with other states continue unbroken.[6] According to the Estrada Doctrine, the same consequences would follow a change of government by revolution, whereas at present, some states seem to consider the deposed government as having gone out of existence, thus terminating the foreign missions.

It is a far cry to the days when *de jure* meant *de jure divino* and any upstart republican head of state was merely a ruler *de facto* in the eyes of "legitimate" monarchs. Recognition has become a powerful weapon in the hands of the rich and strong state: an essential to the life of a government in a weak state. Fervid writers paint lurid pictures of international bankers giving orders to government officials as to whether recognition should be extended in the interests of bond prices and the value of concessions and other investments. That is largely a tale "full of sound and fury, signifying nothing." It is not necessary to believe such extravagances in order to agree that the most beneficent and well-meaning strong state may err in its judgment as to what is best for a small neighbor. President Coolidge told the delegates at the Havana Conference in 1928 that the true path to democratic progress lay in making one's own mistakes rather than in having others make them for one. The present practice of extending recognition to or withholding it from *de facto* governments for reasons other than those governments' factual control of their countries is not conducive to the smooth workings of international affairs; it is not conducive to Pan American amity. The Mexican Government deserves credit for suggesting an alternative practice. The operation of the Estrada Doctrine should be watched with careful interest and an open mind, not alone because it is likely to be discussed at the next Inter-American Conference. Meanwhile, Mexico and other states which espouse the doctrine would do a great service in making public all relevant details regarding its functioning in practice.[7]

PHILIP C. JESSUP

THE RECALL OF WITNESSES UNDER THE WALSH ACT

In 1924 one Blackmer, a citizen of the United States and an important witness in proceedings to uncover fraudulent oil leases, left the United States and took up his residence in France. In 1926 the Congress of the United States passed the so-called Walsh Act (An Act Relating to Contempts, Chap. 762, 44 U. S. Stat. L. 835) authorizing United States courts to sub-

[6] "The change of a head of state, or the change of its government is not believed to terminate a foreign mission" although "It is the practice of the United States to forward new letters of credence accrediting the minister to the new sovereign or head of state in case of a change thereof." Hyde, International Law, Vol. I, pp. 730 and 728.

[7] The *Instituto Americano de Derecho y Legislación Comparada* contemplates the publication of a further volume of comments on the Estrada Doctrine. (See *infra*, p. 805, for review of the first volume.) It is to be hoped that the new volume will contain all the available official data.

poena a witness outside the United States, the subpoenaed witness "being a citizen of the United States or domiciled therein," whenever attendance at the trial of a criminal action is desired by the Attorney General or an assistant or district attorney, or whenever there is neglect or refusal to testify abroad in response to letters rogatory. The act provides that the subpoena in each case shall be addressed to a United States consul in the country in which the witness is found; and it is made the consul's duty to serve the subpoena and make a return, after tendering the witness funds for necessary travelling expenses. If the witness neglects or refuses to appear after being served, he may be adjudged guilty of contempt and fined not to exceed $100,000; and his property in the United States may be seized to satisfy the judgment. Notice of contempt proceedings is likewise given the recusant witness through the consul.[1]

The constitutionality of the Walsh Act has been attacked and upheld in the recent case of Blackmer *v.* United States (April 6, 1931, 49 F. (2d) 523), decided in the Court of Appeals of the District of Columbia.[2] Blackmer failed to respond to subpoenas issued in connection with the criminal prosecution of Fall and Sinclair, was twice adjudged guilty of contempt, was fined $60,000 and costs, and a levy was made upon his property in the United States as provided in the statute. It was held that Congress has power to thus authorize the service of subpoenas upon citizens of the United States residing abroad, and that the proceedings authorized were not in conflict with constitutional guaranties intended to protect the accused in a criminal prosecution, assure due process of law, and prohibit unreasonable searches and seizures or excessive fines.

There can be little doubt of the international validity of such an assertion of jurisdiction over a non-resident national. It is trite to say that the national abroad is entitled to protection from and owes allegiance to his government.[3] His separation from the home soil leaves him still subject to laws of the home state in so far as those laws have been made applicable to him.[4] Thus, jurisdiction to entertain civil suits against the person may be founded

[1] For an excellent brief review of the development of legislation, see "Compelling the Testimony of Absent Witnesses," 43 Harv. L. Rev. 121.

[2] For comment on the decision of the Supreme Court of the District of Columbia in the same case, see 41 Harv. L. Rev. 1067.

[3] "There cannot be a nation without a people. The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance." Minor *v.* Happersett, 21 Wall. 162, 165.

