Taking the Fifth: How the Tenth Circuit Determined the Right Against Self-Incrimination is "More Than A Trial Right" in Vogt v. City Of Hays

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Abstract

In Vogt v. City of Hays, the United States Court of Appeals for the Tenth Circuit ruled that the Fifth Amendment right against self-incrimination is more than a trial right and applies to the use of compelled statements in probable cause hearings as well as in criminal trials. While the Self-Incrimination Clause states that the right applies “in a criminal case,” there is a circuit split regarding the definition of a “criminal case.” The Tenth Circuit joined the Second, Seventh, and Ninth Circuits in finding that the right against self-incrimination applies to more than a trial, relying on the common meaning of the term “criminal case” in the Fifth Amendment text and the Framers’ understanding of the right. This competition winning Note explores the opinion of the court, discusses additional authority to support the court’s finding, and emphasizes the impact of the Vogt decision in protecting a criminal defendant’s constitutional privilege against self-incrimination. As the Supreme Court has granted certiorari to hear the Vogt case in 2018, this discussion provides a timely analysis of the Fifth Amendment before what could be an end to the circuit split over the meaning of a “criminal case.”
I. INTRODUCTION ..................................................................................102
II. HISTORICAL BACKGROUND .................................................................104
III. FACTS ...............................................................................................107
IV. ANALYSIS OF THE OPINION ...........................................................109
    A. Judge Bacharach’s Opinion ..........................................................109
        1. Text of the Fifth Amendment and the common meaning
           of “criminal case” ..................................................................109
        2. The Framers’ understanding of the right against self-
           incrimination ......................................................................111
    B. Judge Hartz’s Concurring Opinion .................................................112
    C. Additional Arguments to Support the Court’s Holding ..............113
V. IMPACT AND CONCLUSION ..............................................................115

I. INTRODUCTION

“Take the Fifth!” From suspense-filled courtroom television dramas to
inquisitorial conversations where someone evades telling the truth, these
words are deeply woven into the American conscience as an invocation of the
right against self-incrimination embodied in the Fifth Amendment. While
this phrase is often used in a variety of contexts, the Fifth Amendment speci-

fies that no one must be coerced into testifying against oneself “in any crim-

inal case.” However, in the 225 years since the Bill of Rights was passed, the
exact meaning of “criminal case” has yet to be established, causing ambiguity
regarding at which point in a criminal action the Self-Incarnation Clause
applies.

In Chavez v. Martinez, the United States Supreme Court held that that the
plaintiff, Martinez, had failed to assert a violation of his Fifth Amendment
rights. Martinez was never criminally prosecuted, nor was he compelled to

1. U.S. Const. amend. V.
2. Id.
testify against himself "in a criminal case." The Court, however, did not define the exact point at which a criminal case begins under the Fifth Amendment. This led to a circuit split over whether the right against self-incrimination is strictly a "trial right" or if the use of coerced statements at proceedings before a criminal trial violates the Fifth Amendment. In *Vogt v. City of Hays*, Matthew Vogt filed a § 1983 action against the cities of Hays and Haysville, Kansas, and four police officers, alleging a violation of his Fifth Amendment right against self-incrimination. Vogt filed this action after the Haysville police department used statements that he made during a hiring process to bring criminal charges against him and support those charges at a probable cause hearing. In agreement with the Second, Seventh, and Ninth Circuits, the Tenth Circuit held in *Vogt* "that the right against self-incrimination is more than a trial right." This Note will explore the Tenth Circuit’s decision in *Vogt* regarding the basis for its determination that self-incrimination liability extends beyond a trial in a criminal case and also applies to probable cause hearings. Part II discusses the historical background of the right against self-incrimination from seventeenth-century England to the recent circuit split over the phrase "criminal case." Part III illustrates the facts behind the *Vogt* decision. Part IV examines how the court reached its holding, discusses an unresolved question set forth in the concurring opinion, and highlights additional grounds to support the court’s determination. Part V concludes by highlighting the impact of this case, noting the additional weight of authority that protects a

