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## Fraud statute invites bogus corruption charges

By Dan Lawton

This is the first in a two-part series concerning "Strippergate," the San Diego City Council public corruption case. Part two will run tomorrow.

### FIRST IN A TWO PART SERIES

At the outset let me tell you that former San Diego City councilman Ralph Inzunza, Jr., is a good friend of mine. His public corruption case, "Strippergate," is now nearly a decade old. As I write these words he has exhausted his appeals and is serving a 21-month sentence in federal prison in central California. Had he been guilty, I would have testified against him myself. But he is innocent. The pointless ruin of his career by federal prosecutors and two complicit federal courts was a mockery of justice. I don't support Ralph Inzunza because of misguided friendship. I support him because he was falsely convicted based on false testimony, prosecutorial misconduct, and an impossible-to-understand statute. Let me explain.

#### The Case.

In 2001 Ralph Inzunza was a 32-year-old, newly-elected city councilman from San Diego's District 8. A married man with a young son, he was bright, idealistic and popular with constituents. His friend, Michael Zucchet, sought a seat on the city council as well. Zucchet asked Ralph for help in raising money for his campaign. Ralph agreed.

Unbeknownst to Ralph at the time, wealthy strip club magnate and Michael Galardi sought the repeal of San Diego's so-called "no-touch ordinance," which banned touching between his exotic dancers and the patrons of his clubs (such as Cheetahs). Galardi had a lobbyist, Lance Malone, whose help he enlisted. The FBI was listening.

Malone embarked on his mission. In 2002, he approached Ralph about a possible repeal of the no-touch ordinance. Ralph was skeptical, saying though he favored the idea, it would go nowhere without police support. Malone and Galardi then concocted a plan to represent (falsely) to Ralph that such support existed. Ralph promised Malone he would try to get Zucchet on board if Zucchet got elected, provided the police were on board too.

During the same year, Malone de-

livered checks (on three occasions) to Ralph, for delivery to Zucchet's election campaign. In all, Zucchet's election campaign accepted \$5,000 in checks from Malone in 2002. Zucchet duly reported the contributions to authorities on the required forms. At no time did Ralph ask for or get any money for his own reelection campaign from Malone or Galardi. Neither councilman put a nickel in his own pocket. Zucchet was elected to the city council.

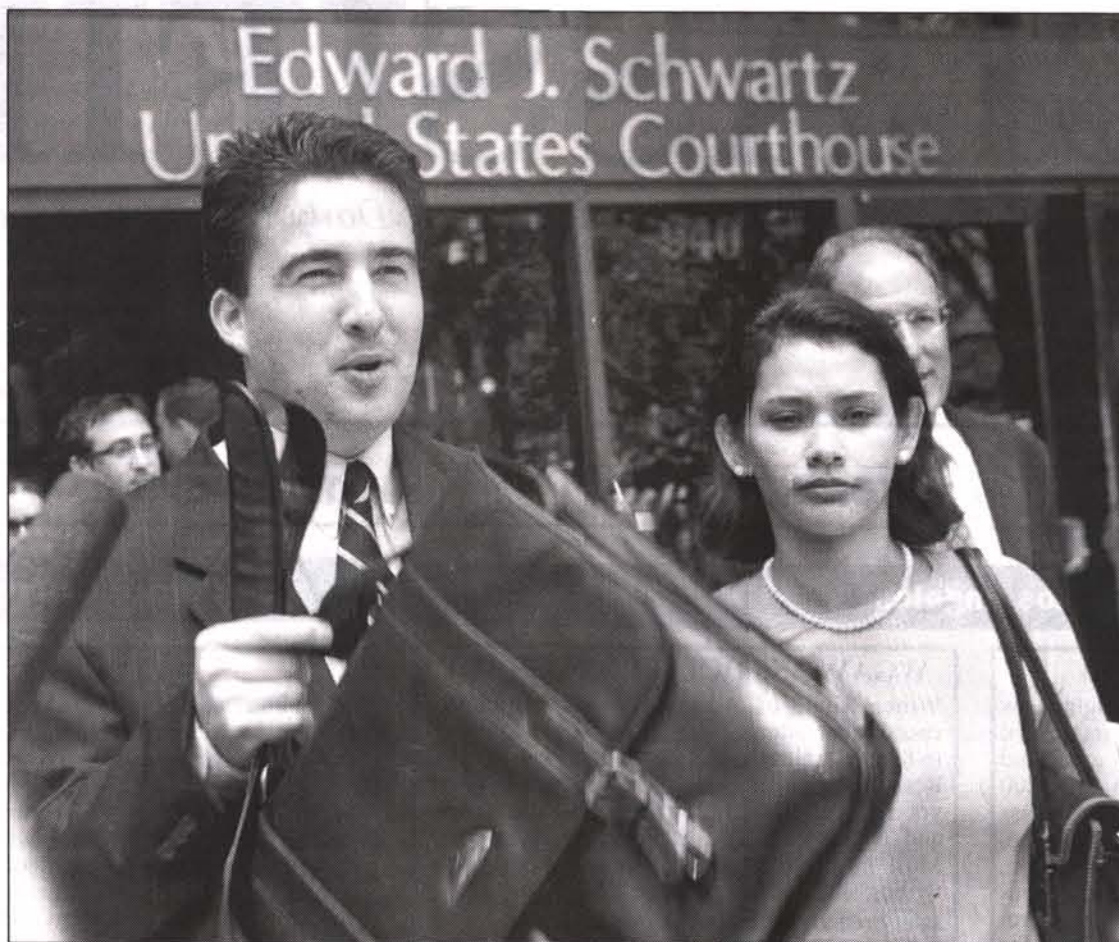
Afterward, repeal of the no-touch ordinance went nowhere. It never came before the council. Nonetheless, federal agents raided City Hall on May 14, 2003, ransacking the councilmen's offices. Their indictments soon followed. Also indicted were Ralph's fellow councilman Charles Lewis, Galardi and Malone. The charges were "honest services wire fraud," conspiracy to commit "honest services wire fraud," and extortion.

