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Instructing Deadlocked Juries: Use of Second Allen Charge Not Error Per Se (United States v. Robinson)

Richard P. Smith

CRIMINAL LAW

INSTRUCTING DEADLOCKED JURIES: USE OF SECOND *Allen* CHARGE NOT ERROR *Per Se*

United States v. Robinson

Courts have long recognized that a criminal trial judge has broad discretion to give supplemental instructions to a deadlocked jury.[1] On the federal level, these instructions are embodied in the *Allen*,[2] or "dynamite,"[3] charge, which directs jurors to listen to each other with a disposition to be convinced, as they have a duty to

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[1] *See, e.g.*, Allis v. United States, 155 U.S. 117, 123 (1894). Since a deadlocked jury necessarily results in a mistrial, many have viewed it as a failure of the judicial system. *See, e.g.*, 22 SYRACUSE L. REV. 1167, 1168 (1971). The common law courts' scorn for hung juries sometimes resulted in trial judges compelling juries to produce verdicts. Bennett, *The Hung Jury and the Dynamite Charge*, 1 AM. J. CRIM. L. 156 (1972); *see* Comment, *Instructing Deadlocked Juries in Light of the Trial of Juan Corona*, 53 ORE. L. REV. 213, 213-14 (1974). Modern cases occasionally reflect a similarly harsh treatment of juries. *See* Commonwealth v. Moore, 398 Pa. 198, 157 A.2d 65 (1959); Mead v. City of Richland Center, 237 Wis. 537, 297 N.W. 419 (1941).

[2] The *Allen* charge derives its name from the Supreme Court decision in Allen v. United States, 164 U.S. 492 (1896). In affirming Allen's conviction, the Court approved the trial judge's supplemental charge to the jury which was modeled after that given in Commonwealth v. Tuey, 62 Mass. (8 Cush.) 1 (1851). 164 U.S. at 501-02. The *Allen* Court paraphrased the instruction in this way:

> [T]hat in a large proportion of cases absolute certainty could not be expected; that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.

Id. at 501. *See generally* United States v. Bailey, 468 F.2d 652, 661-69 (5th Cir. 1972), *aff'd per curiam*, 480 F.2d 518 (5th Cir. 1973)(en banc). Noting the peculiarities of the case and the decision, the *Bailey* court commented "[t]hat it should have become the foundation-stone of all modern law regarding deadlocked juries is perhaps the greatest anomaly of the *Allen* case." 468 F.2d at 666. *See also* Note, *On Instructing Deadlocked Juries*, 78 YALE L.J. 100, 102 n.12 (1968).

[3] The usual explanation for the use of the term "dynamite" is that, like dynamite, the *Allen* charge ought to be used with care because of its explosive effects on a deadlocked jury: "The Allen or 'dynamite' charge is designed to blast loose a deadlocked jury." Green v. United States, 309 F.2d 852, 854 (5th Cir. 1962). The charge has also been called the "nitroglycerin charge," Huffman v. United States, 297 F.2d 754, 759 (5th Cir.) (Brown, J., concurring in part and dissenting in part), *cert. denied*, 370 U.S. 955 (1962), the "third degree instruction," Leech v. People, 112 Colo. 120, 123, 146 P.2d 346, 347 (1944), and the "shotgun instruction," State v. Nelson, 63 N.M. 428, 431, 321 P.2d 202, 204 (1958).

decide the case if they can conscientiously do so.[4] In addition, the jurors comprising the minority are usually specifically addressed and encouraged to reconsider their position in light of the majority view.[5] The *Allen* charge is rendered in the hope that it will generate renewed jury deliberation culminating in a verdict.[6] Such a result averts the declaration of a mistrial and the need for retrial and thereby promotes judicial economy.[7] Notwithstanding the *Allen* charge's utility in this regard, questions have been raised as to the propriety of its use.[8] At issue is the possibility of judicial coercion which may jeopardize a defendant's right to a unanimous, impartial verdict.[9]

Criticism of the *Allen* charge has led to its abandonment by a

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[4] *See* note 2 *supra*. The precise wording of the *Allen* charge varies. *Compare* United States v. Robinson, 560 F.2d 507, 511-12 n.6 (2d Cir. 1977) (en banc), *with* United States v. Seawell, 550 F.2d 1159, 1161 n.2 (9th Cir. 1977).

[5] *See, e.g.*, United States v. Seawell, 550 F.2d 1159 (9th Cir. 1977); Green v. United States, 309 F.2d 852 (5th Cir. 1962); United States v. Rogers, 289 F.2d 433 (4th Cir. 1961); State v. Randall, 137 Mont. 534, 353 P.2d 1054 (1960).

[6] *E.g.*, Campbell v. United States, 316 F.2d 681, 681 n.1 (D.C. Cir. 1963); Green v. United States, 309 F.2d 852, 854-55 n.3 (5th Cir. 1962); *see* Note, *The* Allen *Charge: Recurring Problems and Recent Developments*, 47 N.Y.U.L. REV. 296, 297-98 (1972) [hereinafter cited as *Recurring Problems*]. A jury initially unable to agree on a verdict need not be summarily discharged. The courts have encountered difficulty, however, in fashioning a method that will encourage consensus but not cause any juror to feel compelled to agree with the majority despite his own reservations. *See* Comment, *Deadlocked Juries and Dynamite: A Critical Look at the "Allen Charge,"* 31 U. CHI. L. REV. 386 (1964) [hereinafter cited as *Deadlocked Juries*].

