

Legal Sidebar

Privilege Against Self-Incrimination Supplements Journalist Privilege

10/20/2015

Journalists' privileges, long sought under the First Amendment, may be available in some cases under the cover of the Fifth Amendment's privilege against self-incrimination. This seems to be the implication of the opinion of the United States Court of Appeals for the Sixth Circuit in *Convertino v. Department of Justice*. There, the court held that a journalist might refuse to disclose the source of leaked government documents on the basis of his privilege against self-incrimination.

Nearly a half-century ago, the Supreme Court [held](#) that the First Amendment provides no protection for a journalist who refuses to testify before a grand jury. To this day, federal courts continue to [declare](#) that “[t]here is no First Amendment testimonial privilege, absolute or qualified, that protects a reporter from being compelled to testify by the prosecution or the defense in criminal proceedings about criminal conduct that the reporter personally witnessed or participated in. . . .” The courts do recognize a limited, qualified [privilege](#) in civil cases, however, and it was this qualified privilege which the reporter in *Convertino* sought to claim originally.

[Convertino](#) is a former federal prosecutor, who, while an Assistant United States Attorney, came under internal Justice Department (DOJ) investigation. He contended the investigation was in retaliation for his testimony before the Senate Finance Committee. A reporter for the Detroit Free Press wrote an article detailing allegations in the investigation and indicating the information came from anonymous DOJ officials.

[Convertino](#) argued that DOJ violated the Privacy Act when its officials leaked documents from the internal investigation to the reporter. Convertino sought the identity of the anonymous DOJ officials during depositions, but the reporter invoked his privilege against self-incrimination for most of the questions. The federal district court upheld the reporter's claim. Convertino appealed. The Sixth Circuit [affirmed](#).

In the case of the privilege against self-incrimination, what [counts](#) is the nature of the statement and not the nature of proceedings in which it is compelled. The privilege may be as legitimately invoked at a deposition as at trial. The Sixth [Circuit](#) also pointed out that “the privilege protects the witness from compelled disclosure not merely of evidence which may lead to criminal conviction, but also information which would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution.”

The reporter in *Convertino* feared incrimination beginning with the [statute](#) which outlaws the receipt of stolen federal property, tangible as well as [intangible](#), including the government's confidential information. Convertino charged that the reporter had been provided with DOJ documents relating to its internal investigation. It did not matter that DOJ had conducted an unsuccessful investigation into the leak or that the Attorney General had declared that reporters would not be prosecuted for doing their jobs. What mattered was not “the probability or likelihood of prosecution, but rather ... the possibility of prosecution,” the [court](#) said.

The case appears to suggest that journalists may invoke their privilege against self-incrimination in order to avoid disclosing their sources for leaked confidential government information, notwithstanding the absence of a recognized journalist privilege.

Posted at 10/20/2015 11:43 AM by [Charles Doyle](#) | [Share Sidebar](#)

Category: [Criminal Procedure](#), [Freedom of Speech](#)

Related Policy Issue(s): [Crime and Punishment](#)