6. *Id.* at 1237–38. Section 1983 imposes civil liability on any individual who deprives anyone within the jurisdiction of the United States of "any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983 (2012). The Sixth and Ninth Circuits have each held that police officers may be liable under § 1983 for violating the Fifth Amendment if they compel suspects to make self-incriminating statements and a prosecutor uses those statements in a criminal case. *Vogt*, 844 F.3d at 1250 (citing *Stoot v. City of Everett*, 582 F.3d 910, 926–27 (9th Cir. 2009) and *McKinley v. City of Mansfield*, 404 F.3d 418, 436–39 (6th Cir. 2005)).
8. *Id.* at 1242.
9. *Id.* at 1241–42, 1246.
10. See infra Part II.
11. See infra Part III.
12. See infra Part IV.
II. HISTORICAL BACKGROUND

The right against self-incrimination is enshrined in the Fifth Amendment, which states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." The Fifth Amendment, made applicable to the states by the Due Process Clause of the Fourteenth Amendment, prohibits law enforcement officers from compelling self-incriminating statements in the course of their employment.  

The privilege against self-incrimination predates the framing of the Bill of Rights and was a firmly established common-law right by the late eighteenth century. The right developed in the seventeenth century as English common-law courts issued "writs of prohibition" to prevent inquisitional interrogation in the Court of Star Chamber and the Court of High Commission. The common-law courts declared that statements of criminal defendants that were provoked by torture were inadmissible. William Blackstone wrote in 1765 and again in 1769 that it was an established rule of law that "no man shall be bound to accuse himself." When James Madison drafted the original language of the Fifth Amendment, the Self-Incrimination Clause read, "nor shall [anyone] be compelled to be a witness against himself," without any mention of a "criminal case."

13. See infra Part V.
15. Vogt v. City of Hays, 844 F.3d 1235, 1239 (10th Cir. 2017) (citing Garrity v. New Jersey, 385 U.S. 493, 500 (1967)). While the Bill of Rights originally only restricted actions of the federal government, the Fourteenth Amendment made the Fifth Amendment applicable to the states. Vogt, 844 F.3d at 1239 n.1 (citing Malloy v. Hogan, 378 U.S. 1, 6 (1964)).
17. Id. Under the ex officio oath procedure, individuals were placed under oath and interrogated to extract information that was then used against them in criminal prosecutions, prior to any other accusation against them. Id. The oaths coerced a religious population to choose between violating an oath to God, which was prohibited by religious teachings, and facing execution or incarceration in dungeons. Thea A. Cohen, Self-Incrimination and Separation of Powers, 100 GEO. L.J. 895, 916 (2012).
20. Vogt, 844 F.3d at 1244. Without stating "criminal case," the language applied equally to civil and criminal proceedings, "from the moment of arrest in a criminal case, to the swearing of a
While the Bill of Rights was on the House of Representatives floor for debate, Representative John Laurance voiced his concern that this wording conflicted with “laws passed.” Laurance proposed adding the words “in any criminal case” to apparently limit the self-incrimination privilege to those subject to criminal liability. This language was added to the Amendment and approved by Congress.

Since the Fifth Amendment was added to the Constitution, the United States Supreme Court has yet to clearly define which proceedings fall within the scope of a “criminal case.” In United States v. Verdugo-Urquidez, the Court stated in dicta that the right against self-incrimination is a fundamental trial right and that a violation of the right occurs only at trial. However, the Court later held in Mitchell v. United States that “a sentencing hearing is part of the criminal case,” and therefore, the right against self-incrimination extends to the sentencing phase as well as the trial phase of a criminal case. In Chavez v. Martinez, the Court declined to define the exact moment when a criminal case begins, but Justice Thomas, writing for a plurality of the Court, stated that “a ‘criminal case’ at the very least requires the initiation of legal proceedings.” The plurality in Chavez further held that a violation of the Self-Incarnation Clause does not occur until the prosecution uses the defendant’s coerced statements in a criminal case. Justices Kennedy, Stevens,

deposition in a civil one.” Id. (quoting LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT 423 (1968)).

21. Vogt, 844 F.3d at 1244. It is possible that Laurance was referencing the proposed Judiciary Act, which would permit the judiciary to compel parties in civil cases to produce documents. Id.

22. Id. at 1244–45.

23. Id.

24. Id. at 1239.


27. Vogt, 844 F.3d at 1240.

28. Chavez v. Martinez, 538 U.S. 760, 766 (2003) (plurality opinion). Thomas further stated that police questioning is insufficient to constitute a “case.” Id. at 767.