[7] Note, *Due Process, Judicial Economy and the Hung Jury: A Reexamination of the* Allen *Charge*, 53 VA. L. REV. 123, 125 (1967) [hereinafter cited as *Reexamination*]. One authority has urged that economic considerations should not be a factor in the giving of an *Allen* charge: "To me, expense is never a consideration either to be mentioned or entertained in the dispensation of justice." Thaggard v. United States, 354 F.2d 735, 740 (5th Cir. 1965)(Coleman, J., concurring), *cert. denied*, 383 U.S. 958 (1966). The economic benefits derived from fewer retrials, moreover, appear to be offset by the frequent appeals occasioned by use of the charge. Andrews v. United States, 309 F.2d 127, 129 (5th Cir. 1962) (Wisdom, J., dissenting), *cert. denied*, 372 U.S. 946 (1963).

[8] Although it is unquestioned that the *Allen* charge produces more verdicts than would otherwise result, constitutional and administrative problems may result from its use. *See* notes 33-50 and accompanying text *infra*.

[9] *See* Note, *The* Allen *Charge Dilemma*, 10 AM. CRIM. L. REV. 637 (1972). Although judicial coercion is difficult to define and measure, United States v. Fioravanti, 412 F.2d 407, 416 n.20 (3d Cir.), *cert. denied*, 396 U.S. 837 (1969), appellate courts will find coercion to exist when the charge causes a minority juror to substitute mechanically the majority opinion for his own. *See Deadlocked Juries*, *supra* note 6, at 386-87. This finding entails a careful analysis of the circumstances surrounding the charge. *See* note 22 *infra*. For an analysis of the dynamics and factors involved in jury deliberations, see Note, *On Instructing Deadlocked Juries*, 78 YALE L.J. 100 (1968), wherein it is contended that no present method exists by which the courts can adequately determine whether a jury was coerced. *Id.* at 105. *See also* State v. Voeckell, 69 Ariz. 145, 210 P.2d 972 (1949) (Udall, J., dissenting).

number of courts in recent years.[10] Despite this concern with the appropriateness of the charge, the Second Circuit, in *United States v. Robinson,*[11] recently held that the giving of a second *Allen* charge is neither necessarily coercive nor error *per se.*[12] At defendant Cecil Robinson's bank robbery trial, the jury deliberated for 5 hours and found itself deadlocked eleven to one for conviction.[13] The court advised counsel of the deadlock and thereupon delivered a modified *Allen* charge to the jury.[14] Three hours later, a juror sought advice in a note to the court stating that she still had a "strong reasonable doubt" as to the defendant's guilt.[15] The following morning a short, modified *Allen* charge was given in response to the juror's note.[16] Almost 5 hours after this second charge, the jury voted to convict.[17]

The Second Circuit, sitting en banc, ruled that the delivery of the second *Allen* charge to the deadlocked jury did not constitute reversible error.[18] Judge Mansfield, authoring the majority opin-

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[10] *See* United States v. Thomas, 449 F.2d 1177 (D.C. Cir. 1971) (en banc); United States v. Fioravanti, 412 F.2d 407 (3d Cir.), *cert. denied,* 396 U.S. 837 (1969); United States v. Brown, 411 F.2d 930 (7th Cir. 1969), *cert. denied,* 396 U.S. 1017 (1970). *See* note 43 *infra.*

Commentators have joined the judiciary in expressing criticism of the charge. A noted authority has stated that "[d]espite the durability of the *Allen* charge under heavy attack, its ultimate demise seems clearly indicated. In law, as in other matters, error cannot permanently endure. The *Allen* charge is error." C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 502, at 360 (1969). *See also Recurring Problems, supra* note 6; *Reexamination, supra* note 7; *Deadlocked Juries, supra* note 6.

[11] 560 F.2d 507 (2d Cir. 1977) (en banc), *rev'g* 544 F.2d 611 (2d Cir. 1976).

[12] 560 F.2d at 517.

[13] *Id.* at 511.

[14] *Id.* The precise division of the jury was not made known to counsel. *Id.*

[15] *Id.* at 512. In her note, the juror advised the court that " 'regardless of honest efforts of my co-jurors to persuade me, I am unable to reach a decision without a strong reasonable doubt.' " *Id.* The judge sealed the note and did not disclose the contents to the parties. The sealing of the note was found not to constitute prejudicial error. *Id.* at 516-17.

[16] *Id.* at 512. In his opening remarks the following morning the trial judge said that

> the only response that I can give to that note is to state again for you some of what I stated yesterday afternoon, that is, you should examine the questions submitted to you with candor and with a proper regard for and deference to the opinions of one another; you should listen to one anothers' views with a disposition to be convinced.
>
> That does not mean that you should give up any conscientious views that you hold, but it is your duty after full deliberation, to agree upon a verdict, if you can do so without violating your individual judgment and your individual conscience.

Id.

