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## Deadlocked Juries-The "Allen Charge" Is Defuse

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## RECENT DECISIONS

### Deadlocked Juries—THE “ALLEN CHARGE” IS DEFUSED—*United States v. Thomas*

A deadlocked jury remains an ever-present problem to a judge whose docket is filled with cases to be litigated. Throughout history, crude methods of coercion have been employed by judges to pry a verdict from a deadlocked jury.<sup>1</sup> While such methods have long since been abandoned, a more subtle, though equally effective, device known as the “Allen charge”<sup>2</sup> is still utilized today to bring about the same result.

The “Allen charge,” first upheld by the United States Supreme Court in *Allen v. United States*,<sup>3</sup> is employed by trial judges to blast deadlocked juries into reaching a verdict;<sup>4</sup> hence its nickname, the “dynamite charge.”<sup>5</sup>

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<sup>1</sup> See *Walker v. United States*, 342 F.2d 22, 28 (5th Cir. 1965) (Brown, J., dissenting):

The rule at common law authorized the court to confine the jury under strict charge of a bailiff, to be fed on bread and water till the end of a term unless a verdict was sooner returned; and if a verdict was not then returned, to transport them around in a cart until they did agree on a verdict.

*People v. Sheldon*, 156 N.Y. 268, 269, 50 N.E. 840, 842 (1898):

By ancient common law, jurors were kept together as prisoners of the court until they had agreed upon their verdicts. It was regarded as not only proper but requisite that they should be coerced to an agreement upon a verdict.

For specific instances of coercion, see, e.g., *Pope v. State*, 36 Miss. 121 (1858) (threat of no food or drink until verdict reached); *Commonwealth v. Moore*, 398 Pa. 198, 157 A.2d 65 (1959) (jurors required to deliberate all night); *Mead v. City of Richland Center*, 237 Wis. 537, 297 N.W. 419 (1941) (threat to turn off water and heat in jury room).

<sup>2</sup> The name of the charge is derived from the case of *Allen v. United States*, 164 U.S. 492, 501 (1896), where the Supreme Court approved the charge given in the trial court below. The charge was stated by the court as follows:

. . . [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.

<sup>3</sup> 164 U.S. 492 (1896). The charge was first used in *Commonwealth v. Tuey*, 62 Mass. (8 Cush.) 1 (1851) and in 1896 was given constitutional approval by the Supreme Court in *Allen*.

<sup>4</sup> See *Green v. United States*, 309 F.2d 852, 854 (5th Cir. 1962).

<sup>5</sup> See *Huffman v. United States*, 297 F.2d 754, 759 (5th Cir. 1962) (Brown, J., dis-

Today, the great weight of authority in this country recognizes as proper the giving of the charge by a trial judge to a deadlocked jury.<sup>6</sup> In fact, no court, state or federal, has held that the "Allen charge" is per se coercive or unconstitutional.<sup>7</sup> However, it should be noted that while a charge which strictly adheres to that approved in *Allen v. United States* has been held to be proper,<sup>8</sup> courts have been quick to hold certain variations of the charge invalid.<sup>9</sup>

senting). The "Allen charge" has acquired other descriptives which attest to its effect on deadlocked juries. See, e.g., *Leech v. People*, 112 Colo. 129, 146 P.2d 346 (1944) (refers to charge as "3rd degree" instruction); *State v. Nelson*, 63 N.M. 428, 321 P.2d 202 (1958) (refers to charge as "shotgun instruction").

<sup>6</sup> See, e.g., *Kawakita v. United States*, 190 F.2d 506 (9th Cir. 1951), *aff'd*, 343 U.S. 717 (1952); *Lias v. United States*, 51 F.2d 215 (4th Cir. 1951), *aff'd per curiam*, 284 U.S. 584 (1931). For other cases so holding, see Annot., 100 A.L.R.2d 177, 182-84 (1965). See generally 53 AM. JUR. TRIAL § 956 (1945); 89 C.J.S. TRIAL § 481 (1955).

