***We the People: the Citizen & the Constitution***

2019-2020 High School Hearing Questions

Information, Tips, Analysis, & Resources from the Oregon high school We the People community

Unit 5 / Q. 1

**“The Self-Incrimination Clause of the Fifth Amendment is an unsolved riddle of vast proportions, a Gordian knot in the middle of our Bill of Rights.”\* Do you agree or disagree with this quote? Explain your position.**

* What is the history of the Fifth Amendment’s self-incrimination clause, and why might it be controversial?
* Should refusing to give up your mobile phone’s passcode be protected under the self-incrimination clause of the Fifth Amendment?\*\* Why or why not?

\* Akhil Reed Amar and Renee B. Lettow, “Fifth Amendment First Principles: The Self-Incrimination Clause,” *Michigan Law Review* 93, no. 5 (March 1995): 857–928.

\*\* Katelin Eunjoo Seo v. State of Indiana, 18S-CR-595 (2018).

**Collaboration Tips**

**7** different questions are in this overall question.

Historical events/context that connects to this question:

* **Actions of King George III**
* **Parliament’s actions as it relates to the Declaration of Independence**
* **Magna Carta**
* **Miranda v. Arizona**
* **Search & Seizure in schools**

Sections of the US Constitution that apply:

* **Fourth, Fifth, 14th Amendments**

Vocabulary:

* **Gordian Knot**

Possible Current Events:

* **Facial recognition technology, esp. w/phones**
* **Analog v. digital technology**

Possible Court Cases:

* ***State v. Davis***
* ***Miranda v. Arizona***
* ***Katelin Eunjoo Seo v. State of Indiana***
* ***Riley v. CA***
* ***Boyd v. US***
* ***Entick v. Carington***

**Comments from Justice Jack Landau:**

*The Fifth Amendment right against self-incrimination was based on then-existing state constitutional rights, such as the Virginia constitutional declaration that no man can be "compelled to give evidence against himself." The deeper historical origins are a matter of controversy.*

*The conventional view, originally proposed by John Wigmore and later developed by Leonard Levy, is that the right may be traced to sixteenth-century protestant objections to the oath* ex officio *-- the requirement of the Star Chamber that suspects swear in advance to answer truthfully questions about their religious and political beliefs. The practice forced the suspects either to lie under oath (and thereby risk eternal damnation) or refuse to take the oath (and risk corporal punishment) or take the oath and answer truthfully (and risk corporal punishment). Puritans, in particular, objected to the oath requirement. In 1641, Parliament agreed and abolished the court of Star Chamber. Other scholars, more recently, argue that the right wasn't actually recognized until the late 1700s, when criminal defendants could be represented by counsel (before then, defendants were required to represent themselves, which more or less required self-incrimination). Even after the ratification of the Fifth Amendment, these scholars point out, courts didn't invoke the right against self-incrimination. Magistrates routinely questioned an accused, and if the accused stood mute, that refusal was reported to the jury. It wasn't until the early 20th century that the right against self-incrimination as we now know it came into being, in response to police coercion. For a history of the right against self-incrimination (and a summary of competing views) see generally, State v. Davis (Or. 2011).*

*Amar's critique of Fifth Amendment jurisprudence is largely focused on the fact that US Supreme Court decisions make little sense (shocking news!) and the fact that there is no agreement about the historical origins of the right. He suggests that the amendment be read literally, so that it precludes a defendant only from being a "witness" in the ordinary sense (taking the stand) in his own "criminal case" (that is, the trial).*

*Seo v. Indiana is still pending before the Indiana Supreme Court. The police had seized her iPhone at the time of arrest. She was asked to unlock the phone, but she refused. The police went to court, which ordered her to comply. When she refused, the court held her in contempt. She appealed. The Indiana Court of Appeals, Seo v. State, 109 NE3d 418 (2018),* <https://www.leagle.com/decision/ininco20180821261>

 *vacated the order of contempt.*

*The somewhat lengthy opinion -- with a nice summary of the relevant US S Ct case law -- is worth reading. In a nutshell, it holds that an iPhone passcode is testimonial in nature, particularly given the extraordinary amount of information that a smart phone contains. The opinion is also notable for the thoughtful dissent. At bottom, the court split over an issue of analogies: Is an encrypted telephone like a locked wall safe?*