[17] *Id.*

[18] The en banc court was also confronted with the question whether the trial court abused its discretion in admitting evidence of Robinson's possession of a .38 caliber handgun at the time of his arrest, 10 weeks after the bank robbery. Robinson was said to have been one of four men who participated in the robbery. Ten weeks after the crime he was arrested when one of the suspects confessed and identified Robinson as an accomplice. *Id.* at 512. Besides this testimony, the government found Robinson's fingerprint in the back seat of the getaway

ion,[19] noted that a carefully worded supplemental instruction is permitted in order to provide guidance for confused or deadlocked juries.[20] Such a charge is proper, according to the Second Circuit, if it

car owned by his friend. On the day of the robbery, Robinson was absent from work. Bank surveillance photographs could not positively identify Robinson, nor could the witnesses in the bank. *Id.* at 510-11. At trial, Judge Bryan admitted testimony as to Robinson's possession of the gun, since his alleged coparticipant had testified that four guns had been used in the robbery, including at least one .38 caliber revolver. Judge Bryan did not allow the gun itself to be put into evidence. Cautionary instructions were employed, informing the jury that testimony concerning Robinson's possession of the gun was to be used solely for purposes of establishing his identity as one of the participants in the robbery. The jury was specifically cautioned that they should not speculate on Robinson's character or reputation. *Id.* at 510-11 & 510 n.4.

A Second Circuit panel reversed Robinson's conviction on appeal, holding that the admission of the testimony under the circumstances of the case was reversible error, since the potential prejudice from the testimony substantially outweighed its probative value. 544 F.2d at 615-16. Judge Oakes, writing for himself and Judge Gurfein, viewed the testimony regarding the gun as establishing only a weak inference that Robinson was one of the bank robbers. Although relevant, since the testimony was likely to have had a significant prejudicial impact on the minds of the jurors, and as the circumstances of the case were "exceedingly close," reversal was required. *Id.* at 616. Judge Mansfield, in his dissent, believed the gun testimony to have substantial probative value and found no abuse of discretion by the trial judge. *Id.* at 623-24 (Mansfield, J., dissenting).

The en banc court vacated the panel judgment and reinstated Robinson's conviction. Judge Mansfield stated in the majority opinion that broad discretion is accorded the trial judge because he is in a superior position to assess the impact of the evidence on the basis of his personal observation of the trial. 560 F.2d at 514. In noting that the trial judge's determination will rarely be overruled, the en banc majority found the "preferable rule is to uphold the trial judge's exercise of discretion unless he acts arbitrarily or irrationally." *Id.* at 515. Analyzing the trial judge's actions, Judge Mansfield found a sound basis for the admittance of the testimony. The trial judge had acted to minimize the impact of the evidence by admitting only testimony and not the gun itself, and by employing cautionary instructions. These factors led the majority to conclude that the trial judge had not acted arbitrarily or unreasonably. *Id.* at 514-16.

In his dissent, Judge Oakes took issue with the majority's reasoning. He noted that " 'great discretion in the trial judge . . . does not mean immunity from accountability.' " *Id.* at 519 (Oakes, J., dissenting) (quoting United States v. Dwyer, 539 F.2d 924, 928 (2d Cir. 1976)). Judge Oakes found the connection beween the evidence of Robinson's possession of the gun and his participation in the robbery to be slight as compared to the potential prejudice involved. 560 F.2d at 521-22 (Oakes, J., dissenting).

[19] A majority of the Second Circuit judges joined in Judge Mansfield's opinion. Judges Oakes, Gurfein, and Feinberg dissented. Judge Oakes viewed the *Allen* charge holding as "bad law." 560 F.2d at 518 (Oakes, J., dissenting). Judge Gurfein concurred in Judge Oakes' dissent and added that he believed the case should not have been heard en banc. *Id.* at 525-26 (Gurfein, J., dissenting). Judge Feinberg would have vacated the order for rehearing en banc, believing it to be improvidently granted. *Id.* at 526 (Feinberg, J., dissenting). He noted that no new rule of law was announced by the court and thus en banc treatment of the case was not warranted. Judge Feinberg concluded that the convening of the en banc court simply because "a majority of the active judges disagree with" a panel decision "misconceive[s] the purpose of the extraordinary en banc procedure." *Id.*

[20] 560 F.2d at 517 (citing United States v. Hynes, 424 F.2d 754, 757 (2d Cir.), *cert. denied*, 399 U.S. 933 (1970)). For a discussion of the problem of distinguishing between legitimate guidance and coercive interference, see Note, *The* Allen *Charge Dilemma*, 10 AM. CRIM. L. REV. 637, 639-44 (1972).

assists the jurors in their deliberations by stressing the importance of reaching a verdict without forcing any juror to yield a conscientious belief.[21] Stating that an "individualized determination of coercion" is required before the giving of an *Allen* charge can be held reversible error,[22] the court proceeded to examine the circumstances surrounding the trial court's delivery of the charge.[23] Declaring that the particular wording of the charges fell "far short of being coercive,"[24] and taking note of the length of jury deliberation following each charge,[25] the court concluded that the coercive effect of the

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[21] 560 F.2d at 517.

[22] *Id.* Usually the permissibility of the instruction is determined by considering the totality of the circumstances in which it was given. *See* Jenkins v. United States, 380 U.S. 445, 446 (1965). The balancing process has concerned itself with three areas in recent years: the wording of the charge, the timing of the charge, and the weight of the evidence. *See Recurring Problems, supra* note 6, at 302.

