

Thomas Jefferson to John Jay and Chief Justices of the Supreme Court, July 18, 1793 , from The Works of Thomas Jefferson in Twelve Volumes. Federal Edition. Collected and Edited by Paul Leicester Ford.

TO THE CHIEF JUSTICE AND JUDGES OF THE SUPREME COURT OF THE UNITED STATES J. MSS.

Philadelphia, July 18, 1793.

Gentlemen, —The war which has taken place among the powers of Europe produces frequent transactions within our ports and limits, on which questions arise of considerable difficulty, & of greater importance to the peace of the U. S. These questions depend for their solution on the construction of our treaties, on the laws of nature & nations, & on the laws of the land; and are often presented under circumstances which do not give a cognizance of them to the tribunals of the country. Yet their decision is so little analogous to the ordinary functions of the Executive, as to occasion much embarrassment & difficulty to them. The President would therefore be much relieved if he found himself free to refer questions of this description to the opinions of the Judges of the Supreme court of the U. S. whose knolege of the subject would secure us against errors dangerous to the peace of the U. S. and their authority ensure the respect of all parties. He has therefore asked the attendance of such of the judges as could be collected in time for the occasion, to know, in the first place, their opinion, Whether the public may, with propriety, be availed of their advice on these questions? and if they may, to present, for their advice, the abstract questions which have already occurred, or may soon occur, from which they will themselves strike out such as any circumstances might, in their opinion, forbid them to pronounce on. I have the honor, &c.1

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1 The “Questions” to which this letter alludes, were considered at a Cabinet meeting between July 12th and 18th, and a memorandum of what was agreed upon was given to Jefferson to transcribe, which he did, and sent the completed paper to the President on the latter date, in the following letter:

“Th. Jefferson has the honor to inclose to the President a copy of the questions to be proposed to the judges, which he has endeavored to make with exactness, but cannot be sure he may not have mistaken some of the interlineations of the original. He has added at the end those from his own paper which were agreed to. Whey are the numbers 22. &c. to the end.

“He incloses also the rough draughts of Colo Hamilton & Genl Knox; the former may serve to correct any errors of copying which he may have committed.”

The “Questions,” the first twenty-one of which were printed in Hamilton's *Works of Hamilton* (IV, 450), as drafted by Hamilton, were as follows:

Questions for Judges

1. Do the treaties between the US, & France give to France or her citizens a *right*, when at war with a power with whom the US. are at peace, to fit out originally in & from the ports of the US, vessels armed for war, with or without commission?
2. If they give such a *right*, does it extend to all manner of armed vessels, or to particular kinds only? if the latter, to what kinds does it extend?
3. Do they give to France, or her citizens, in the case supposed, a right to refit, or arm anew vessels, which before their coming within any port of the US. were armed for war, with or without commission?

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4. If they give such a right, does it extend to all manner of armed vessels, or to particular kinds only? if the latter, to what kinds does it extend? does it include an *augmentation* of force, or does it only extend to replacing the vessel in statu quo?

5. Does the 22d. Article of the Treaty of Commerce, in the case supposed, extend to vessels armed for war on account of the *government* of a power at war with France, or to merchant armed vessels belonging to the subjects or citizens of that power (viz) of the description of those which, by the English, are called Letters of Marque ships, by the French 'batiments armés en merchandize et en guerre'?

6. Do the treaties aforesaid prohibit the US. from permitting in the case supposed, the armed vessels belonging to a power at war with France, or to the citizens or subjects of such power to come within the ports of the US. there to remain as long as they may think fit, except in the case of their coming on with prizes made of the subjects or property of France?

7. Do they prohibit the US. from permitting in the case supposed vessels armed on account of the government of a power at war with France, or vessels armed for merchandize & war, with or without commission on account of the subjects or citizens of such power, or any vessels other than those commonly called privateers, to sell freely whatsoever they may bring into the ports of the US. & freely to purchase in & carry from the ports of the US. goods, merchandize & commodities, except as excepted in the last question?