29. Id. at 766–67. Justice Souter said in his concurring opinion that while he agreed that the respondent Martinez’s § 1983 claim should be rejected, he believed that the decision demanded a higher degree of discretion than Justice Thomas recognized. Id. at 777 (Souter, J., concurring). Souter recommended applying an intermediate balancing approach to limit expansion of civil liability without a “powerful showing” necessary to expand protection of the right. GEOFFREY B. FEHLING, VERDUGO, Where’d You Go?: Stoot v. City of Everett and Evaluating Fifth Amendment Self-Incarnation Civil Liability Violations, 18 GEO. MASON L. REV. 481, 500–01 (2011) (citing Chavez, 538 U.S. at 777–78 (Souter, J., concurring)). Souter argued for a “limiting principle” to mitigate the risk of assigning civil liability for every police interrogation challenged under a broad interpretation of the Self-Incarnation Clause. Id. at 501 (quoting Chavez, 538 U.S. at 779 (Souter, J., concurring)).
and Ginsburg, however, asserted that the right against self-incrimination applies at the moment when police extract a suspect’s statement with compulsion.  

Following the Chavez decisions, several circuits began to differ regarding when a “criminal case” begins under the Fifth Amendment. The Third, Fourth, and Fifth Circuits have each held that the right against self-incrimination is strictly a trial right. By comparison, the Second, Seventh, and Ninth Circuits have concluded that violations of the right against self-incrimination may occur when coerced statements are used in certain pretrial proceedings. 

Relying on Justice Thomas’s definition of “criminal case” in Chavez, the Second Circuit stated that under the Fifth Amendment, an initial court appearance at which bail is determined is part of a criminal case. Thus, the Second Circuit held that the right against self-incrimination applies to such appearances. The Seventh Circuit concluded in Sornberger v. City of Knoxville that a criminal case includes bail hearings, arraignment hearings, and probable cause hearings under the Fifth Amendment. In Best v. City of Portland, the Seventh Circuit also included suppression hearings in its definition of a criminal case. The Ninth Circuit has held that a compelled statement need not be used at trial for a Fifth Amendment violation to occur, but rather “[a] coerced statement has been ‘used’ in a criminal case when it has been relied upon to file formal charges against the declarant, to determine judicially that

30. Chavez, 538 U.S. at 795 (Kennedy, J., dissenting in part); id. at 799 (Ginsburg, J., dissenting in part).
31. Vogt, 844 F.3d at 1240.
32. Id.; see Murray v. Earle, 405 F.3d 278, 285 (5th Cir. 2005) (maintaining that that the right against self-incrimination “is a fundamental trial right which can be violated only at trial”); Burrell v. Virginia, 395 F.3d 508, 513–14 (4th Cir. 2005) (concluding that a claim of a violation of Fifth Amendment rights fails without an allegation of any trial action); Renda v. King, 347 F.3d 550, 557–58 (3d Cir. 2003) (holding that a § 1983 claim against a police officer for failure to provide Miranda warnings is baseless if “the plaintiff’s statements are not used against her at trial”).
33. Vogt, 844 F.3d at 1240.
34. Higazy v. Templeton, 505 F.3d 161, 172–73 (2d Cir. 2007) (relying on previous Supreme Court and Second Circuit decisions, which found bail was a critical part of a criminal proceeding in the context of the Sixth and Eighth Amendments).
35. Id.
36. Sornberger v. City of Knoxville, 434 F.3d 1006, 1027 (7th Cir. 2006). The court in Sornberger reasoned that a “criminal case” had begun at the pretrial hearings because the prosecution of the suspect “was commenced because of her allegedly un-warned confession.” Id. at 1026–27.
37. Best v. City of Portland, 554 F.3d 698, 702–03 (7th Cir. 2009). The court relied on its prior decision in Sornberger to conclude that because criminal charges were already filed against the suspect, the use of the suspect’s statements at a suppression hearing was sufficient to allege a Fifth Amendment violation. Id.
the prosecution may proceed, and to determine pretrial custody status.\textsuperscript{38}