Proper wording of the charge usually involves two counterbalancing elements: if the charge requests the minority to reconsider their position in light of the majority's view, it should also remind them of the importance of each juror maintaining a conscientious belief. *Id.* at 299; *Reexamination, supra* note 7, at 128-30. While it has been suggested that the court admonish the majority jurors to reconsider in light of the minority view, this has been chided as "an invitation to a frolic with Alice in Wonderland." United States v. Fioravanti, 412 F.2d 407, 417 (3d Cir.), *cert. denied,* 396 U.S. 837 (1969). Problems arise if the trial judge notes in the charge that retrial would be expensive, that a deadlock will necessitate retrial, and that leniency could be expected for the defendant. *Recurring Problems, supra* note 6, at 303-04.

The timing of the charge is analyzed with respect to the length of time between the beginning of deliberations and the giving of the charge, and the length of time between the giving of the charge and the rendering of the verdict. If either time is considered too brief under the circumstances, there is an inference of coercion and reversal will generally result. *Reexamination, supra* note 7, at 132-33.

Appellate courts will sometimes consider the quantum of evidence presented at trial against the defendant in gauging the likelihood of coercion. If the evidence points to guilt, a technically improper charge might be found to be non-reversible error. *Recurring Problems, supra* note 6, at 308-09. From a pragmatic standpoint the tests used by appellate courts in measuring the coercive effect of an instruction are imprecise, *see* United States v. Brown, 411 F.2d 930, 932-33 (7th Cir. 1969), *cert. denied,* 396 U.S. 1017 (1970), as the factors causing jurors to change their position cannot be proven or assessed accurately, Note, *The* Allen *Charge Dilemma,* 10 AM. CRIM. L. REV. 637, 642 (1972); *see Reexamination, supra* note 7, at 136-37.

[23] 560 F.2d at 517-18.

[24] *Id.* at 517. Judge Bryan's first charge in *Robinson* stressed the desirability of a verdict, the time and effort involved in the trial, and the probability of retrial before another jury if a decision was not reached. The jurors were instructed to listen to each other with proper deference and regard but not to yield a conscientious belief. *Id.* at 511-12 n.6. The second charge was brief and summarized the first. *Id.* at 512.

[25] *Id.* at 517-18. The jury deliberated for 3 hours after the first *Allen* charge and for more than 4 hours following the second. *Id.* Although the Second Circuit will consider the length of time between the delivery of the *Allen* charge and the jury's return with a verdict in attempting to measure the coercive effect of the instruction, *see, e.g.,* United States v. Barash, 412 F.2d 26 (2d Cir.), *cert. denied,* 396 U.S. 832 (1969), the time factor alone will not necessitate a reversal. *See* United States v. Hynes, 424 F.2d 754 (2d Cir.), *cert. denied,* 399

charges was minimal.[26] The en banc majority therefore affirmed the defendant's conviction.[27]

In a vigorous dissent, Judge Oakes characterized the second charge to the jury as impermissibly coercive.[28] Stressing that the trial judge was aware of the eleven to one jury split before he gave the first *Allen* charge, Judge Oakes contended that the second charge created a feeling of isolation on the part of the dissenting juror and seemed to add the court's influence to the side of the jury majority.[29] In light of these circumstances, he reasoned, the delivery of a second charge necessitated that the conviction be reversed.[30]

It is submitted that the Second Circuit's holding in *Robinson* may endanger the sixth amendment rights of defendants and impede appellate review in the circuit. It frequently has been stated that a single *Allen* charge, mirroring the charge endorsed nearly a century ago by the Supreme Court, "stands at the brink of impermissible coercion."[31] The coercive effects of the charge are increased by the preeminent position of the trial judge and the resultant psychological impact of his instructions on dissenting jurors.[32]

U.S. 933 (1970) (conviction affirmed where the verdict was reported 5 minutes after the giving of the *Allen* charge).

Sometimes the interval between the retiring of the jury and the delivery of the instruction is so short that a reviewing court will find that the trial court abused its discretion in urging agreement. *Reexamination, supra* note 7, at 132; *see* Andrews v. United States, 309 F.2d 127 (5th Cir. 1962), *cert. denied,* 372 U.S. 946 (1963).

[26] Although the court ostensibly applied a "totality of circumstances" test, it seems apparent that the impact of the second charge on the lone holdout was not adequately considered. *See* note 30 *infra.*

[27] 560 F.2d at 509.

[28] *Id.* at 525 (Oakes, J., dissenting). Judge Oakes stated that the court was making "new—and I think bad—law in its disposition of the double *Allen* charge point." *Id.* at 518.

[29] *Id.* at 525. Many authorities accept the view that delivering an *Allen* charge when there is a lone holdout juror creates a sense of isolation on the juror's part and gives the impression that the court is specifically directing its remarks to the holdout. United States v. Meyers, 410 F.2d 693, 697 (2d Cir.) (Smith, J., dissenting), *cert. denied,* 396 U.S. 835 (1969); *Recurring Problems, supra* note 6, at 306-08; *Reexamination, supra* note 7, at 130-32. It has been stated that "[t]he charge usually comes at a psychological low point in the proceedings when suggestions calculated to bring agreement are apt to be met with less than ordinary critical evaluation." *Deadlocked Juries, supra* note 6, at 388-89. *See also* United States v. Sawyers, 423 F.2d 1335, 1349 (4th Cir. 1970) (Soboloff, J., dissenting).