It should be noted that while there are many variations of the "Allen charge," a charge which falls within the scope of that approved in *Allen v. United States* has three main elements: an emphasis by the judge that no juror is expected to yield his conscientiously held opinion; a charge to dissenting jurors that they give consideration to the majority's opinion, if the much larger number are for conviction or acquittal; and an urging that minority jurors reconsider the correctness of their views since not concurred in by the majority of jurors. The dynamite of the "dynamite charge" rests in the second and third elements.

<sup>7</sup> See *Hodges v. United States*, 408 F.2d 543, 552 (8th Cir. 1969):

We initially reject the claim that the Allen charge itself must be held today, some 70 years after the decision, to be coercive, prejudicial, and unconstitutional. The Supreme Court has not yet seen fit to disavow it and, so long as it stands approved in decided Supreme Court cases, we are not to resolve that issue contrarily.

Every federal circuit has at one time approved the "Allen charge." See, e.g., *Mills v. Tinsley*, 314 F.2d 311 (10th Cir. 1963); *Bowen v. United States*, 153 F.2d 747 (8th Cir. 1946); *Bord v. United States*, 133 F.2d 313 (D.C. Cir. 1942); *Weathers v. United States*, 126 F.2d 118 (5th Cir. 1942); *Paschen v. United States*, 70 F.2d 491 (7th Cir. 1934); *United States v. Commerford*, 64 F.2d 28 (2d Cir. 1933); *Lias v. United States*, 51 F.2d 215 (4th Cir. 1931); *Israel v. United States*, 3 F.2d 743 (6th Cir. 1925); *Shaffman v. United States*, 289 F. 370 (3d Cir. 1923); *Shea v. United States*, 260 F. 807 (9th Cir. 1919); *Boston & M. R.R. v. Stewart*, 254 F. 14 (1st Cir. 1918).

In addition fifteen states have expressly authorized the "Allen charge." Today, two states, Montana and Arizona and two federal districts, the 7th and 3d (in addition to the *Thomas* case which banned the charge in the D.C. Circuit) have banned the "Allen charge." But in none of these was the charge itself, as approved in *Allen v. United States*, held to be coercive per se or unconstitutional. In each, the state and federal courts banned the charge on supervisory grounds. It remains today for some court to declare the "Allen charge" unconstitutional and coercive per se.

<sup>8</sup> See cases cited note 6 *supra*.

<sup>9</sup> The fact that the courts are willing to accept the "Allen charge," but nothing beyond this, is seen in *United States v. Rogers*, 289 F.2d 433, 435 (4th Cir. 1961) where the court stated that "[t]he charge approved in *Allen* approaches the limits to which

Recently, the "Allen charge" has become the subject of extreme criticism both from the bench and from legal writers alike.<sup>10</sup> The recent case of

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the court should go . . . ." Also in *United States v. Smith*, 303 F.2d 341, 343 (4th Cir. 1962) the court held that "[u]naccented and unembellished, the Allen charge is quite bold enough . . . ."

For cases in which the trial courts varied the wording of the charge, as approved by the Supreme Court, and were reversed *see, e.g.*, *Powell v. United States*, 297 F.2d 318 (5th Cir. 1961) (where the judge added to the charge that it was not to the credit of a juror to stand out in a pure spirit of stubbornness); *United States v. Rogers*, 289 F.2d 433 (4th Cir. 1961) (where the trial judge failed to include language emphasizing the individual juror's right to retain his conscientiously held dissenting viewpoint); *Kelsey v. United States*, 47 F.2d 453 (5th Cir. 1931) (where a judge added to the charge that unless the jury reached a verdict they would be violating the sacredness of their oaths as jurors); *Stewart v. United States*, 300 F. 769 (8th Cir. 1924) (where the court added language emphasizing a duty to agree). *See generally* Comment, *Defusing the Dynamite Charge: A Critique of Allen and its Progeny*, 36 TENN. L. REV. 749, 755-56 (1969); Note, *Due Process, Judiciary Economy and the Hung Jury: A Reexamination of the Allen Charge*, 53 VA. L. REV. 123, 128-30 (1967); Annot., 100 A.L.R. 2d 177 (1965).

