Unanimously wrong

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On Friday, Sept. 8, federal prosecutors announced that they were dropping charges against former Virginia Gov. Robert McDonnell in light of the U.S. Supreme Court overturning his conviction at the end of June. In McDonnell v. United States, 2016 DJDAR 6444 (June 27, 2016), the Supreme Court redefined what is misconduct by elected officials sufficient to violate federal law and made it far more difficult to prosecute and convict government corruption. From the earliest days of law school, I teach my students that just because the Supreme Court decides something doesn’t mean it is right, even if the court is unanimous. I think the court got it unanimously wrong in McDonnell.

While governor of Virginia, McDonnell and his wife, Maureen McDonnell, received over $175,000 in gifts and loans from a Virginia businessman, Jonnie Williams. This included Williams took Maureen McDonnell on a shopping trip and bought her $20,000 of designer clothes, Williams gave the McDonnells $15,000 for their daughter’s wedding, and Williams gave the McDonnells $70,000 in loans.

Williams, of course, had a reason for doing all of this. Williams was the CEO of Star Scientific, a Virginia-based company that developed and marketed Anatabloc, a nutritional supplement. Antabloc was made from anatabine, a compound found in tobacco (not something usually linked with health products). Williams and Star Scientific wanted to obtain Food and Drug Administration approval of Anatabloc as an anti-inflammatory drug. A crucial step in securing that approval was independent research studies on the health benefits of Antabloc. Williams and Star Scientific hoped Virginia’s public universities would undertake such studies, pursuant to a grant from Virginia’s Tobacco Commission.

McDonnell introduced Williams to key state officials and hosted dinners with Williams and Virginia policymakers in attendance. McDonnell met with Lisa Hicks-Thomas, the Virginia secretary of administration, and Sara Wilson, the director of the Virginia Department of Human Resource Management, and told them that he was taking Anatabloc and said that the pills "were working well for him" and "would be good for" state employees. McDonnell undeniably used his position as governor of Virginia for his own significant personal gain.
McDonnell was convicted under the federal honest services statute and the Hobbs Act.

The former makes it a crime for "a public official or person selected to be a public official, directly or indirectly, corruptly" to demand, seek, receive, accept, or agree "to receive or accept anything of value" in return for being "influenced in the performance of any official act." An "official act" is defined as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." The 4th U.S. Circuit Court of Appeals affirmed the conviction.

But the Supreme Court, in a unanimous opinion last June, reversed the conviction. Chief Justice John Roberts wrote the opinion for the court. He said that federal law is violated only if a government official commits an "official act." The court concluded that "official act" requires a decision or an action on a matter pending before the government; it must involve a formal exercise of governmental power.

The court concluded that McDonnell did not engage in any official act because all he did was introduce Williams to government officials and set up meetings. The court explained: "Setting up a meeting, hosting an event, or calling an official (or agreeing to do so) merely to talk about a research study or to gather additional information, however, does not qualify as a decision or action on the pending question of whether to initiate the study." The court concluded: "In sum, an 'official act' is a decision or action on a 'question, matter, cause, suit, proceeding or controversy.' The 'question, matter, cause, suit, proceeding or controversy' must involve a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee."

Although the justices were unanimous, I believe that the court interpreted "official act" far too narrowly. The statutes expressly say that government officials cannot take "actions" in exchange for their personal gain. Making introductions and arranging meetings and providing endorsements are all, by definition, "actions" taken as a government official. McDonnell could and did take these actions entirely and only because he was governor of Virginia. The conduct was done in exchange for a substantial amount of money. Government officials should not be using their positions for their own personal gain. The federal anti-corruption laws were intentionally broadly written and meant to be broadly interpreted.

If I were to get $10,000 or a Rolex watch (something else that McDonnell received from Williams) in exchange for recommending a student for admission to UC Irvine Law School or personally introducing the student to the Law School admissions dean, I surely have taken an official action. I do not have the authority to admit a student to UC Irvine Law School and never once have been involved in any admissions decision. But I likely have influence with the admissions dean who reports to me and with my colleagues on the admissions committee. That influence never should be for sale. Using my influence in exchange for money should be illegal, whether or not the student was actually accepted for admission, or even would have been accepted anyway. Government officials have influence, even when there is not a formal decision, and their actions never should be in exchange for money or things of value.

The court left open the possibility that McDonnell could be retried with different jury instructions. But rather than do this, the government announced it was dismissing all charges.
The Supreme Court's decision in *McDonnell v. United States* will make it much harder for the government to prosecute and convict those who misuse their official power for their personal gain. I don't care if it was unanimous, the court was wrong.