[30] 560 F.2d at 525 (Oakes, J., dissenting). Judge Oakes examined the totality of the circumstances and concluded that there existed a high potential for coercion. *Id.* at 524-25. The gravity of a second charge in this situation cannot be minimized. As the dissent noted, the lone holdout juror knew that the second charge was directed at her: "Her note told the judge that she was the holdout, so that he knew to whom his remarks were addressed, and she knew that he knew." *Id.* at 525.

[31] United States v. Seawell, 550 F.2d 1159, 1163 (9th Cir. 1977); *accord,* United States v. Fioravanti, 412 F.2d 407, 420 (3d Cir.), *cert. denied,* 396 U.S. 837 (1969); Green v. United States, 309 F.2d 852, 854-55 (5th Cir. 1962).

[32] The Supreme Court has recognized the great impact of the trial judge on juries:

Constitutional attack on the *Allen* charge has therefore been continual.[33] The protection of dissenting juror's conscientiously held conviction seems fundamental to the trial-by-jury guarantee.[34] When judicial guidance exceeds its instructive purpose and interferes with the jury's independent deliberations, the sixth amendment may be diluted.[35] Absent any indication from the Supreme Court that reconsideration of the *Allen* case is imminent,[36] however,

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"[H]is lightest word or intimation is received with deference and may prove controlling." Starr v. United States, 153 U.S. 614, 626 (1894).

The thought process of a minority juror after hearing the *Allen* charge has been depicted in one opinion in the following manner:

> The majority think he is guilty; the Court thinks I ought to agree with the majority so the Court must think he is guilty. While the Court did tell me not to surrender my conscientious convictions, he told me to doubt *seriously* the correctness of my own judgment. The Court was talking directly to me, since I am the one who is keeping everyone from going home. So I will just have to change my vote.

State v. Voeckell, 69 Ariz. 145, 155, 210 P.2d 972, 980 (1949) (Udall, J., dissenting) (emphasis in original).

[33] *See, e.g.*, Thaggard v. United States, 354 F.2d 735, 739 (5th Cir. 1965) (Coleman, J., concurring), *cert. denied*, 383 U.S. 958 (1966); Huffman v. United States, 297 F.2d 754, 755 (5th Cir.) (Brown, J., concurring in part and dissenting in part), *cert. denied*, 370 U.S. 955 (1962); Commonwealth v. Spencer, 442 Pa. 328, 275 A.2d 299 (1971); Note, *The* Allen *Charge Dilemma*, 10 AM. CRIM. L. REV. 637 (1972); *Reexamination, supra* note 7, at 136-44. The early dissents of Fifth Circuit judges, *see* note 44 *infra*, were couched in constitutional terms. As yet, no federal court has declared the *Allen* charge unconstitutional *per se*. One state court, however, has found the charge to be "contrary to the hallowed tradition of trial by jury secured by both our federal and state constitutions." Commonwealth v. Spencer, 442 Pa. 328, 336, 275 A.2d 299, 304 (1971), *discussed in* 76 DICK. L. REV. 614 (1972).

[34] *See, e.g.*, United States v. Seawell, 550 F.2d 1159, 1163 (9th Cir. 1977); United States v. Thomas, 449 F.2d 1177, 1181 (D.C. Cir. 1971) (en banc); United States v. Fioravanti, 412 F.2d 407, 417 (3d Cir.), *cert. denied*, 396 U.S. 837 (1969). Pressuring a dissenting minority juror to join the majority raises constitutional issues regarding one's right to a unanimous impartial verdict. In enumerating its reasons for abandoning the *Allen* charge, the Third Circuit noted that "it is often a conscientious and determined minority which proves to be the safeguard against outrageous conduct wrought by tides and currents of public opinion." United States v. Fioravanti, 412 F.2d 407, 416 (3d Cir.), *cert. denied*, 396 U.S. 837 (1969). In a similar vein, a number of authorities have suggested that a defendant has a right to a hung jury and that the *Allen* charge jeopardizes that right. *See, e.g.*, United States v. Brown, 411 F.2d 930 (7th Cir. 1969), *cert. denied*, 396 U.S. 1017 (1970); Huffman v. United States, 297 F.2d 754, 759 (5th Cir.) (Brown, J., concurring in part and dissenting in part), *cert. denied*, 370 U.S. 955 (1962); Comment, *Instructing the Deadlocked Jury: Some Practical Considerations*, 8 J. MAR. J. PRAC. & PROC. 169, 170 (1974).

[35] *See* note 34 *supra*. The appeal from the bench for a verdict may distort the neutrality of a trial. By stressing the duty to produce a verdict and by addressing the minority, the judge, in effect, is involved in jury deliberations. Bennett, *The Hung Jury and the Dynamite Charge*, 1 AM. J. CRIM. L. 156, 176-77 (1972). The qualifications in the charge do not save it from being "a direct appeal from the Bench for a verdict." Thaggard v. United States, 354 F.2d 735, 740 (5th Cir. 1965) (Coleman, J., concurring), *cert. denied*, 383 U.S. 958 (1966).

