

to apply. They are happy with the rule. The Government is happy with the rule. The District judges appear happy with the rule.

Rather than disturb the application of that rule by changing the words on which it is based, I think the less agitating course of action would be to leave the courts to apply that rule in their own way.

I am afraid that a legislative act which changed the terminology, although slightly, would still give a foundation to judges to start tinkering with this unanimous rule that they laid down in *McDonald* and we would be back, I think, to very diversified and controversial disagreements in the court of appeals and in the District courts as to what the legislative rule meant.

The CHAIRMAN. Thank you, Mr. Acheson.

Now, the staff has suggested a number of questions to be propounded to you, and I would like to ask them of you, and if any of them will take any research on your part or any time, just take the time for that.

The first question suggested by the staff is: What is the insanity test in criminal proceedings in the District of Columbia at the present time?

I think you have already answered that the test is the test laid down in the *McDonald* case.

Mr. ACHESON. That is correct, Mr. Chairman.

The CHAIRMAN. And the test is essentially the ALI test?

Mr. ACHESON. That is exactly right, Mr. Chairman.

The CHAIRMAN. And the second question is: Even though the appeals court has set forth insanity rules in the *Durham* and *McDonald* cases, is it still permissible for the trial court where the testimony supports it, to supplement the insanity instruction in terms of irresistible impulse, the *M'Naghten* right and wrong test, and as that test was modified by the *Holloway* case?

Mr. ACHESON. Well, that is permissible only if the district judge makes it very clear that irresistible impulse is only one of a number of examples of the way that mental condition can affect conduct.

If he makes it a synonym, an illustration that is intended to be synonymous with *Durham* or *McDonald*, he will probably be reversed, even now.

The leading case on that proposition is *Campbell v. The United States*, 113 U.S. App. D.C. 260, 307 F.2d 597 (1902).

The CHAIRMAN. In your opinion, was the *McDonald* case decided by the appeals court as a supplement to the *Durham* insanity case in order to allow the jury to consider a defendant's mental capacity for choice and control? Do you wish to enlarge in that area?

Mr. ACHESON. It serves as a clarification of *McDonald*. I think it is fair to say that that is what it is.

The CHAIRMAN. Clarification of *Durham*?

Mr. ACHESON. I am sorry, of *Durham*. I don't believe it was intended to be of *Durham*, altogether. I don't—I am not privy to the secrets of judges, but I suspect that when they are trying to get a unanimous court to sign on to an opinion like the *McDonald* opinion, they cannot be too categorical in what they say it is going to do. I think it was intended by the full court to be a clarification—a supplement, using your phrase.

The CHAIRMAN. How many other Federal jurisdictions, if you know, follow the insanity test as it is now defined for the District of Columbia, how many follow the *Durham* and *McDonald* tests?