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The Supreme Court and official corruption (opinion)

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governor.JPG

Former Virginia Gov. Bob McDonnell speaks outside the Supreme Court in April. On June 27, the Supreme Court overturned his bribery conviction.

(AP Photo/Andrew Harnik)

By Ofer Raban

Soon after he was elected governor of Virginia, Robert McDonnell and his wife received a Rolex, golf trips, designer clothes, cash and other gifts totaling \$175,000 from a Virginia business who wanted the University of Virginia to conduct research on a dietary supplement manufactured by his company. In return for the gifts, the governor asked officials to meet with the businessman and convened meetings with university researchers and officials where he wondered aloud whether exploring the businessman's product would be "good for the Commonwealth."

One university official mentioned concerns over political pressure when evaluating whether the research should be conducted. To their credit, University of Virginia officials never undertook the research. The governor also inquired with the Virginia secretary of administration whether it "would be good" for state employees to have the supplement included in their health care coverage.

In 2014 McDonnell was convicted of federal bribery charges. The jury found that the governor unlawfully received loans, gifts and cash in exchange for the performance of "official acts."

Recently, the United States Supreme Court reversed the conviction by declaring that the jury instructions' definition of "official acts" was too broad. The jury was not told that "setting up a meeting, talking to another official, or organizing an event" do not count as an "official act" unless the official also exerts pressure in favor of a certain decision.

Thus, according to the Supreme Court, the federal bribery statute left the governor free to convene official meetings on the businessman's behalf in exchange for expensive gifts or cash. (A newly enacted Virginia statute now prohibits such conduct.)

Then, despite considerable evidence that the governor also sought to pressure the university to conduct the research, the court overruled two lower federal courts and reversed the conviction.

The explanation for this remarkable decision, which refused to find criminality in the corrupt actions of a crooked politician, lies with the court's vision of campaign finance.

"Conscientious public officials," said the court, "arrange meetings for constituents, contact other officials on their behalf, and include them in events all the time." If such acts could constitute corruption, elected officials may be reluctant to perform them for campaign contributors, and contributors may be reluctant to contribute.

There are two obvious responses to this purported concern: First, McDonnell did not receive campaign contributions, but cash and goods straight into his pocket. But more fundamentally, the statute only makes it a crime to arrange meetings or contact other officials on behalf of a supporter *if done in exchange for financial support*. If there is no such exchange, there is no crime. It is only the exchange of money for political favors that is made criminal.

The problem with this second response, however, is its tension with the court's conception of the proper relationship between elected representatives and their financial supporters. In its (in)famous Citizens United decision, the Supreme Court declared that "the fact that (contributors) may have influence over or access to elected officials does not mean that these officials are corrupt. ... It is well understood that a substantial and legitimate reason ... to make a contribution ... is that the candidate will respond by producing those political outcomes the supporter favors."

At least some political outcomes can be legitimately produced in response to financial support. Hence the insistence on an exceedingly restrictive reading of the bribery statute.

And yet, Citizens United was a 5-4 decision, whereas last week's decision was unanimous.

What made the four liberal justices (who disagreed with the conservatives in Citizens United) join their conservative colleagues here?

The answers are manifold, but here is the cynical option: Citizens United was about campaign finances, whereas McDonnell was about gifts. And while federal judges do not run political campaigns, they do receive gifts. Supreme Court justices receive free airfare, free stays in luxury hotels, expensive collectibles, memberships in golf clubs, and even cash awards. A federal bribery statute that criminalizes a broad range of "official acts" performed by public officials in exchange for gifts may have struck too close to home for these public officials.

Continuing a trend, the court's decision will further fuel the corrupting confluence of money and American politics.

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