[36] Since the decision by the Supreme Court in *Allen*, *see* note 2 *supra*, the Court has twice upheld, without comment, verdicts rendered after delivery of an *Allen* charge. *See* Kawakita v. United States, 343 U.S. 717 (1952); Lias v. United States, 284 U.S. 584 (1931)(per curiam). Since 1952, certiorari has been denied in all cases involving the *Allen* charge. *See, e.g.*, United

and without definitive empirical proof establishing that the charge is coercive,[37] courts are understandably reluctant to declare the *Allen* charge unconstitutional *per se*.[38] Nevertheless, the repetition of the charge to dissenting jurors raises grave questions concerning fulfillment of the right to trial by impartial jury[39] and the requirement that guilt be proven beyond a reasonable doubt.[40]

Interference with the operation of the appellate system may arise from the fact that variations in the wording of the *Allen* charge often lead to appeals by convicted defendants.[41] The resultant drain on appellate resources has prompted three circuits to act in their supervisory capacity[42] and prohibit further use of the charge.[43] Other

States v. Hynes, 424 F.2d 754 (2d Cir.), *cert. denied*, 399 U.S. 933 (1970); United States v. Wynn, 415 F.2d 135 (10th Cir. 1969), *cert. denied*, 397 U.S. 994 (1970); United States v. Brown, 411 F.2d 930 (7th Cir. 1969), *cert. denied*, 396 U.S. 1017 (1970); Thaggard v. United States, 354 F.2d 735 (5th Cir. 1965), *cert. denied*, 383 U.S. 958 (1966).

[37] *See* note 22 *supra*.

[38] *See, e.g.*, United States v. Bailey, 480 F.2d 518, 519 (5th Cir. 1973)(en banc) (Coleman, J., concurring); Comment, *The Faltering Allen Charge and its Proposed Replacement*, 16 ST. LOUIS L.J. 619, 622-23 (1972). One appellate judge has argued, in dissent, that "[s]ince the Supreme Court has not disavowed the charge it is not for us to do so." United States v. Thomas, 449 F.2d 1177, 1189 (D.C. Cir. 1971)(en banc) (Robb, J., dissenting); *accord*, Hodges v. United States, 408 F.2d 543, 552 (8th Cir. 1969) (Blackmun, J.).

[39] *See* note 34 and accompanying text *supra*.

[40] *See* Commonwealth v. Spencer, 442 Pa. 328, 275 A.2d 299 (1971); Note, *The* Allen *Charge Dilemma*, 10 AM. CRIM. L. REV. 637 (1972). *See generally* Comment, *Instructing Deadlocked Juries In Light of the Trial of Juan Corona*, 53 ORE. L. REV. 213 (1974). The Supreme Court has recently reaffirmed the notion that proof of guilt beyond a reasonable doubt is of constitutional dimension. *See* Patterson v. New York, 432 U.S. 197 (1977); Mullaney v. Wilbur, 421 U.S. 684 (1975).

[41] An examination "of the decisions of the several federal courts of appeals in recent years leaves no doubt that these courts are spending increasing amounts of time struggling with a host of problems created by continued use of the *Allen* charge." ABA STANDARDS RELATING TO TRIAL BY JURY § 5.4, commentary at 155 (Approved Draft, 1968). The administrative problems caused by the *Allen* charge have prompted courts to act in their supervisory capacity and prohibit its use. *See* note 43 *infra*. For a survey of state courts which have abandoned the charge, see United States v. Seawell, 550 F.2d 1159, 1162 n.4 (9th Cir. 1977).

[42] The Supreme Court has stated that "supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system." La Buy v. Howes Leather Co., 352 U.S. 249, 259-60 (1957). Though not clearly defined by the Court, the supervisory powers of courts of appeals were recently explained by Mr. Justice Rehnquist:

> Within such a unitary jurisdictional framework the appellate court will, of course, require the trial court to conform to constitutional mandates, but it may likewise require it to follow procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution.

Cupp v. Naughten, 414 U.S. 141, 146 (1973).

In United States v. Jacobs, 547 F.2d 772 (2d Cir. 1976), *cert. granted*, 431 U.S. 937 (1977), the Second Circuit invoked its supervisory power to affirm the suppression of a potential defendant's grand jury testimony and the dismissal of a perjury charge. The purpose of the

courts of appeals have prescribed modifications in the language and use of the original *Allen* charge;[44] none have upheld its unsolicited

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decision was to encourage uniformity of practice between strike force attorneys and the United States Attorney for the same district. The court stated that such an exercise of power is clearly recognized in the Second Circuit. 547 F.2d at 776. Noting that the Third, Seventh, and District of Columbia Circuits have utilized their supervisory powers to prohibit further use of the *Allen* charge, the *Jacobs* court concluded: "These cases surely do not demonstrate a disrespect for the Supreme Court. They perhaps, in part, represent a recognition of the undesirability of unequal treatment, as evidenced by many appeals, when some judges use the *Allen* charge and others do not." *Id.*

The Third Circuit has explained its supervisory power to be "little more than ruling on a basis not specifically set forth in the Constitution, or by statute, procedural rule, or precedent." *In re* Grand Jury Proceedings, 507 F.2d 963, 970 (3d Cir. 1975) (Aldisert, J., dissenting). The other courts of appeals, like the Second and Third Circuits, have acknowledged the exisence of this power. *See* Burton v. United States, 483 F.2d 1182, 1187-88 (9th Cir. 1973).

[43] Three circuits have banned the *Allen* charge for administrative reasons; none of the three specifically ruled, however, on the charge's constitutionality. The Third Circuit in United States v. Fioravanti, 412 F.2d 407 (3d Cir.), *cert. denied,* 396 U.S. 837 (1969), prohibiting further use of the charge stated that "[i]ts peccancy comes from its tendency to hurt, from its tendency to erode the jurors' capacity for meaningful group deliberation with its concomitant arguing, influencing, and exchange of views." 412 F.2d at 420.

