

Overview: the Larry Craig appeal

Last summer, U.S. Sen. Larry Craig, R-Idaho, was arrested at the Minneapolis-St. Paul International Airport for allegedly attempting to solicit sex from an undercover police officer. The sensational allegations that surrounded the arrest — coupled with Craig's famous protestation that he merely had a "wide stance" — made the case instant fodder for talk-show hosts and cultural pundits of all stripes.

While most people know of the Larry Craig case from its many references in popular culture, there has been comparatively little attention paid to its underlying legal issues. Those issues will get a full hearing today at the Minnesota Court of Appeals. Below are summaries of the basic arguments that both sides are expected to make.

How the case began

On June 11, 2007, Sgt. David Karsnia was working an undercover detail aimed at stemming lewd behavior in the airport's public restrooms. As part of this operation, Karsnia waited inside bathroom stalls, hoping to catch people engaging in public sex or other prohibited conduct. According to Karsnia's police report, Craig entered the bathroom where he was stationed, gazed through the cracks in his stall partition, and then sat down in an adjacent stall. The report then states that Karsnia observed Craig slowly tapping his right foot, which he "recognized as a signal often used by persons communicating a desire to engage in sexual conduct." Karsnia reported that he then tapped his own foot. He said Craig responded by moving his right foot until it touched the officer's left foot, and also by "swiping his hand under the stall divider for a few seconds." At that point, Karsnia produced his badge and ordered Craig out of his stall. Craig was subsequently charged with disorderly conduct and interference with privacy, and later, by mail, he pleaded guilty to disorderly conduct. Judge Gary Larson dismissed the gross misdemeanor of interference with privacy.

In August of 2007, Craig's guilty plea became a matter of public record and caused a torrent of news coverage. In the wake of the overwhelming press attention, Craig attempted to withdraw his plea, and was supported in his efforts by a brief filed by the Minnesota chapter of the ACLU. In October of 2007, Hennepin County District Judge Charles Porter denied Craig's motion to withdraw his plea, and the senator's attorneys filed an appeal soon

thereafter.

Craig's appeal

In general, it is difficult to withdraw a guilty plea under Minnesota law. In the senator's appellate brief, his attorneys defend his attempt to do so in the following ways:

First, they maintain that the lower court erred by not allowing Craig to withdraw his guilty plea. Minnesota law requires that courts examine the factual basis for all guilty pleas before accepting them. Craig's brief maintains that the district court failed to do this, causing a serious procedural flaw. According to the brief, "There is no indication that Judge Larson ... signed the Plea Petition or reviewed the factual basis and accepted the plea." Craig's attorneys also hold that even if Judge Larson had reviewed the facts of the case, they would not be sufficient to warrant a guilty plea. For instance:

The disorderly conduct law that Craig was charged under states that disorderly conduct must affect "others." Craig's brief notes that his alleged conduct only affected Karsnia, and, as such, it could not meet the proper definition of "others." The statute also requires that the conduct in question must be "offensive, obscene, abusive, boisterous or noisy." Craig's brief holds that simple foot tapping and the waving of a hand do not rise to the level of conduct contemplated by the statute.

Finally, Craig's attorneys claim that the disorderly conduct statute is unconstitutional as it applies to the actions of their client. Since Craig's actions were constitutionally protected, they argue, Craig could not plead guilty to the disorderly conduct charge, for his conduct did not constitute a crime. To quote the brief itself:

"The described conduct amounted to a communication by one person directed toward another person, who responded. This communication was subject to protection under the First Amendment to the United States Constitution. To apply the disorderly conduct statute to these facts, therefore, would render the statute unconstitutionally overbroad."

The ACLU brief

The Minnesota chapter of the ACLU filed a friend of the court brief in the Larry Craig matter that expands on these constitutional issues in greater

detail. According to the ACLU's brief, "The State prosecuted Senator Craig because of what it claimed his alleged conduct communicated: an invitation to have sex. Senator Craig should be allowed to withdraw his plea to correct that manifest injustice."

In short, the ACLU brief claims that Craig's alleged attempt to solicit sex by nonverbal means was constitutionally protected. The ACLU cites both Minnesota and U.S. Supreme Court precedents that support treating certain types of physical conduct the same as language, thus making Craig's actions permissible, protected expression.

The ACLU brief then attempts to narrow the scope of the disorderly conduct law, stating that the statute has already been held to be unconstitutionally overbroad by Minnesota courts. For instance, a 1978 Minnesota Supreme Court decision held that the government "may not criminalize expression merely because it is offensive, alarming, angering, or disturbing."

Finally, the ACLU maintains that Craig allegedly invited Karsnia to engage in conduct which is not, in itself, a crime. The brief states that if Craig's invitation was to have sex in a restroom stall, then that conduct would be protected under *State v. Bryant*, a 1970 Minnesota Supreme Court decision which holds that "individuals who engage in sex in closed stalls in public restrooms have a reasonable expectation of privacy."

The state's argument

In its brief, the State of Minnesota responds to the arguments raised by Craig's attorneys in a number of ways. First, it holds that there was a sufficient factual basis for the district court to find Craig guilty, and that Judge Larson had indeed reviewed those facts. Despite the lack of a signature on the plea petition, the state maintains that other court documents clearly indicate that Judge Larson had reviewed the document to the standards required by law.

The state then uses a significant portion of its brief to try to persuade the appellate court to disregard several arguments made by Craig and the ACLU. As a procedural matter, the state maintains that many issues were improperly raised on appeal, since they were only raised at the district court level by the ACLU's "friend of the court" amicus brief. According to the state's attorneys, Craig's lawyers did not raise constitutional issues at the district court level, nor did they "assert that the purported lack of presence of others

make the disorderly conduct statute inapplicable." By not raising these issues at the district court level, the state maintains that Craig did not properly preserve them for appeal, and therefore the appellate court cannot hear them.

The state's brief also focuses heavily on conduct that it says was deliberately minimized by Craig's attorneys — namely that Craig repeatedly stared "into an occupied bathroom stall through a crack in the frame" before sitting down next to Karsnia. According to the state's brief, Craig's "prehensile stare into the partitioned portion of the bathroom stall, interrupted only by stares down at his fidgeting fingers" occurred with enough frequency, and for long enough that Karsnia was able to note Craig's eye color. Such behavior, the brief holds, clearly rises to the level prohibited by the disorderly conduct statute.

Finally, even if the court chooses not to disregard the constitutional issues raised by the other briefs, the state holds that the disorderly conduct law is still constitutional under a variety of U.S. and Minnesota Supreme Court precedents. Also, attorneys for the state contend that Craig's reach under the stall was not covered by the *State v. Bryant* case, since Craig's body intruded into another stall, and was not confined to the one that he occupied, where he had a reasonable expectation of privacy under the *Bryant* decision.

Oral arguments in the *State of Minnesota v. Larry Edwin Craig* case will be heard at 9 a.m. today at the Minnesota Judicial Center.

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