And by that I mean that the defendant is entitled to have the jury instructed to consider whether he is responsible under the *Durham* rule.

He is not entitled by putting in some evidence to a directed verdict of acquittal.

All that he is entitled to do is to get to the jury.

Now, of course, if his evidence, for example—if you have a situation in which the evidence by the defendant is very substantial, very great, uncorrected, psychiatric experts, a large number who testify unanimously that the accused is of unsound mind, the defendant then might be entitled to a directed verdict.

In other words, the defense would have been established as a matter of law so great that he would be entitled to a directed verdict.

But there will be very few cases which are so absolutely clear.

Senator DOMINICK. Well, Mr. Krash, I think you are missing my point. It seems to me that on page 3 what we are talking about is the ability of the defendant to establish this affirmative defense.

All he has to show is substantial evidence.

Mr. KRASH. Well, my point is that the issue goes to the jury by his showing some evidence.

In other words, that is the sense in which I use it. He has established a defense. That is what I mean by establishing the defense. By putting in some evidence.

Now, let me just quote the way the court of appeals puts it perhaps The court of appeals said in the *McDonald* case:

> Under Davis against United States if there is some evidence supporting the defendant's claim of mental disability, he is entitled to have that issue submitted to the jury.

And that is what I mean.

Now, I think what this C–1 in the bill is entitled to do is to mean that the defendant must produce substantial evidence. That is what I interpret the bill to mean.

Senator DOMINICK. Well, I am not sure I would agree with you.

Mr. KRASH. I certainly could be mistaken. That is my reading of it.

The CHAIRMAN. Might I ask your views on this.

You have indicated that you very much agree with the answer of the U.S. attorney that at this time the Congress should not enact an insanity statute that adopts the ALI test even though it is substantially the same as the *Durham* test as modified by the *McDonald* decision.

What would be your thought if you took the *Durham* test, an accused is not criminally responsible if his unlawful act was the product of mental disease or defect, and then add to it the additional sentence that is given by way of amplification in the *McDonald* case:

> Consequently, for that purpose the jury should be told the mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls.

Would there be any real gain in phrasing the unanimous decision of the circuit court of appeals into a statute?

Mr. KRASH. My answer is "No." I would not favor doing that. In other words, I make my point clear, I would not favor making the *Durham* rule as clarified by the McDonald test, incorporating that in a statute itself. Any more than I would favor making the American Law Institute test or the *Currens* Test. I don't think at this point in