The Seventh Circuit abandoned the *Allen* charge in the "interests of justice." United States v. Brown, 411 F.2d 930, 933 (7th Cir. 1969), *cert. denied,* 396 U.S. 1017 (1970). The court noted the administrative problems in evaluating the coercive effects of the instruction. Recognizing that some instruction is often necessary, the court prospectively adopted a charge consistent with the standards set forth by the American Bar Association. 411 F.2d at 933-34.

The District of Columbia Circuit, following the lead of the Third and Seventh Circuits, declared that "[w]e believe that appellate courts should no longer be burdened with the necessities and niceties—and the concomitant uncertainties—of gauging various *Allen*-type renditions in terms of the coerciveness of their impact." United States v. Thomas, 449 F.2d 1177, 1186 (D.C. Cir. 1971) (en banc). Noting that an earlier recommendation urging trial judges to stay within the strict limits of *Allen,* Fulwood v. United States, 369 F.2d 960, 963 (D.C. Cir. 1966)(Burger, J.), *cert. denied,* 387 U.S. 934 (1967), had not been followed, the *Thomas* court adopted the ABA standard. 449 F.2d at 1187.

[44] The circuits that have retained the *Allen* charge have, for the most part, tempered it. The First Circuit requires that the jury majority, as well as the dissenters, be instructed to reexamine their views. *See* United States v. Flannery, 451 F.2d 880, 883 (1st Cir. 1971). Moreover, according to that court, a supplemental instruction ought to remind the jury of the burden of proof required for conviction. *Id.*; *accord,* United States v. Angiulo, 485 F.2d 37 (1st Cir. 1973), *aff'd per curiam,* 497 F.2d 440 (1st Cir.), *cert. denied,* 419 U.S. 896 (1974); Pugliano v. United States, 348 F.2d 902 (1st Cir.), *cert. denied,* 382 U.S. 939 (1965). The Fourth Circuit also has urged the use of a modified *Allen* charge that addresses the majority and the minority jurors. United States v. Sawyers, 423 F.2d 1335, 1342 & n.7 (4th Cir. 1970). The Eighth Circuit has encouraged trial judges to ensure that all possible safeguards are observed so that jurors will adhere to conscientious beliefs. United States v. Pope, 415 F.2d 685 (8th Cir. 1969), *cert. denied,* 397 U.S. 950 (1970). It has been suggested by the Tenth Circuit that if the *Allen* charge is utilized at all, it should be given in the original predeliberation instructions. United States v. Wynn, 415 F.2d 135 (10th Cir. 1969), *cert. denied,* 397 U.S. 994 (1970).

Though the Fifth Circuit has retained the *Allen* charge, individual judges within the circuit have strongly urged a contrary position. *See* Thaggard v. United States, 354 F.2d 735 (5th Cir. 1965) (Coleman, J., concurring), *cert. denied,* 383 U.S. 958 (1966); Andrews v.

use a second time.[45] Indeed, only months before the *Robinson* decision, the Ninth Circuit, in *United States v. Seawell,*[46] held that it is reversible error to repeat an *Allen* charge after a jury has reported itself deadlocked and has not requested a second instruction.[47] After noting that a single *Allen* charge, although valid in the Ninth Circuit, is "inherently coercive,"[48] the *Seawell* court concluded that sanctioning a repetition of the charge would amount to "an unwarranted expansion of its use."[49] In so ruling, the court expressly rejected the conclusion reached in *Robinson* that case-by-case appellate review of the propriety of a second supplemental instruction would be acceptable.[50]

The Second Circuit holding in *Robinson* therefore is at variance with the current trend evident in judicial decisions.[51] Of the three

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United States, 309 F.2d 127 (5th Cir. 1962) (Wisdom, J., dissenting), *cert. denied,* 372 U.S. 946 (1963); Huffman v. United States, 297 F.2d 754 (5th Cir.) (Brown, J., concurring in part and dissenting in part), *cert. denied,* 370 U.S. 955 (1962). More recently, the Fifth Circuit, in a sharply divided en banc decision, affirmed use of the *Allen* charge. United States v. Bailey, 480 F.2d 518 (5th Cir. 1973)(en banc)(per curiam).

[45] *See* United States v. Seawell, 550 F.2d 1159, 1163 n.10 (9th Cir. 1977).

[46] 550 F.2d 1159 (9th Cir. 1977).

[47] *Id.* at 1163. After more than 3½ hours of deliberation, the *Seawell* jury sent a note to the judge indicating a ten-to-two deadlock. The judge responded with a standard *Allen* charge which made reference to the expense of the trial and alluded to a future retrial. While the court stressed the need for a conscientious verdict, it also asked the minority to reexamine their views and noted that they had a duty to reach agreement if possible without surrendering honest convictions. *See id.* at 1161 n.2. Since it specifically addressed the minority jurors, the *Seawell* instruction was somewhat more forceful than the one delivered in *Robinson. See* note 24 *supra.* The first *Seawell* instruction did not result in a jury verdict, however, and 3 ½ hours later the jury again reported itself at an impasse. The court reread the *Allen* charge and a verdict was returned 50 minutes later. 550 F.2d at 1162.