For cases where the wording of Allen-type charges were closely scrutinized by the courts but not held error, *see, e.g.*, *Fulwood v. United States*, 369 F.2d 960 (D.C. Cir. 1966); *Walker v. United States*, 342 F.2d 22 (5th Cir. 1965); *Jenkins v. United States*, 330 F.2d 220, 221 (D.C. Cir. 1964) (Wright, J., dissenting); *Huffman v. United States*, 297 F.2d 754, 755 (5th Cir. 1962) (Brown, J., dissenting).

It is submitted that this constant struggle with the wording of the various Allen-type charges evidences an uneasy acceptance of the "Allen charge" by the courts. Indeed, any charge which goes beyond that approved by the Supreme Court is held to be coercive. Should such a precarious instruction remain a majority concept today?

<sup>10</sup> For criticism of the "Allen charge" on the federal court level, *see, e.g.*, *United States v. Fioravanti*, 412 F.2d 407 (3d Cir. 1969) (the "Allen charge" departs from the sole legitimate purpose of a jury to bring back a verdict based on the law and evidence received in an open court); *United States v. Brown*, 411 F.2d 930 (7th Cir. 1969) (the charge interferes with the accused's right to a fair and impartial jury trial); *Thaggard v. United States* 354 F.2d 735 (5th Cir. 1965) (Coleman, J., specially concurring) (if the *Allen* case were submitted to the Supreme Court today, the result might not be the same as it was in 1896); *Jenkins v. United States*, 330 F.2d 220 (D.C. Cir. 1964) (Wright, J., dissenting) (a hung jury can be a safeguard to liberty); *Green v. United States*, 309 F.2d 852 (5th Cir. 1962) (there is small if any justification for the use of the charge); *Andrews v. United States*, 309 F.2d 127 (5th Cir. 1962) (Wisdom, J., dissenting) (the charge causes more trouble in the administration of justice than it is worth); *Huffman v. United States*, 297 F.2d 754 (5th Cir. 1962) (Brown, J., dissenting) (there is no longer any use for the charge).

For criticism of the "Allen charge" on the state court level, *see, e.g.*, *State v. Thomas*, 86 Ariz. 161, 342 P.2d 197 (1959) (the evils of the charge far outweighs the benefits); *State v. Voeckell*, 69 Ariz. 145, 210 P.2d 972 (1949) (Udall, J., dissenting) (most courts tolerate the charge rather than commend it and many agree it would be better for the courts to omit the instruction); *Eikmeier v. Bennett*, 143 Kan. 888, 57 P.2d 87 (1936) (the charge has a potential to coerce); *State v. Randall*, 137 Mont. 534, 353 P.2d 1054

*United States v. Thomas*,<sup>11</sup> banning the "Allen charge" within the District of Columbia Circuit, reflects a growing trend in case decisions holding the charge improper.<sup>12</sup>

In *Thomas* the court was faced with a charge which varied from that approved in *Allen v. United States*<sup>13</sup> and was highly coercive.<sup>14</sup> The charge had been given to a deadlocked jury in the trial court below and had quickly induced a verdict. In keeping with the majority of jurisdictions, the court held that a charge which varies the proper thrust of the "Allen charge" is error.<sup>15</sup> Unwilling to stop at this point, the *Thomas* court broke with the majority and banned the use of the "Allen charge" completely.<sup>16</sup>

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(1960) (it is improper to discourage jurors from taking a view contrary to that entertained by the majority).

Legal writings also are critical of the "Allen charge" and suggest its abolition. See, e.g., AM. BAR ASS'N PROJECT ON MINIMUM STANDARDS FOR CRIM. JUSTICE, TRIAL BY JURY, 146 (Tentative Draft, 1968); Comment, *Defusing the Dynamite Charge: A Critique of Allen and its Progeny*, 36 TENN. L. REV. 749 (1969); Note, *Deadlocked Juries and Dynamite: A Critical Look at the Allen Charge*, 31 U. CHI. L. REV. 386 (1964); Note, *Due Process, Judicial Economy and the Hung Jury: A Reexamination of the Allen Charge*, 53 VA. L. REV. 123 (1967); Note, *On Instructing Deadlocked Juries*, 78 YALE L.J. 100 (1968).