In \textit{Vogt}, the defendants argued that the right against self-incrimination can only be violated at trial, citing a prior Tenth Circuit case in which the court concluded that the Fifth Amendment was a trial right.\textsuperscript{39} In \textit{Stover}, the Tenth Circuit court quoted an earlier case, stating, “The time for protection [of the right against self-incrimination] will come when, if ever, the government attempts to use [allegedly incriminating] information against the defendant at trial.”\textsuperscript{40} In \textit{Stover}, the government and an indicted police officer agreed that use of a compelled statement during grand jury proceedings to return an indictment triggered the Fifth Amendment. The court said in dicta that the parties were correct in this assumption.\textsuperscript{41} Thus, despite the defendants’ argument that the quotation means the right against self-incrimination is only a trial right, the court in \textit{Vogt} stated that \textit{Stover} suggests the right applies in other proceedings as well.\textsuperscript{42}

III. FACTS

Matthew Vogt (“Vogt”) worked as a police officer for the City of Hays, Kansas (“Hays”).\textsuperscript{43} In 2013, Vogt applied for a position with the police department in the City of Haysville, Kansas (“Haysville”).\textsuperscript{44} During the hiring process, he divulged to the Haysville police department that he had kept a
knife that he acquired while working as a police officer for Hays.\textsuperscript{45} Haysville offered the position to Vogt on the condition that he report his procurement of the knife and give it back to the Hays police department.\textsuperscript{46}

Vogt reported to Hays that he retained the knife, and the Hays police chief then demanded Vogt submit a written report regarding his possession of the knife.\textsuperscript{47} Vogt provided an ambiguous, one-sentence report and gave Hays a two-week notice of resignation because he intended to accept the position in Haysville.\textsuperscript{48} Meanwhile, the Hays police chief launched an internal investigation regarding the knife, and a Hays police officer ordered Vogt to submit a more detailed statement to maintain his employment with the Hays police department.\textsuperscript{49} The Hays police department provided Vogt’s statements and the additional evidence to the Kansas Bureau of Investigation, asking the bureau to initiate a criminal investigation.\textsuperscript{50} Upon commencement of the criminal investigation, Haysville withdrew its offer of employment.\textsuperscript{51}

Vogt was then charged with two felony counts in Kansas state court for possessing the knife.\textsuperscript{52} After a probable cause hearing, the state district court dismissed the charges, finding lack of probable cause.\textsuperscript{53} Vogt then filed suit in federal district court, alleging that his compelled statements regarding his possession of the knife were used against him in violation of his right against self-incrimination.\textsuperscript{54}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{45} \textit{Id.}
\item \textsuperscript{46} \textit{Id.} Two Haysville officers told him that they would verify with Hays to ensure that he complied. \textit{Id.}
\item \textsuperscript{47} \textit{Id.}
\item \textsuperscript{48} \textit{Id.}
\item \textsuperscript{49} \textit{Id.} Vogt complied and made the additional statement, which the Hays police then used to find additional evidence. \textit{Id.}
\item \textsuperscript{50} \textit{Id.}
\item \textsuperscript{51} \textit{Id.}
\item \textsuperscript{52} \textit{Id.}
\item \textsuperscript{53} \textit{Id.}
\item \textsuperscript{54} \textit{Id.} In the § 1983 action against Hays, Haysville, and four police officers, Vogt alleged his statements were used (1) to open an investigation which led to discovery of additional evidence regarding the knife, (2) to start a criminal investigation, (3) to file criminal charges, and (4) to aid the prosecution during the probable cause hearing. \textit{Id.}
\end{enumerate}
\end{footnotesize}
IV. ANALYSIS OF THE OPINION

A. Judge Bacharach’s Opinion

Joining the Second, Seventh, and Ninth Circuits, the Court of Appeals for the Tenth Circuit held in Vogt that the Fifth Amendment right against self-incrimination encompasses “more than a trial right,”55 determining “that the phrase ‘criminal case’ includes probable cause hearings.”56 Therefore, the court concluded that Vogt adequately pled a violation of his right against self-incrimination when he alleged that his compelled statements were used against him in a probable cause hearing.57 In reaching its decision, the court primarily relied upon (1) the text of the Fifth Amendment in light of the common meaning of the term “criminal case” and (2) the Framers’ understanding of the privilege against self-incrimination.58