8. Do they oblige the US. to permit France, in the case supposed, to sell in their ports the prizes which she or her citizens may have made of any power at war with her, the citizens or subjects of such power; or exempt from the payment of the usual duties, on ships & merchandize, the prizes so made, in the case of their being to be sold within the ports of the US?

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9. Do these treaties, particularly the Consular convention, authorize France, as of right, to erect courts within the jurisdiction of the US. for the trial & condemnation of prizes made by armed vessels in her service?
10. Do the laws & usages of nations authorize her, as of right, to erect such courts for such purpose?
11. Do the laws of neutrality, considered relatively to the treaties of the US. with foreign powers, or independently of those treaties permit the US. in the case supposed, to allow to France, or her citizens the privilege of fitting out *originally*, in & from the ports of the US. vessels armed & commissioned for war, either on account of the government, or of private persons, or both?
12. Do those laws permit the US. to extend the like privilege to a power at war with France?
13. Do the laws of neutrality, considered as aforesaid, permit the US. in the case supposed, to allow to France or her citizens, the privilege of refitting or arming anew, vessels which before their coming within the US. were armed & commissioned for war? May such privilege include an *augmentation* of the force of such vessels?
14. Do those laws permit the US. to extend the like privilege to a power at war with France?
15. Do those laws, in the case supposed, permit merchant vessels of either of the powers at war, to arm in the ports of the US. without being commissioned? May this privilege be rightfully refused?
16. Does it make any difference in point of principle, whether a vessel be armed for war, or the force of an armed vessel be augmented, in the ports of the US. in the *means* procured

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in the US. or with means brought into them by the party who shall so arm or augment the force of such vessel? if the first be unlawful, is the last lawful?

17. Do the laws of neutrality, considered as aforesaid, authorize the US. to permit to France, her subjects or citizens, the sale within their ports of prizes made of the subjects or property of a power at war with France, before they have been carried into some port of France & there condemned, refusing the like privilege to her enemy?

18. Do those laws authorize the US. to permit to France the erection of courts within their territory & jurisdiction, for the trial & condemnation of prizes, refusing that privilege to a power at war with France?

19. If any armed vessel of a foreign power at war with another, with whom the US. are at peace, shall make prize of the subjects or property of it's enemy within the territory or jurisdiction of the US. have not. the US, a right to cause restitution of such prize? are they bound or not by the principles of neutrality so to do, if such prize shall be within their power?

20. To what distance, by the laws & usages of nations, may the US. exercise the right of prohibiting the hostilities of foreign powers at war with each other, within rivers, bays, & arms of the sea, & upon the sea along the coasts of the US.?

21. Have vessels armed for war under commission from a foreign power, a right, without the consent of the US. to engage, within their jurisdiction, seamen or souldiers, for the service of such vessels, being citizens of that power, or of another foreign power, or citizens of the US?

22. What are the articles, by name, to be prohibited to both or either party?

23. To what extent does the *reparation* permitted in the 19. Article of the treaty with France go?

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24. What may be done as to vessels armed in our ports before the President's proclamation? and what as to the prizes they made *before* and *after*.
25. May we, within our own ports, sell ships to both parties, prepared merely for merehandize? May they be pierced for guns?
26. May we carry either or both kinds to the ports of the belligerent powers for sale?
27. Is the principle that free bottoms make free goods, & enemy bottoms make enemy goods, to be considered as now an established part of the law of nations?
28. If it is not, are nations with whom we have no treaties, authorized by the law of nations to take out of our vessels enemy passengers, not being souldiers, & their baggage?
29. May an armed vessel belonging to any of the belligerent powers follow *immediately* merchant-vessels, enemies, departing from our ports, for the purpose of making prizes of them?—if not, how long ought the former to remain after the latter has sailed? and what shall be considered as the place of departure, from which the time is to be counted? and how are the facts to be ascertained?