In Clark, *Progress of Project Effective Justice—A Report on the Joint Committee*, 47 J. AM. JUD. SOC'Y 88, 90 (1963) Mr. Justice Clark gave credence to this criticism of the charge when he stated:

Nor do we circulate the Allen charge to the new judges as I used to when heading up the criminal division in the Department of Justice. Allen is dead and we do not believe in dead law.

11 449 F.2d 1177 (D.C. Cir. 1971).

12 The trend toward outlawing the "Allen charge" first began in the state courts. Arizona became the first state to ban the charge in *State v. Thomas*, 86 Ariz. 161, 342 P.2d 197 (1959). Montana followed suit in *State v. Randall*, 137 Mont. 534, 353 P.2d 1054 (1960). The federal courts, after struggling with the charge for years, began to follow the trend in the late 1960's. Two federal circuits, the 3d and 7th, banned the "Allen charge" in *United States v. Fioravanti*, 412 F.2d 407 (3d Cir. 1969) and *United States v. Brown*, 411 F.2d 930 (7th Cir. 1969). On September 14, 1971 the D.C. Circuit became the third federal district to ban the use of the charge.

13 See note 2 *supra*.

14 After giving the standard "Allen charge" to the jury, the trial judge upon learning that the jury was deadlocked added this sentence to the charge: "I am sure you ladies and gentlemen know we have a substantial backlog of work, and to spend another day before another jury just doesn't make sense to me." The *Thomas* court held this variation of the "Allen charge" was coercive and grounds for reversal.

15 See note 9 *supra*.

16 Even so, the split (5-4) decision of the *Thomas* court reflects the difficult struggle in the judiciary between those who feel the charge should remain in force and those who believe it should be banned. The narrowness of the majority's margin evidences the reluctance of the courts to depart from a decision which has stood as the law for seventy-five years.

While the action taken by the *Thomas* court is significant, it is submitted that the court failed to go far enough in its decision. The justices chose to ban the "Allen charge" under the supervisory authority of the court<sup>17</sup> instead of ruling that the charge is unconstitutional and coercive per se.<sup>18</sup>

Three chief criticisms have been advanced against the "Allen charge" by its foes in urging that the charge should be banned. The first of these, on which the *Thomas* court based its decision,<sup>19</sup> is that the use of the "Allen charge," with its many variations, subjects appellate courts to too many appeals concerning the validity of the charge in each particular case.<sup>20</sup>

A second and seemingly more direct attack is that the charge is per se coercive. The general rule is that a juror may not be coerced by the judge into voting against his conscientious belief.<sup>21</sup> Yet, the very purpose of the "dynamite charge" is to generate a verdict where the jury appears to be deadlocked.<sup>22</sup> The charge is clearly coercive because it strongly indicates

<sup>17</sup> See *State ex rel. Regis v. District Court*, 102 Mont. 74, 55 P.2d 1295 (1936) (the supervisory authority exercised by circuit courts is employed to control the course of litigation in the trial court when necessary to prevent extended and needless litigation).

<sup>18</sup> The *Thomas* court stated: "We have not held that the Allen charge is per se coercive; rather we have predicated our decision on the needs of judicial administration." Thus instead of periodically laboring the refinement of "Allen-charge" language the court decided to exercise its supervisory power over the administration of law in the D.C. Circuit and ban further use of the "Allen charge."

<sup>19</sup> See note 18 *supra*.

<sup>20</sup> See, e.g., *United States v. Fioravanti*, 412 F.2d 407 (3d Cir. 1969) (the use of the charge is an invitation for perennial appellate review); *Andrews v. United States*, 309 F.2d 127 (5th Cir. 1962) (Wisdom, J., dissenting) (the charge causes more trouble in the administration of justice than it is worth); *State v. Thomas*, 86 Ariz. 161, 342 P.2d 197 (1959) (the continued use of the charge will result in an endless chain of decisions); *State v. Voeckell*, 69 Ariz. 145, 210 P.2d 972 (1949) (Udall, J., dissenting) (the charge will not remain at rest).

