

The CHAIRMAN. I asked the same question of the present U.S. Attorney and he said, among other things, that in his opinion the case law in the District of Columbia, as it now stands today in this question of the insanity test, is substantially the same as the American Law Institute test to which you alluded.

Now, I do not know whether you agree with that or do not agree with it, and I am not trying to pit you against each other.

All we are trying to do is work out a very difficult problem in a very difficult area.

My question to Mr. Acheson was, if the case law in the District of Columbia is substantially the same as the American Law Institute test, what is wrong with writing the American Law Institute test into the law?

Mr. GASCH. Precisely.

The CHAIRMAN. His answer to that was that if you write the insanity test into law then defense counsel will be bringing new cases before the appellate courts and the circuit courts to again test the instruction or the test.

Mr. GASCH. Well, I do not know that there is any final answer to the question of whether you should leave the judges the prerogative of rulemaking power or whether you should have Congress legislate in such a field as this.

It is a question of one's individual preference.

My preference is to have Congress lay down the rule, and I will tell you why I feel that way.

The case-by-case method is basically a wasteful method. You take the 80 or more cases decided in the Durham area. Each of them, as far as I can recall, represented the reversal of a criminal conviction and the expense and necessity for re-trying the case, and the fact that in some instances like in the *Dallas Williams* case, the man was given the opportunity of killing two innocent gas station attendants.

I do not like to legislate in that manner, if it can be avoided. I would much rather have the considered judgment of the Congress on what the rule should be.

The CHAIRMAN. Very well. Now, let me ask just a couple more questions, if you do not mind.

Your interpretation of the affirmative defense, which the defendant must establish by a showing of substantial evidence, do I understand you to mean that the burden of proof is in any way affected?

In other words if the defendant makes an affirmative defense then he must establish that affirmative defense by substantial evidence and once accomplished the burden of proof would shift to the Government.

Mr. GASCH. I would agree with you, sir.

The CHAIRMAN. As it does at the present time.

Mr. GASCH. Yes, sir.

The CHAIRMAN. To the Government to prove beyond a reasonable doubt that the defendant is sane?

Mr. GASCH. That is correct, sir.

The CHAIRMAN. Is that not true?

Mr. GASCH. Or that there was no—then you get to the second aspect of the Durham formula:

If it were shown that the defendant was suffering from a mental disease or defect then the Government could further prove its case by