1. Text of the Fifth Amendment and the common meaning of “criminal case”

In the court’s opinion, authored by Judge Bacharach, the Tenth Circuit concluded that the right against self-incrimination “is more than a trial right” by primarily examining the text of the Fifth Amendment and interpreting the term “criminal case” in light of its common understanding.59 First, the court highlighted that the text says “no person shall be ‘compelled in any criminal case to be a witness against himself,’” and that there is no mention of the word “trial” or the term “criminal prosecution” in the Fifth Amendment.60

55. Id. at 1241–42.
56. Id. at 1239.
57. Id. at 1246. The court held that Vogt adequately pleaded a valid § 1983 claim against the City of Hays in violation of the Fifth Amendment as the Hays police chief had final policymaking authority and Vogt had adequately pleaded causation. Id. at 1250–51. However, the court “affirm[ed] the dismissal of the (1) claims against the four police officers based on qualified immunity and (2) claims against the City of Haysville based on its lack of compulsion in Vogt’s making of a self-incriminating statement.” Id. at 1246.
58. Id. at 1241–42.
59. Id.
60. Id. at 1242 (emphasis added). “Trial” and “criminal prosecution,” however, both appear in the Sixth Amendment. Id. (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .”) (quoting U.S. CONST. amend. VI). The term “trial” also appears in the Seventh Amendment. Vogt, 844 F.3d at 1242 (“In suits at common law . . . the right of trial by jury shall be preserved . . . .”) (quoting U.S. CONST. amend. VII)).
The court cited Counselman v. Hitchcock, a case from 1892, in which the Supreme Court held that witnesses may assert their Fifth Amendment right during a grand jury hearing and that the phrase “criminal case” is broader than the phrase “criminal prosecution” as it appears in the Sixth Amendment. In Vogt further added that, on its face, the phrase “criminal case” in the Fifth Amendment seems to include all proceedings included in a “criminal prosecution.” The Supreme Court in Rothgery held that a “criminal prosecution” under the Sixth Amendment commences at “the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.” Therefore, if a “criminal case” is more comprehensive than a “criminal prosecution,” then it would follow logically that a “criminal case” would at the very latest commence when the accused is formally charged, as in the Sixth Amendment context. In Vogt, the probable cause hearing where the compelled statements were used occurred after he was formally charged; thus, a criminal prosecution had already commenced and his Sixth Amendment right to counsel attached before the compelled statements were used. Therefore, a “criminal prosecution” and “criminal case” had already begun before the statements were used at the probable cause hearing.

Next, the Tenth Circuit stated that the words and phrases of the Constitution were used in their commonly understood meaning and that dictionary definitions from the Founding era are effective in determining the common meaning of “criminal case.” The court cited Noah Webster’s 1828 dictionary—hailed by the court as “[t]he most authoritative dictionary of that

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61. Vogt, 844 F.3d at 1242 (citing Counselman v. Hitchcock, 142 U.S. 547, 562–63 (1892)). In Counselman, the government argued that the Fifth Amendment did not apply to grand jury proceedings because there was no “criminal case” at that point, but the Court rejected this argument. Id.

62. Id.; see also O’Neill, supra note 3 (citing Rothgery v. Gillespie County, 554 U.S. 191, 198 (2008), in which the Court held that under the Sixth Amendment, a criminal prosecution starts at the beginning of any adversary judicial criminal proceedings and concludes at acquittal or sentencing).

63. Rothgery, 554 U.S. at 198 (quoting United States v. Gouveia, 467 U.S. 180, 188 (1984)).

64. Cf. Counselman, 142 U.S. at 563 (“It is entirely consistent with the language of article 5, that the privilege of not being a witness against himself is to be exercised in a proceeding before a grand jury.”).

65. Vogt, 844 F.3d at 1238 (stating Vogt was charged in state court prior to the probable cause hearing); see Rothgery, 554 U.S. at 198.

66. Vogt, 844 F.3d at 1242 (citing United States v. Sprague, 282 U.S. 716, 731 (1931). The Court in Sprague noted that “[t]he Constitution was written to be understood by the voters,” based on ordinary usage of words. 282 U.S. at 731.

