, Congress could tailor the definition of the term "proceeds" to the nature of the predicate offense at issue. It could do this by taking into consideration the seriousness of the offense and the difficulties of proof for prosecutors. The problem with this solution is that there are over 200 remaining predicate offenses for money laundering for which Congress would need to craft a definition.

A more workable solution might be for Congress to explicitly impose a "receipts" definition in the Money Laundering Control Act and accept a revision of the sentencing guidelines for money laundering to correct the troublesome sentencing disparities that appear to underlie much of the concern about the "merger" problem. The sentencing guidelines for money laundering could mandate a significantly lower sentence where a "merger" problem exists and the

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197 See Santos, 128 S. Ct. at 2034 (Breyer, J., dissenting) ("[L]ike the plurality, I see a 'merger' problem."); id. at 2044 (Alito, J., dissenting) ("[I]f a defendant is convicted of money laundering for doing no more than is required for a violation of 18 U.S.C. § 1955, the defendant's sentence should be no higher than it would have been if the defendant had violated only that latter provision.").  


199 See generally Saler, supra note 55 (discussing the difficulties of a "receipts" definition).  


201 In his separate dissent, Justice Breyer advocated reform of the sentencing guidelines as an option for correcting the "merger" problem. See Santos, 128 S. Ct. at 2035 (Breyer, J., dissenting). In the principal dissent, Justice Alito also concurred in the idea that such a reform is a workable option. See id. at 2044 (Alito, J., dissenting) ("[T]he obvious remedy is an amendment of the money laundering Guideline."). Even Justice Stevens admitted that revision of the sentencing guidelines could provide an acceptable reform. See id. at 2033 (Stevens, J., concurring).
conduct underlying the predicate offense and the money-laundering charge appear factually indistinguishable. The Commission could go so far as to make the available sentence nearly or totally indistinguishable from that of the underlying offense. Such an adjustment has the advantage of imposing a unified definition that solves the disparities that appear to be emerging among the lower courts. It also addresses the very real concerns about the sentencing disparity and the criticisms that were raised in Santos of how the Act is or could be employed in regard to merged offenses.\textsuperscript{202}

One issue that remains is whether a revision of the sentencing guidelines for money laundering is necessary in light of United States v. Booker.\textsuperscript{203} The Court's decision in that case makes the sentencing guidelines advisory rather than mandatory.\textsuperscript{204} In the principal dissent, Justice Alito suggests, that as a result of Booker, sentencing judges can simply depart from the money-laundering sentencing guidelines in cases where the defendant is convicted of money laundering for engaging in behavior that is no more than required for the underlying offense.\textsuperscript{205} If achieving fair and uniform sentences is the goal, however, then simply relying on the sentencing judge to depart when "merger" issues arise does not seem like a strong enough solution. Despite the now advisory nature of the guidelines, they remain a primary factor in sentencing decisions, and "[t]he district courts, while not bound to apply the [g]uidelines, must consult those [g]uidelines and take them into account when sentencing."\textsuperscript{206} Specifically amending the guidelines to address this issue rather than relying on sentencing judges to depart from the money-laundering guidelines and impose a lesser penalty when a "merger" problem exists encourages uniformity in sentencing among the lower courts.

The next issue is whether an amendment to the sentencing guidelines does enough to protect the interests of defendants. Justice Scalia argued that "the merger problem affects more than just sentencing; it affects charging decisions and plea-bargaining as well."\textsuperscript{207} Although an amendment to the sentencing guidelines is not a perfect solution and does not correct all possible unfairness to defendants, it does provide a substantial remedy for these concerns. The primary attractiveness of the money-laundering charge to prosecutors is that it

\textsuperscript{202} See supra Part II.B.

\textsuperscript{203} 543 U.S. 220 (2005).

\textsuperscript{204} See id. at 245-46 ("[T]he federal sentencing statute, as amended, makes the [g]uidelines effectively advisory. It requires a sentencing court to consider [g]uidelines ranges, but it permits the court to tailor the sentence in light of other statutory concerns as well." (citations omitted)).

\textsuperscript{205} See Santos, 128 S. Ct. at 2044 (Alito, J., dissenting).

\textsuperscript{206} Booker, 543 U.S. at 264.

\textsuperscript{207} Santos, 128 S. Ct. at 2028 (plurality opinion).
calls for stiff penalties and there is the possibility that these penalties can be used as leverage over the defendant during the plea-bargaining stage. The proposed amendment makes it extremely unlikely that a defendant would actually receive such a stiff penalty. A correction of the sentencing disparity also makes it more unlikely that defendants will be pressured into accepting plea bargains. These factors combine to make it much less likely that a prosecutor would decide to bring a prosecution in the case of “merged” transactions.

CONCLUSION

The Money Laundering Control Act of 1986 is designed to combat what Congress perceived to be the nation’s problem with money laundering. The drafters of the Act expressed a belief that money laundering forms the underpinning of drug trafficking and organized crime and expressed a desire to disrupt that connection. The Act they created is a powerful tool for federal prosecutors and provides for stiff criminal penalties for those convicted of money laundering.

The Supreme Court in United States v. Santos attempted to address the “merger” issue that arises in certain prosecutions under the Act by adopting a “receipts” definition of the term “proceeds.” Unfortunately, the decision created more problems than it solved, largely because it does not give the lower courts a workable framework for interpreting the term “proceeds” in the Act. This is hardly surprising given that the Justices themselves could not seem to agree about what precedent the case actually set down for the lower courts. The effects of the case on prosecutions for money laundering involving drug trafficking or organized crime are especially troubling.

In the wake of Santos, lower courts are now applying divergent interpretations of the case. Some courts are applying a “profits” definition to all predicate offenses for money laundering. Others appear to be leaning toward the idea that the meaning of the term “proceeds” can vary with the underlying offense, at least as far as applying a “receipts” definition in cases involving drug-trafficking activities and organized crimes. Other courts choose to limit Santos to money laundering where the predicate offense is illegal gambling. All of the possible interpretations the lower courts could use regarding the decision have significant drawbacks, as does the lack of uniformity.

This Note explored a number of possible remedies for the divergent approaches that are emerging among the lower courts. It suggested that the problems caused by Santos may resolve themselves or that a judicial remedy might be possible, but that a legislative remedy is the most workable solution. A congressional rewrite of the statute

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208 See supra text accompanying notes 76–80.
offers the approach most suited to achieving uniformity among the lower courts. The best solution for the problem would be for Congress to rewrite the Money Laundering Control Act to reflect its intent regarding the definition of the term "proceeds." A new statute that explicitly adopts a "receipts" definition combined with a revision of the sentencing guidelines to correct the "merger" issue would retain the power of the charge but would also address the very valid concerns about fairness raised by Justice Scalia and Justice Stevens in *Santos.*