It is not uncommon for the federal courts of appeal to be confronted with a plethora of issues. See, e.g., *Kent v. United States*, 343 F.2d 247 (D.C. Cir. 1964) (is it proper to give the charge before the jury retires?); *Green v. United States*, 309 F.2d 852 (5th Cir. 1962) (is it wrong to emphasize certain parts of the charge?); *Huffman v. United States*, 297 F.2d 754 (5th Cir. 1962) (Brown, J., dissenting) (do additions to the charge make it coercive?); *United States v. Rogers*, 289 F.2d 433 (4th Cir. 1961) (does failure to include necessary language make the charge coercive?); *Anderson v. United States*, 262 F.2d 764 (8th Cir. 1959) (may the charge be given after the court is advised, upon inquiry, that the jury is evenly divided?); *Bowen v. United States*, 153 F.2d 747 (8th Cir. 1946) (is the giving of the charge following a voluntary revelation of the numerical split of the jury inherently coercive?).

<sup>21</sup> See, e.g., *United States v. Fioravanti*, 412 F.2d 407, 416 (3d Cir. 1969); *Billeci v. United States*, 184 F.2d 394, 403 (D.C. Cir. 1950); *Meadows v. State*, 182 Ala. 51, 62 So. 737, 738 (1913); *Riggins v. State*, 226 Ga. 381, 174 S.E.2d 908, 911 (1970). See also 58 AM. JUR. 2d New Trial § 111 (1971).

<sup>22</sup> See *United States v. Fioravanti*, 412 F.2d 407, 416 (3d Cir. 1969).

that the jury must reach a verdict, when in fact there is no such rule,<sup>23</sup> and it is aimed squarely at the minority jurors with no corresponding charge to the majority.<sup>24</sup> Moreover, the "Allen charge" is based on the theory that the majority is correct or at least has better judgment than the minority, when again no such rule in fact exists.<sup>25</sup> The jury system rests primarily on the assumption that jurors should deliberate patiently and for extended periods of time if necessary in reaching their decision.<sup>26</sup> In violation of this policy, the "Allen charge" pressures a juror toward reaching a verdict<sup>27</sup> and usually induces quick agreement in that regard.<sup>28</sup> Thus, the danger becomes clear that a minority juror may be coerced into changing his conscientiously held belief by the use of the charge.<sup>29</sup>

<sup>23</sup> See *Thaggard v. United States*, 354 F.2d 735, 740 (5th Cir. 1965) (Coleman, J., specially concurring); *Jenkins v. United States*, 330 F.2d 220, 222 (D.C. Cir. 1964) (Wright, J., dissenting).

<sup>24</sup> This danger is pointed out by *United States v. Fioravanti*, 412 F.2d 407, 417 (3d Cir. 1969) where court stated: "Thus is revealed the very real treachery of the Allen Charge. It contains no admonition that the majority reexamine its position; it cautions only the minority to see the error of its ways." The court in *Eikmeier v. Bennett*, 143 Kan. 888, 891, 57 P.2d 87, 92 (1936) adds: "To say to a minority that they should re-examine their views . . . without putting a like duty on the majority . . . is wrong."

<sup>25</sup> See, e.g., *United States v. Fioravanti*, 412 F.2d 407, 416 (3d Cir. 1969); *Green v. United States*, 309 F.2d 852, 855 (5th Cir. 1962).

After hearing the "Allen charge" with its instruction to the minority juror not to forsake his conscientiously held belief, yet to reconsider the correctness of his opinion in light of that of the majority, a minority juror might reason as follows:

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, 152, 210 P.2d 972, 980 (1949) (Udall, J., dissenting).

<sup>26</sup> See *Green v. United States*, 309 F.2d 852, 854 (5th Cir. 1962); 5 *WHARTON'S CRIMINAL LAW AND PROCEDURE* § 2116, at 299 (1957).

<sup>27</sup> See *Green v. United States*, 309 F.2d 852 (5th Cir. 1962); *Huffman v. United States*, 297 F.2d 754 (5th Cir. 1962) (Brown, J., dissenting).