110
era”—which defines “case” as “[a] cause or suit in court.”67 The court added that in 1871, the Supreme Court’s opinion in Blyew v. United States defined “case” broadly as it appears in Article III, explaining that “case” and “cause” are synonymously defined as “a proceeding in court, a suit, or action.”68 The court used these definitions to conclude that the Framers understood “case” to comprise more than just a trial and that if the Framers had intended to restrict the Self-Incidence Clause to the trial, “they could have said so.”69

2. The Framers’ understanding of the right against self-incrimination

In addition to the Fifth Amendment’s text, the dictionary definitions from the Founding era, and the Blyew decision, the Tenth Circuit also based its holding on how the Framers most likely viewed the right against self-incrimination.70 While the court acknowledged that there are “few contemporaneous clues” of the Framers’ understanding, Laurance’s proposal to limit the Self-Incidence Clause to a “criminal case” suggests that the Framers understood that the clause is not exclusively limited to a suspect’s trial.71 Further, because historical sources indicate that criminal defendants in the Founding Era were “deemed incompetent as witnesses” at their own trials, the court concluded that the issue of compelled testimony probably would have arisen primarily in pretrial proceedings.72

67. Vogt, 844 F.3d at 1243 (referencing Noah Webster, Case, An American Dictionary of the English Language (1st ed. 1828)).
68. Vogt, 844 F.3d at 1243–44 (citing Blyew v. United States, 80 U.S. 581, 594–95 (1871)).
69. Vogt, 844 F.3d at 1243 (quoting Davies, supra note 16, at 1014); see also Cohen, supra note 17, at 919–20 (“[T]he drafters of the Constitution were perfectly capable of writing the word trial when they wished to limit the scope of some clause to that portion of a case.”). Based on the absence of the word “trial” in the Fifth Amendment, there is no logical inference from the text that the Framers intended to limit the right against self-incrimination to trial proceedings. O’Neill, supra note 3.
70. Vogt, 844 F.3d at 1244.
71. Id. at 1244–45. The court emphasized that “the historical sources show that the right against self-accusation was understood to arise primarily in pretrial or pre-prosecution settings rather than in the context of a person’s own criminal trial.” Id. at 1246 (quoting Davies, supra note 16, at 1017–18).
72. Vogt, 844 F.3d at 1246 (quoting Ferguson v. Georgia, 365 U.S. 570, 574 (1961)); see also Davies, supra note 16, at 999 (stating historical sources reveal that the right against self-accusation played little role in trials during the Framing Era). In that era, an arrestee would be “examin[ed]” by a magistrate following an arrest, in part to decide whether to release, bail, or detain the arrestee to await trial. Id. at 1003. Peace officers in that era lacked the authority to interrogate suspects or arrestees as modern practices of policing and police interrogation had not yet developed. Id. at 1003–04. Magistrates were only permitted to examine suspects after an arrest was made, and the right against self-incrimination was violated if the arrestee was placed under oath during the judicial examination. Id. at 1005–06. Therefore, during the Framing Era, the right against self-incrimination was
Following the adoption of Laurance’s “criminal case” language, the Senate reorganized the group of rights that would become the Fifth and Sixth Amendments. The court explained how the Senate placed the Self-Incrimination Clause in the Fifth Amendment, along with other rights that extend to pretrial proceedings. This stood in contrast to the Sixth Amendment, which contained the cluster of rights that protected the accused after indictment. By explaining where the Founders placed the right against self-incrimination in the Bill of Rights, the court determined that they did not consider it only applicable at trial.

The court in Vogt summarized its analysis by noting an absence of any evidence to suggest that the Framers sought to limit the right against self-incrimination to trial alone. The defendants argued against the interpretation that the right extends to pretrial proceedings by analogizing that courts have held in other contexts that evidence may be used at pretrial hearings “even if the evidence would be inadmissible at trial.” The court rejected the defendants’ argument because it avoids the question by wrongly assuming that the Fifth Amendment permits the use of coerced statements in hearings before trial. Upon dismissing the defendants’ contention, the court concluded that because Vogt alleged that his coerced statements were used in a probable cause hearing, he adequately pled that his statements were used against him in a criminal case in violation of the Fifth Amendment.