[4] Borchard, The Diplomatic Protection of Citizens Abroad, 21; Fauchille, *Traité de Droit International Public*, I, §433; Holtzendorff, *Handbuch des Völkerrechts*, II, 630; Westlake, International Law, 2d ed., I, 213.

upon the person's nationality.[5] Nationals may be punished for crimes committed abroad.[6] Though domiciled abroad, they may be taxed on the income received from their foreign property.[7] They may be recalled for military service.[8] Surely service as a witness before the courts is a public duty which may be required of all nationals, whether residing at home or abroad.[9] As the court observed in the Blackmer case, "it was as much his [Blackmer's] patriotic duty to yield his testimony in the government's efforts to uncover fraud and punish the guilty as it would be his duty to bear arms in defense of his country." [10]

Though indisputably valid from the international point of view, the assertion of jurisdiction to coerce the performance of witness duty by a non-resident national must nevertheless be accomplished in the United States within limits set by various constitutional guaranties intended to preserve the rights of the people. Thus Congress may not authorize "unreasonable searches and seizures." [11] It may not deprive any person of life, liberty or property "without due process of law." [12] It may not deny to those accused in "criminal prosecutions" the various safeguards which the Constitution assures,[13] nor authorize "excessive fines." [14]

The court concluded in the Blackmer case that the Walsh Act neither contemplated nor authorized unreasonable searches and seizures. It was satisfied that there had been no denial of due process, pointing out that the subpoena, with a tender of reasonable travelling and attendance fees, was communicated to Blackmer through the United States consul, that there was like communication of the order to show cause in the contempt proceedings, and that there was notice by publication of the order for sequestration of property.[15] The sequestration was regarded as a proceeding *quasi in rem* and hence free from the objections which might have been made to a

[5] Dicey, Conflict of Laws, 4th ed., 396; Goodrich, Conflict of Laws, 139; Beale, "Jurisdiction of Courts Over Foreigners," 26 Harv. L. Rev. 193, 296; American Law Institute, Restatement of the Law of Conflict of Laws (Proposed Final Draft No. 1), §§49, 86; 27 Harv. L. Rev. 464.

[6] Trial of Earl Russell [1901] A. C. 446; United States *v.* Bowman, 260 U. S. 94; France, Code of Criminal Procedure, Art. 5; Moore, "Report on Extraterritorial Crime and the Cutting Case," U. S. For. Rel. (1887) 757, 779; Hyde, International Law, I, 424; Westlake, Collected Papers, 127–128; Dickinson, Cases, 683–691.

[7] Cook *v.* Tait, 265 U. S. 47; Levitt, "Income Tax Predicated Upon Citizenship," 11 Va. L. Rev. 607. *Cf.* United States *v.* Goelet, 232 U. S. 293.

[8] "For the failure to respond to a call to arms after emigration but prior to naturalization, the sovereign may, not unreasonably, penalize its disobedient non-resident national by depriving him, should its law so provide, of civil or other rights, or of property within its control." Hyde, International Law, I, 668. See also Borchard, *op. cit.*, 21.

[9] "The giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the government is bound to perform upon being properly summoned." Blair *v.* United States, 250 U. S. 273, 281.

[10] 49 F. (2d) 523, 532. [11] Constitution, Amendment IV. [12] *Ibid.*, Amendment V.

[13] *Ibid.*, Amendment VI. [14] *Ibid.*, Amendment VIII.

[15] *Cf.* Cooke *v.* United States, 267 U. S. 517, 537.

proceeding *in personam* against an absent defendant.[16] Since contempt proceedings are not "criminal prosecutions," Blackmer was not in a position to invoke the safeguards of the Sixth Amendment.[17] The argument that the Walsh Act violated the amendment because the process which it provided for summoning non-resident witnesses was not made available to the accused, as well as to the prosecution, thus depriving the accused of "compulsory process for obtaining witnesses in his favor," was not an argument available to the recusant witness in contempt proceedings.[18] Considering Blackmer's hostile attitude, the importance of his testimony, and the probable ineffectiveness of small fines, it was held that the fines imposed were not excessive.[19]

Thus the Walsh Act has passed safely, for the time, through the ordeal of constitutionality. There will undoubtedly be further ordeals. We are advised that Blackmer's counsel have petitioned the United States Supreme Court for writs of *certiorari*.[20] It is possible that further attacks may be made upon the statute in cases presenting slightly different facts. Had Blackmer responded to the subpoena and testified, for example, an objection entered in behalf of Fall and Sinclair that the act denied them "compulsory process for obtaining witnesses" in their favor would have raised an issue which the court was not required to decide in the present case.[21] Had Blackmer been a Frenchman domiciled in the United States, instead of a fugitive citizen of the United States residing in France, a different and somewhat more difficult question would have been presented.[22] For the present, therefore, it

[16] *Cf.* Cooper *v.* Reynolds, 10 Wall. 308; Pennoyer *v.* Neff, 95 U. S. 714. *Cf.* also Kempson *v.* Kempson, 63 N. J. Eq. 783. It is not to be doubted that Congress is competent to authorize proceedings *in personam* against non-resident nationals, provided that the requirements of due process are satisfied. Whether it has done so in the Walsh Act, query? Counsel for the United States conceded that the judgment against Blackmer was not *in personam*.