Galardi quickly pled guilty and promised to cooperate, with his sentencing held in abeyance pending the outcome of the councilmen's trial. During his interviews with federal agents, Galardi described no cash gifts to the councilmen whatsoever.

An 11-week jury trial followed. Ralph defended on the grounds he promised no official action, had no corrupt intent, wasn't influenced by the \$5,000 donated to Zucchet, and sincerely believed the no-touch ordinance was a "silly law" and should be repealed if (as he was told) the police didn't support it. Michael Galardi was the government's star witness. (His own future sentencing hung in the balance.) On the stand, he told the jury he had bribed the

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councilmen with \$12,000 in cash, delivered to Malone for distribution to the councilmen. This was a lightning bolt out of a clear blue sky. Even the trial judge (Jeffrey Miller) found this remarkable epiphany not



Associated Press

San Diego City Councilman Ralph Inzunza, left, is accompanied by his wife, Anna, as he pushes his way through a crowd outside the federal courthouse in San Diego, in 2005.

credible. Prosecutors waited until after the trial was over to produce documents proving that Galardi had never described any such cash payments even to his own lawyers before the trial.

Judge Miller refused to instruct the jury that the government had to prove corrupt intent in order to convict. This meant the jury could convict the councilmen even if they lacked any corrupt intent.

The jury acquitted Ralph of 24 of the counts against him. Nonetheless, it also convicted him of nine counts of "honest services wire fraud," three counts of extortion, and one count of conspiracy. Zucchet also suffered convictions (later thrown out by Judge Miller as lacking evidence).

Afterward, Malone submitted an affidavit denying that the councilmen had ever traded promises of action for contributions. He denied delivering any cash payments. He denied the councilmen had asked for anything other than legal campaign

contributions. He denied he had asked for or gotten any *quid pro quo*, or anything of value, in return for the contributions. He said neither Inzunza nor Zucchet had ever promised anything other than a willingness to listen and a lack of bias against sexually oriented businesses. Judge Miller ignored the affidavit.

Ralph appealed, but he lost. Judge Canby of the 9th U.S. Circuit Court of Appeals struggled with his opinion affirming the conviction. He "confess[ed] considerable uneasiness" in deciding the case because, "in our flawed but nearly universal system of private campaign financing, large contributions are commonly given in expectation of favorable official action." Nonetheless, Canby wrote that the jury could have properly found that Ralph's promises of action could have been a *quid pro quo* for the \$5,000 given to Zucchet. According to Canby, this was because Ralph promised action "at or near the same time" as Zucchet received the checks. Canby

brushed off Galardi's tale about the \$12,000 cash. This was a product of "memory failure" and "pro-prosecution bias" which "gave rise to credibility problems," he wrote. (This is the most polite euphemism for "lying on the witness stand in order to help the prosecutor" which I have ever read in any judicial opinion.) As to it, Judge Canby wrote, it wasn't "reasonably probable that [this] testimony ... prejudiced the trial."

#### The Honest Services Fraud Statute — an Incomprehensible Standard.

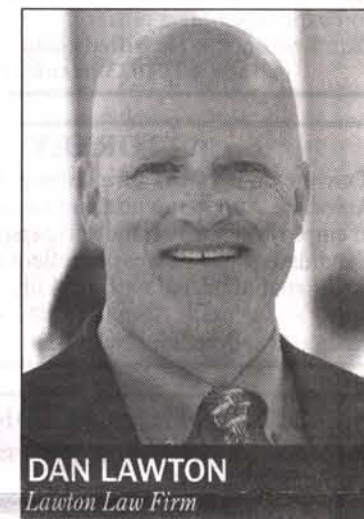
What made all this possible was a statute that is impossible to understand or apply in a consistent way. I write of the honest services fraud statute, 18 U.S.C. Section 1346. This statute proscribes theft of "honest services." Unfortunately, the statute and case law construing it are unclear. Does a gift to a legislator in 2012 become a crime when the legislator votes for the donor's bill in 2014? Does the law require harm to the victim, or private gain to the defendant — or not? No one honestly

can claim to know the answers to these questions. And so a person can violate the law without realizing it. No less a liberal than Antonin Scalia has condemned the statute on this very basis. He writes that its lack of any "coherent limiting principle" invites "abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct." *Sorich v. United States*, 555 U.S. 1204 (2009) (Scalia, J., dissenting from denial of certiorari). He has a point. The problem is that, except for him, Justice Stephen Breyer (who agrees), and a few others, no one seems to care. I suppose it's hard to get Congress interested in repealing a statute which outlaws "honest services fraud." (Can you imagine either President Obama or Mitt Romney campaigning for the statute's repeal?)

To federal prosecutors, that's just fine. To them, the good part of the honest services fraud statute is this: It has a lower burden of proof than other anti-corruption laws. It requires no proof of corrupt intent. And so it's easier to get convictions. Ralph's case — in which no corrupt intent was required to be proven — is a nice example of this.

Tomorrow: juxtaposing "Strippergate" with the legalized corruption endorsed by Congress and courts.

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