B. Judge Hartz’s Concurring Opinion

In his concurring opinion, Judge Hartz wrote separately to highlight the
limited scope of the court’s holding and to note several questions that the parties did not raise and, thus, the court did not address. One important issue that Hartz addressed is the following: while a violation of the Fifth Amendment right against self-incrimination could occur at a probable cause hearing, is there a violation if use of the defendant’s statements does not lead to a criminal sanction against the defendant (as in Vogt, where the state trial court did not find probable cause)? Based on the court’s assertion that the phrase “criminal case” applies to probable cause hearings, it appears that any use of self-incriminating statements at a probable cause hearing would likely be a Fifth Amendment violation—regardless of the particular outcome of the hearing. However, if a suspect’s right against self-incrimination is violated at a probable cause hearing, and the court does not find probable cause, there may be an issue of justiciability—whether the issue of Fifth Amendment violation is moot if the suspect is not criminally charged.

C. Additional Arguments to Support the Court’s Holding

While the Tenth Circuit’s analysis of the meaning of “criminal case” was sufficient, there are additional points that the court could have used to supplement its argument. First, Thea A. Cohen makes a compelling argument in her article that the right against self-incrimination applies at all stages of a case, based on how the separation of powers relates to the Fifth Amendment. Cohen argues that because cases are the domain of the judicial branch according to Article III of the Constitution, courts have the duty to protect the right against self-incrimination in any proceedings in which the court hears a criminal case—whether before, during, or after the defendant’s trial. It is less

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80. Id. at 1252–53 (Hartz, J., concurring).
81. Id. Hartz addressed other specific questions regarding how the Fifth Amendment applies to the employment context and to voluntary disclosures of information to government agencies. Id.
82. Id. at 1241–42 (majority opinion); see also Stoot v. City of Everett, 582 F.3d 910, 925 (9th Cir. 2009) (finding that a violation of the Self-Incrimination Clause occurs when coerced statements are used “to determine judicially that the prosecution may proceed”).
83. Cf. North Carolina v. Rice, 404 U.S. 244, 246 (1971) (per curiam) (“[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them.”); In re Grand Jury Subpoenas Dated Dec. 7 & 8 (Stover), 40 F.3d 1096, 1099 (10th Cir. 1994) (“The existence of a live case or controversy is a constitutional prerequisite to the jurisdiction of the federal courts.”) (quoting Beattie v. United States, 949 F.2d 1092, 1093 (10th Cir. 1991)).
84. See infra text accompanying notes 85–93.
85. Cohen, supra note 17, at 918–19.
86. Id. at 918–20. However, while the Fifth Amendment applies to states via the Fourteenth
clear whether the Self-Incrimination Clause extends to grand jury proceedings because grand juries operate independently from the judicial branch under this line of reasoning.\textsuperscript{87} However, the Court stated in Counselman and later in \textit{United States v. Monia} that a grand jury investigation is part of a criminal case and that the privilege against self-incrimination applies to grand jury proceedings.\textsuperscript{88}

Cohen adds that at least three pretrial proceedings are mentioned in the Constitution—bail hearings, the issuance of arrest warrants, and grand jury proceedings.\textsuperscript{89} Cohen further adds that Article III courts have jurisdiction over the first two proceedings and a degree of supervisory control over the third.\textsuperscript{90} Additionally, the court in \textit{Vogt} could have stated that because matters of liberty are at stake during proceedings to determine bail and pretrial custody, it would be unjust to permit the use of coerced statements at “proceeding[s] that might lead to a de facto prison term lasting months or even years.”\textsuperscript{91} Finally, the court could have emphasized that while the Supreme Court in \textit{Chavez} declined to clearly define “criminal case,” the Self-Incrimination Clause likely applies to probable cause hearings based on logical inferences that can be made from both Justice Thomas’s plurality opinion and Justice Souter’s concurrence.\textsuperscript{92} Consider the following: if a criminal case begins, at the very least, when legal proceedings commence, and the Fifth Amendment addresses use of compelled statements in a courtroom, it follows logically that statements made at a probable cause hearing would be protected. Because a probable cause hearing occurs both in a courtroom and after the institution of legal proceedings, the use of such statements should be considered part of a

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Amendment, the separation of powers element does not directly apply to states because state governments are not required to divide themselves equally into three branches. \textit{Id.} at 926–27.