[17] "While contempt may be an offense against the law and subject to appropriate punishment, certain it is that since the formation of our government proceedings to punish such offenses have been regarded as *sui generis* and not 'criminal prosecutions' within the Sixth Amendment or common understanding." Myers *v.* United States, 264 U. S. 95, 104.

[18] See Blair *v.* United States, 250 U. S. 273.

[19] *Cf.* Waters-Pierce Oil Co. *v.* Texas (No. 1), 212 U. S. 86, 111.

[20] U. S. Daily, July 13, 1931, p. 4.

[21] The court pointed out that, while Section 2 of the Walsh Act makes compulsory process available only to the prosecution, Section 1 makes the same process available to the accused whenever a witness neglects or refuses to testify abroad in response to letters rogatory; further, that in a criminal prosecution only the accused may have recourse to letters rogatory. It was suggested, therefore, that the act provides the accused with "substantially equal process to that accorded the United States." 49 F. (2d) 523, 530. May the accused demand more than process which is substantially as efficacious as that available to the prosecution? *Cf.* In re Dillon, 7 Sawy. 561; Moore, Digest, V, 78. But *cf.* also United States *v.* Heinze, 218 U. S. 532, 545.

[22] Jurisdiction to entertain civil suits against the person may be founded upon the person's domicile. But whether the local allegiance resulting from domicile will support jurisdiction to recall for witness duty, query?

is enough to say that the power of Congress to provide for the recall for witness duty of United States nationals residing abroad has been successfully defended and that procedure for enforcing the recall provided in the Walsh Act has survived the test of a determined attack upon its constitutionality.

If it is proper to recall nationals for witness duty, and if the recall is to be exercised effectively, it is difficult to conceive of a more satisfactory way of coercing the return than through seizure of property,[23] or of a more appropriate method of notifying the national abroad than through the national consular service. Seizure of property by the state to coerce the return of a non-resident national is an old device tested by use in a variety of circumstances.[24] The consular service provides a well-organized machinery for keeping in touch with nationals abroad.[25]

In making it the consul's duty to "serve" subpoenas, orders, etc., the Walsh Act does not authorize, indeed it could not properly authorize, an exercise of executive or judicial jurisdiction by a United States officer in a foreign country. It merely makes the consul the agent through which a department of the United States government communicates with its non-resident nationals. The consul acts, in the words of the court in the Blackmer case, "as a mere messenger of the government of the United States." [26] The jurisdiction is founded upon allegiance, not upon personal service at a place within the territorial jurisdiction of the court. Personal service is significant because it provides a form of notice which is amply sufficient to satisfy the constitutional requirements of due process of law.[27] It is no more an invasion of the territorial jurisdiction of another state than notice to a national abroad that he is required to pay a tax or that he has been ordered to return for military service.[28]

EDWIN D. DICKINSON

RATIFICATION OF LEAGUE OF NATIONS CONVENTIONS

Perhaps the most striking fact in the history of international law since the time of Grotius has been the extraordinary development of conventional law since the beginning of the present century. Professor Manley Hudson, in

[23] The return of a non-resident national may be coerced by withdrawal of protection, expatriation, arrest upon return, or forfeiture of property within the control of the state. Of these sanctions, forfeiture of property is probably the most humane and the most efficacious.

[24] See Bartue and the Duchess of Suffolk's Case, 2 Dyer, 176b; Knowles *v.* Luce, Moo. (K. B.) 109.

[25] See Hyde, International Law, I, 828–832.

[26] 49 F. (2d) 523, 528.

[27] "Actual service of process outside the state, while of course it cannot enlarge a state's jurisdiction, would seem an essentially fair way of bringing knowledge of a pending suit to one who is subject to the jurisdiction." Goodrich, Conflict of Laws, 139. *Cf.* McDonald *v.* Mabee, 243 U. S. 90; In re Hendrickson, 40 S. D. 211.

[28] The doubts expressed in 27 Columbia L. Rev. 204, 207–209, seem to be based upon a misconception of the function which the consul performs under the Walsh Act.