<sup>28</sup> See *Burrup v. United States*, 371 F.2d 556, 559 (10th Cir. 1967) (Phillips, J., concurring): "I know from trial court experience that the Allen instruction, when given usually induces quick agreement on a verdict by the jury." Mr. Justice Frankfurter explained the reason for this result in *Bollenbach v. United States*, 326 U.S. 607, 612 (1946):

An experienced trial judge should have realized that such a long wrangle in the jury room . . . would leave the jury in a state of frayed nerves and fatigued attention, with the desire to go home and escape overnight detention, particularly in view of a plain hint from the judge that a verdict ought to be forthcoming.

<sup>29</sup> See *Burrup v. United States*, 371 F.2d 556, 559 (10th Cir. 1967). For a thorough discussion of the coercive effect of the "Allen charge" and the danger it presents see Note, *Deadlocked Juries and Dynamite: A Critical Look at the Allen Charge*, 31 U. CHI. L. REV. 386 (1964).

The third criticism of the charge is that it is unconstitutional.<sup>30</sup> The United States Constitution guarantees an accused a trial by an impartial jury.<sup>31</sup> However, where a judge, in his position of authority,<sup>32</sup> directs the "Allen charge" to the minority jurors, there is a strong possibility that the constitutionally protected impartiality can no longer be achieved.<sup>33</sup> Furthermore, if the charge, as contended, influences a single juror to forsake his valid belief and vote with the majority, then the State has not proved its case beyond a reasonable doubt.<sup>34</sup> The accused has thus been denied due process of law, for he has been convicted not on the basis of evidence presented in court,<sup>35</sup> but rather through the jurors' response to what they take to be the desire of the judge.<sup>36</sup>

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<sup>30</sup> For a discussion of the constitutionality of the charge, see Comment, *Defusing the Dynamite Charge: A Critique of Allen and its Progeny*, 36 TENN. L. REV. 749, 750-54 (1969); Note, *Due Process, Judicial Economy and the Hung Jury: A Reexamination of the Allen Charge*, 53 VA. L. REV. 123, 136-44 (1967).

<sup>31</sup> U.S. CONST. amend. VI. See, e.g., *Parker v. Gladden*, 385 U.S. 363 (1966). *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Thaggard v. United States*, 354 F.2d 735 (5th Cir. 1965) (Coleman, J., specially concurring); *Baker v. Hudspeth*, 129 F.2d 779 (10th Cir. 1942). Thus, the sixth amendment guarantee of a trial by an impartial jury should mean that the jury be free from every influence except the law and evidence.

<sup>32</sup> The authority which the judge commands is pointed out by Mr. Chief Justice Fuller in *Starr v. United States*, 153 U.S. 614, 626 (1894):

It is obvious that under any system the influence of the trial judge is necessarily and properly of great weight and that his lightest word or intimation is received with deference and may prove controlling.

<sup>33</sup> See *Thaggard v. United States*, 354 F.2d 735, 741 (5th Cir. 1965) (Coleman, J., specially concurring):

The real burden of what I am saying is that the essential meaning of Constitutionally guaranteed trial by jury is that once the jury has retired to consider of its verdict it should not be subjected to so much as the appearance of any influence from any source for the purpose of producing a verdict.

Is a jury whose dissenting members have been subjected to a direct charge from the judge an impartial jury? *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) stated that an impartial jury requires a juror to be neutral as to the outcome of the trial. Where a dissenting juror has been told by the judge, in effect, to agree with the majority and reach a verdict, is he now neutral as to the outcome of the trial?

<sup>34</sup> Due process requires that guilt be proven beyond a reasonable doubt in a criminal trial. This is stated in *Billeci v. United States*, 184 F.2d 394, 403 (D.C. Cir. 1950):

All twelve jurors must be convinced beyond a reasonable doubt; if only one of them fixedly has a reasonable doubt, a verdict of guilty cannot be returned. These principles are not pious platitudes . . . . They are working rules of law binding upon the court.

<sup>35</sup> The necessity for this requirement of due process is explained in *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) where the court held that the verdict must be based upon the evidence developed at the trial, for only the jury can strip a man of his liberty or his life.

