To claim, as does section II, that a two-hour plane trip to New Orleans would be a "hardship" for the Archivist is a frivolity that prostitutes law, debases the judicial process, xxx insults the intelligence as is a a self-defamation by the Archibists who spends long periods away from his desk. Mix My correspondence with the National Archives discloses he has ahd an Acting Archivist functioning in his place often and for protracted periods. The essence of other arguments that are not really serious is that a federal court should exercise the prerogatives and obligations of a State court. The cases cited seem not to be relevant to the issue in any event.

Add to pages one and two:

What is here inherent is the government's involuntary concession , that it was aware the film at issue had never, within the meaning of the law, been thx Kennedy property

II

A witness can be compelled to attend criminal proceedings in a foreign jurisdiction pursuant to 23 D. C. Code 801, et seq., only

> "If at a hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution" [23 D. C. Code 802].

The language of 23 D. C. Code appears to require that privilege claims be decided at the hearing required: surely it is an undue hardship to require a witness to repair to the criminal trial to raise a valid claim of privilege. It is no answer to contend that since in state witnesses can only raise the privilege at the trial, to require the same of out-of-state witnesses is not an undue hardship. In New York v. O'Neill, 359 U.S. 1 (1959), the Supreme Court decided that the Uniform Witness Act was not unconstitutional on its face because it seemed to give a witness a plenary hearing in the sending state. Such a hearing was found necessary to sustain the Act against constitutional attack. "Because of the generous protections to be accorded a person brought or summoned before the court of the forwarding State, procedural due process in the hearing itself must be accorded and this is firmly established." New York v. O'Neill, 359 U.S. 1, 8 (1959). But procedural due process requires that the person adversely affected be given opportunity to raise whatever defenses he sees fit to raise at the required hearing; and the Court must decide the issues thus posed. In Re Oliver, 333 U.S. 257, 273-278 (1948); Kent v. United States, 383 U.S. 541 (1966). Thus, unless 23 D.C. Code is construed to provide an opportunity for hearing on claims of privilege and other defenses asserted, it will be constitutionally defective.

It has been held that questions of privilege are for the Court in the state where the criminal proceedings are held to decide rather than for the sending Court. Application of State of Washington, 198 N.Y.S. 2d 897 (App. Div. 1960), vacated with directions to dismiss the appeal 203 N.Y.S. 2d 914 (Ct. of App. 1960). See also In Re Pitman, 201 N.Y.S. 2d 1000 (Ct. Gen. Sess. 1960). As has been shown, such a holding does not square with the requirement that due process be accorded at the sending jurisdiction's hearing or with the plain import of the Act. Furthermore, only if a showing is made that the witness "would . . . testify favorably", State v. Smith, 208 A. 2d 171, 174 (N.J. Super. App. Div. 1965), or "that the testimony to be given by the witnesses is material," State v. Fouquette, 221 P. 2d 404, 410 (1950) cert. denied 341 U.S. 932, does the Act authorize grant of a certificate initiating a proceeding to require a person to attend out-of-state proceedings. Accord: People v. Cavanaugh, 444 P. 2d 110, 113 (Ca. Sup. Ct. 1968); State v. Nance, 438 P. 2d 536, 543 (Wash. Sup. Ct. 1968). Thus the records in United States ex rel Pennsylvania v. McDevitt, 195 A. 2d 740 (D.C. Ct. of App. 1963) show that the trial court determined that opposition to being required to attend a foreign proceeding on the ground that the evidence that the witness could give would be merely cumulative was sufficient to warrant denial of Pennsylvania's application for an order under 23 D. C. Code 801, et seq. Thus ruling was affirmed on appeal. United States ex rel Pennsylvania v. McDevitt. A fortiori, a witness is entitled to show that he would not give any testimony at all. Of course, this would negate any showing that the witness "would testify . . . favorably" or that testimony would be given. Such a showing must be made by the state even before the state obtains

a certificate, as has been shown above. The facts shown by the certificate are subject to rebuttal at the required hearing in the sending state. United States ex rel Pennsylvania v. McDevitt; 23 D. C. Code 802. One way of rebutting such facts is to show a valid privilege.

Thus, reason and law require the sending court to determine the right of the requesting court to place a witness sought under the Out-of- State Witness Act on the stand and to elicit testimony from him.

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