\textsuperscript{87} \textit{Id.} at 923 (“Grand juries operate with ‘functional independence from the Judicial Branch,’ and the judges do not have supervisory power over the type of evidence grand jurors may hear.”).

\textsuperscript{88} See Counselman v. Hitchcock, 142 U.S. 547, 562 (1892); Cohen, \textit{supra} note 17, at 924 (citing \textit{United States v. Monia}, 317 U.S. 424, 427–28 (1943)).

\textsuperscript{89} Cohen, \textit{supra} note 17, at 919.

\textsuperscript{90} \textit{Id.} It logically follows that if the federal judiciary has jurisdiction over these pretrial proceedings (or supervisory control in the case of grand juries), the judiciary must protect the right against self-incrimination at these proceedings as well as at trial. \textit{Id.}

\textsuperscript{91} \textit{Id.} at 921. In 2004, approximately sixty percent of defendants in federal criminal cases were unable to post bail or were detained without bond before trial. \textit{Id.}

\textsuperscript{92} \textit{Chavez} v. Martinez, 538 U.S. 760, 766, 777 (2003); see \textit{id.} at 766 (“[A] ‘criminal case’ at the very least requires the initiation of legal proceedings.”) (plurality opinion); \textit{id.} at 777 (stating that the Fifth Amendment centers on “courtroom use” of a defendant’s coerced statements) (Souter, J., concurring).
V. IMPACT AND CONCLUSION

The Tenth Circuit's decision in Vogt serves to clarify the meaning of the phrase "criminal case" in the Fifth Amendment by seeking to capture the original meaning of the phrase as the Founders understood it while relying on established precedent. This holding follows a trend established by the Second, Seventh, and Ninth Circuits, which, in applying Chavez, have also concluded that the right against self-incrimination is more than a trial right. The Tenth Circuit conducted a more thorough textual analysis than its sister circuits in reaching its conclusion. The Vogt decision is especially significant because there are now more circuits that agree that the right applies before trial than those that hold that it only applies at trial. However, agreement between a plurality of circuits does not necessarily mean that the holding is correct. Because the Supreme Court granted certiorari in the Vogt case, the circuit split may be resolved if the Court conclusively rules on the issue in 2018.

The Tenth Circuit's holding "that the right against self-incrimination is more than a trial right" ensures the protection of an individual's right not to incriminate oneself—a privilege that was established at common law before the Founding Era and later preserved in the Fifth Amendment. Permitting the use of coerced statements against the accused in pretrial proceedings would greatly constrict the scope of the Fifth Amendment and could reduce the incentive of law enforcement to avoid compulsion of self-incriminating

93. Chavez, 538 U.S. at 766, 777.
95. Id. at 1240. Although the Second Circuit reached a similar conclusion in Higazy—by applying decisions on the Sixth and Eighth Amendments to the Fifth Amendment context by analogy—the Vogt court focused more closely on the original meaning of "criminal case" in the Fifth Amendment and the Framers' understanding of the Self-Incrimination Clause. See supra note 34 and accompanying text. While also finding the Fifth Amendment is more than a trial right, the Seventh and Ninth Circuits were quite conclusory in their reasoning compared to the Vogt court's rigorous investigation of the historical context. See supra notes 36–39 and accompanying text.
96. Vogt, 844 F.3d at 1240.
98. Vogt, 844 F.3d at 1241–42.
99. Davies, supra note 16, at 1001–02, 1007 ("[T]he Framers undertook to preserve the common-law rights that were deemed essential to accusatory criminal procedure and, thus, ban legislative importation of inquisitorial procedure.").
statements. 100 To prevent the erosion of this essential right and to resolve the circuit split over the scope of the right against self-incrimination, it is up to the Supreme Court to revisit its holding in Chavez and precisely define at which stage a person charged with a crime may plead the Fifth. 101

Daniel J. De Cecco*

100. Minor, supra note 76, at 137 (noting that police understand that the majority of criminal cases reach a disposition before trial). Following this reasoning, permitting the pretrial use of compelled statements would encourage coercive interrogation tactics that the Fifth Amendment seeks to prevent. Id.

101. See Chavez v. Martinez, 538 U.S. 760, 766-67 (2003) ("We need not decide today the precise moment when a 'criminal case' commences . . .").

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116