[48] 550 F.2d at 1162. In adopting the rule that delivery of an unsolicited second *Allen* charge is reversible error, the court acknowledged that some cases not warranting such protection would nevertheless be automatically reversed. On balance, this "cost" of embracing a *per se* rule was found to be less weighty than the defendant's right to an impartial jury trial and the administrative inconvenience of a less definite rule. *Id.* at 1163 n.8.

[49] *Id.* at 1163.

[50] *Id.* The court stated that "[p]ragmatic considerations weigh against the application" of the usual test of considering all the circumstances to determine the propriety of the charge when it is given more than once. *Id.*

[51] *See* notes 43-50 and accompanying text *supra.* The Second Circuit has consistently reaffirmed its adherence to the *Allen* charge. *See, e.g.,* United States v. Tyers, 487 F.2d 828 (2d Cir. 1973), *cert. denied,* 416 U.S. 971 (1974) (instruction that law requires retrial unless unanimous verdict rendered not coercive); United States v. Martinez, 446 F.2d 118 (2d Cir.), *cert. denied,* 404 U.S. 944 (1971) (rejection of arguments by other circuits and commentators that *Allen* charge should be prohibited); United States v. Hynes, 424 F.2d 754 (2d Cir.), *cert. denied,* 399 U.S. 933 (1970) (*Allen* charge is satisfactory supplemental jury charge); United States v. Meyers, 410 F.2d 693 (2d Cir.), *cert. denied,* 396 U.S. 835 (1969) (admonishment that jurors should not relinquish conscientious beliefs sufficient to balance the *Allen* charge's coercive tendencies). *But cf.* United States v. Kenner, 354 F.2d 780, 783-84 (2d Cir. 1965),

circuits which have abandoned the *Allen* charge,[52] two, the Seventh and the District of Columbia,[53] have opted for guidelines established by the American Bar Association.[54] While no particular language is mandated in these circuits,[55] the more coercive aspects of the *Allen* charge have been discarded. Since the instruction may be given prior to deliberation,[56] no reference is made to dissenting jurors.[57] Instead, the instruction states that no juror should hesitate to reexamine his views.[58] Later repetition of the instruction is permissible if the jury cannot agree.[59] Insasmuch as all jurors are ad-

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cert. denied, 383 U.S. 958 (1966) (the propriety of particular charge given was seriously questioned because of its possible coercive impact).

[52] *See* note 43 *supra*.

[53] *See* United States v. Thomas, 449 F.2d 1177 (D.C. Cir. 1971) (en banc); United States v. Brown, 411 F.2d 930 (7th Cir. 1969), *cert. denied*, 396 U.S. 1017 (1970).

[54] The guidelines are contained in ABA STANDARDS RELATING TO TRIAL BY JURY § 5.4 (Approved Draft, 1968). The ABA standard provides:

> 5.4 Length of deliberations; deadlocked jury.
>
> (a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:
>
> (i) that in order to return a verdict, each juror must agree thereto;
>
> (ii) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
>
> (iii) that each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;
>
> (iv) that in the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and
>
> (v) that no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.
>
> (b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in subsection (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.
>
> (c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.

Id. at 145-46. The ABA recommends that the *Allen* charge not be used; instead, the jury should be advised of the five points contained in the standard. *Id.*, commentary at 146. Giving the instruction prior to the deliberative process is advised and its later repetition is within the discretion of the trial judge. *Id.* at 147. An illustrative charge conforming to the ABA guidelines is *Instruction 8.11 of Jury Instructions and Forms for Federal Criminal Cases*, 27 F.R.D. 39, 97-98 (1961).

[55] *See* United States v. Thomas, 449 F.2d 1177 (D.C. Cir. 1971) (en banc); United States v. Brown, 411 F.2d 930 (7th Cir. 1969), *cert. denied*, 396 U.S. 1017 (1970).

[56] ABA STANDARDS RELATING TO TRIAL BY JURY § 5.4(a) (Approved Draft, 1968).

[57] *See* note 54 *supra*.

[58] *Id.*

[59] *Id.*

dressed before the deliberative process, the instruction seems to have less coercive potential. As use of a more neutral charge should prove less vulnerable to constitutional attack, the administration of criminal justice is thereby benefited.

The Second Circuit holding in *Robinson,* that the unsolicited use of a second *Allen* charge is not *per se* reversible error, seems to compound the constitutional problems associated with a single *Allen* charge. In recognition of this factor, the Ninth Circuit has laid down a *per se* rule, finding the unsolicited use of a second charge inconsistent with the rights guaranteed by the sixth amendment.[60] Viewed from the perspective of judicial economy, the *Allen* charge has been found to impede the efficient operation of the appellate process.[61] As the Second Circuit neglected to specify the circumstances in which the use of a second *Allen* charge would be proper, the court has invited variations in its use by trial judges, thereby increasing the likelihood of appeals. It is therefore regrettable that the Second Circuit declined to invoke its supervisory power and adopt the alternative instruction utilized by the Seventh and District of Columbia Circuits. Hopefully, the division among the circuits as to the viability of the charge, coupled with the sharp criticism its use has provoked, will lead to Supreme Court review of the *Allen* charge in the near future.

Richard P. Smith

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[60] United States v. Seawell, 550 F.2d 1159, 1163 (9th Cir. 1977).

[61] *See* notes 41-45 and accompanying text *supra.*