<sup>36</sup> The question of the "Allen charge" and its denial of due process is discussed in Note, *Due Process, Judicial Economy and the Hung Jury: A Reexamination of the*

The court in *United States v. Thomas* has dealt another blow to the "Allen charge" in banning the use of the charge within its district and substituting a charge approved by the American Bar Association,<sup>37</sup> which omits the direction to the minority jurors to reconsider their views. Yet, at best it is but a glancing blow and not the knockout punch desired. For in making its decision, the *Thomas* court chose to take only a cautious step forward<sup>38</sup> and merely ban the charge under its supervisory authority. The court failed to expose the "Allen charge" as a coercive and unconstitutional means of forcing a verdict from a deadlocked jury. Therefore, although the *Thomas* court did endorse the trend away from upholding the use of the "Allen charge"<sup>39</sup> it also demonstrated the court's own reluctance to completely loose the shackles of this outdated doctrine.

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*Allen Charge*, 53 VA. L. REV. 123 (1967). The seriousness of this problem is given a practical illustration in *Thaggard v. United States*, 354 F.2d 735, 741 (5th Cir. 1966) (Coleman, J., specially concurring):

It . . . seems from practical experience that after a jury has retired to consider its verdict, has done so for some time and has indicated that it is in hopeless deadlock, every juror, not being trained in the law understands from the Allen charge that what the judge wants is a verdict. So, there the previously reluctant juror stands, fancying himself in opposition to the wishes of a United States Judge, which is about the last position in which he ever wanted to find himself. He is only exercising everyday human nature when he gets out of that unhappy predicament just as quickly as he can.

<sup>37</sup> AM. BAR ASS'N PROJECT ON MINIMUM STANDARDS FOR CRIM. JUSTICE, TRIAL BY JURY, § 5.4 at 145-46 (Tentative Draft, 1968).

The instruction recommended by the A.B.A. is as follows:

Before the jury retires for deliberation, the court may give an instruction which informs the jury:

- (1) that in order to return a verdict, each juror must agree thereto;
- (2) 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;
- (3) that each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;
- (4) 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
- (5) 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.

The obvious difference between this charge and the "Allen charge" is that the dynamite—the specific charge to the minority jurors to reconsider their opinions in light of the majority and question the correctness of that opinion—has been eliminated.

<sup>38</sup> The *Thomas* court did not hold that the Allen charge was coercive, and failed to discuss the constitutional question. Rather it predicated its decision on the needs of judicial administration. Yet, it is submitted that in banning the Allen charge and recommending in its place the charge approved by the A.B.A., set out in note 37 *supra*, which eliminates the controversial dynamite portion of the charge, the *Thomas* court is impliedly admitting that which it is hesitant to express—that the arguments against the charge as unconstitutional and coercive per se have merit.

<sup>39</sup> See notes 10 and 12 *supra*.

The "Allen charge" is an anachronism in our modern age.<sup>40</sup> It has no place in a society in which jury verdicts are regarded as the result of patient and impartial deliberation.<sup>41</sup> Its very use shows a failure by the courts to recognize that a hung jury is at least a temporary victory for the accused and a valid alternative to a verdict of guilty or not-guilty;<sup>42</sup> that the majority of the jurors are not necessarily correct;<sup>43</sup> and that a unanimous verdict, in criminal cases, means exactly that.<sup>44</sup> Hopefully the trend away from the use of the "Allen charge" will continue. More importantly, it is urged that future decisions expose its more seriously objectionable characteristics and thereby insure that the "dynamite charge" will be defused forever.

*F.A.T.*

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<sup>40</sup> See, *Huffman v. United States*, 297 F.2d 754, 759 (5th Cir. 1962) (Brown, J., dissenting).

<sup>41</sup> See note 26 *supra*.

<sup>42</sup> See *United States v. Fioravanti*, 412 F.2d 407, 416 (3d Cir. 1969); *Huffman v. United States*, 297 F.2d 754, 758 (5th Cir. 1962) (Brown, J., dissenting).

<sup>43</sup> See cases cited note 25 *supra*.

<sup>44</sup> See *Thaggard v. United States*, 354 F.2d 735, 741 (5th Cir. 1966) (Coleman, J., specially concurring); *Billeci v. United States*, 184 F.2d 394, 403 (D.C. Cir. 1950).