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CASENOTE; *DIETZ V. BOULDIN*: TESTING THE LIMITS OF A DISTRICT COURT'S LIMITED INHERENT POWER

Erik Anderson

*"It is better that the present plaintiff should suffer an inconvenience than to head down this murky path."*¹

I. INTRODUCTION

The power of our courts to wield certain implied powers "must necessarily result to our [c]ourts of justice from the nature of their institution."² *Dietz v. Bouldin*³ is the story of how a common Montana traffic accident reached the highest court in the land by questioning the extent of this necessary power.⁴ The case specifically raised the question of whether a federal district court could recall and re-empanel an already excused and discharged jury. In a 6–2 decision, the United States Supreme Court chose efficiency over prudence and modernity over convention by holding a federal judge does wield such power.⁵

II. FACTUAL AND PROCEDURAL BACKGROUND

The facts of the case read like the bread and butter of many Montana practitioners. Rocky Dietz had the unfortunate luck of driving through a Bozeman, Montana intersection at the same moment Hillary Bouldin made the unfortunate mistake of running a red light.⁶ Dietz suffered injuries in the crash, of course, and promptly sought a regimen of physical therapy and steroid injections.⁷ Staying on script, Dietz sued Bouldin for negligence in Montana district court.⁸ Bouldin removed the case to federal court, where Bouldin admitted fault and stipulated to medical expenses in the amount of \$10,136.⁹ The only remaining issue for the jury was whether Dietz was entitled to further damages.¹⁰

The jury threw a wrench in the well-oiled machine when it sent out a note during deliberations asking: "Has the \$10,136 medical expenses been paid; and if so, by whom?"¹¹ The jury apparently did not understand it was required to return a verdict at least as large as the stipulated amount.

¹ *Dietz v. Bouldin*, 136 S. Ct. 1885, 1888 (2016) (Thomas, J., dissenting).

² *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812).

³ 136 S. Ct. 1885 (2016).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 1890 (majority opinion).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

The court, with approval by counsel, responded that the answer the jurors sought was not relevant to their verdict.¹² The jury ultimately returned a verdict in Dietz's favor, but for \$0 in damages.¹³ Thereafter, the judge thanked the jurors and ordered them "discharged," and "free to go."¹⁴

Moments later, when the judge realized his mistake, he instructed the clerk to corral the jurors back into the courtroom. He summoned counsel to his chambers, where he informed them that he had "just stopped the jury from leaving the building" after realizing that the verdict was not "legally possible in view of stipulated damages."¹⁵ In fact, one juror had already left the courtroom to retrieve a hotel receipt.¹⁶ Over opposition from Dietz's attorney, the court decided to re-empanel the jury to deliberate anew and reach a proper verdict.¹⁷ The judge cited concerns over the time and money that would be wasted if a new trial was ordered.¹⁸ The jury subsequently returned a verdict for Dietz in the amount of \$15,000 in damages.¹⁹

On appeal, a unanimous Ninth Circuit affirmed, finding that re-empanelment was proper so long as no jurors were exposed to "outside influences."²⁰ Recognizing a split among circuits, the United States Supreme Court granted certiorari to "resolve confusion...on whether and when a federal district court has the authority to recall a jury after discharging it."²¹

III. MAJORITY HOLDING

A. *Scope of Inherent Power*

The Court began its analysis by describing the traditional extent of a federal district court's inherent power. Power to hear a motion *in limine* or dismiss for *forum non conveniens* were two examples given of "inherent powers that are governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."²² However, Dietz argued the trial court erred by finding that an inherent power existed where one did not and could not exist.²³ But the Court employed a two-part test to determine the power was within the limits inherently vested in a federal

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 1891.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 1892 (quoting *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630–31 (1962)).

²³ Petitioner's Brief at 31, *Dietz v. Bouldin*, Feb. 29, 2016, No. 15-458.

district court.²⁴ First, the Court examined whether the purported power to re-empanel was “a reasonable response to the problems and needs confronting the court’s fair administration of justice.”²⁵ Second, the Court considered whether the power was contrary to any express grant or limitation on the district court by rule or statute.²⁶ Both inquiries resulted in the Court’s conclusion that a district court does have a limited inherent power to recall a jury by rescinding a discharge order.²⁷ In addition, analogous cases were relied upon to demonstrate the current reach of inherent district court power, including the inherent power to rescind orders at any point prior to final judgment in a civil case,²⁸ to revoke a bail order,²⁹ to efficiently manage its dockets and courtrooms,³⁰ and to dismiss cases for failure to prosecute.³¹ According to the Court, the common thread among these cases is the district courts’ inherent power to further “Rule 1’s paramount command.”³²

Although the Court found the inherent power to re-empanel a jury existed, it tempered its holding by emphasizing that this power was not appropriate for use at every opportunity.³³ Other vital interests such as the fair administration of justice dictated restraint.³⁴ In this sense, the Court was cognizant of the potential for taint when a jury is re-empaneled.³⁵

B. Determining the Extent of Prejudice

The Court developed a multifactor test to determine whether “any suggestion of prejudice” has occurred.³⁶ First, a court should look to the length of the delay between discharge and recall.³⁷ While providing no definitive timing requirements, the Court noted that “even a few minutes could be too long depending on the case.”³⁸ Second, a judge should determine whether the jurors spoke with anyone about the case during the discharge.³⁹ Here the Court emphasized that access to smartphones and mobile devices by jurors was potentially more dangerous than talking with

²⁴ *Dietz*, 136 S. Ct. at 1892.

²⁵ *Id.* (citing *Degen v. United States*, 517 U.S. 820, 823–24 (1996)).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Marconi Wireless Tele. Co. of America v. United States*, 320 U.S. 1, 47–48 (1943).

²⁹ *Fernandez v. United States*, 81 S. Ct. 642, 644 (1961).

³⁰ *Landis v. North American Co.*, 299 U.S. 248, 254 (1936) (finding a district court has inherent power to stay proceedings pending resolution of parallel action).

³¹ *Link*, 370 U.S. at 631–32.

³² *Dietz*, 136 S. Ct. at 1891. *See* Fed. R. Civ. P. 1 (rules should be “construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”).

³³ *Id.* at 1893.

³⁴ *Id.*

³⁵ *Id.* at 1894.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

those in the courtroom, stating that “[p]rejudice can come through a whisper or a byte.”⁴⁰ Third, a judge should consider the reaction which results from a verdict, as emotional outbursts from people inside the courtroom could cause jurors to reconsider their decision.⁴¹

Deitz further argued that the common law demanded a categorical bar on re-empaneling a jury, going so far as to cite the ancient English case credited with establishing the finality of discharge.⁴² However, the Court swept this argument aside, holding that any common law rule against re-empanelment was outdated and “unhelpful to understanding modern civil trial practice.”⁴³ Many common law practices to prevent prejudice have long since been abandoned in the quest for efficiency, such as strict jury sequestration,⁴⁴ or as demonstrated by the move to a harmless-error standard.⁴⁵ Thus, the Court found the necessities of the modern world and our devotion to efficiency sufficient consolation for its retreat from tradition.

IV. JUSTICE THOMAS’S DISSENT

Justice Thomas, while acknowledging Holmes’s famous quip that a rule of law should not stand simply because “it was laid down in the time of Henry IV,”⁴⁶ insisted that, in fact, old rules often last through the ages “because wisdom underlies them.”⁴⁷ In his dissent, which was joined by Justice Kennedy, