

The CHAIRMAN. That is the point you are making?

Mr. ACHESON. Yes, sir.

The CHAIRMAN. The next suggested question—I think you have answered. The question is whether it would be desirable for the defendant to provide notice to the government of an intention to plead an insanity defense. I think you said that you liked that section of the suggested title II concerning written notice to the prosecution.

Mr. ACHESON. I like that, but the problem does not arise more than once a year or so, I would say, with us.

The CHAIRMAN. I see.

Mr. ACHESON. There is a problem also with that provision of the bill, as to how to enforce it if the defendant does not give the written notice. There seems to me at least to be a serious constitutional question whether you can deprive him of the insanity defense. And if you cannot deprive him of it, then that provision of written notice would have no sanction and would—

The CHAIRMAN. I thought that you were interested in having notice and that you would be in favor of that provision.

Mr. ACHESON. Well, it is a sanction that really ought to be directed against the lawyer and not against the defendant, as it is under the bill.

The CHAIRMAN. Well, one further suggested question: Does it appear desirable to have the defendant carry the burden of establishing his insanity defense by a preponderance of evidence? Where is that burden as of now?

Mr. ACHESON. Well, in the District of Columbia the government, if the insanity defense is properly raised by a showing, some evidence of mental disease, the government has the burden of providing beyond a reasonable doubt either that the defendant does not have a mental disease or that the crime was not a product of the mental disease.

The CHAIRMAN. And then the burden shifts, is that right?

Mr. ACHESON. Then the burden shifts. Now, under the law of Oregon, or certainly as it was a year or two ago, I am not sure now, under the law of Oregon the defendant had to show beyond a reasonable doubt that he was insane and not responsible. In about 22 States, Mr. Chairman, the defendant must show by a preponderance of the evidence that he was insane and not responsible.

So the answer to the question is that the States are divided on how they place the burden of proof on this issue.

The CHAIRMAN. Well, the suggested title II, subsection (c), line 6 to 10 on page 3 reads as follows:

Mental disease or defect is an affirmative defense which the defendant must establish by a showing of substantial evidence.

That places the burden on the defendant.

Mr. ACHESON. I don't believe that provision changes the burden of proof. I think it is intended only to require that the issue be raised initially by a showing of more than a scintilla of evidence.

The CHAIRMAN. Are there sections within title II that involve the burden of proof?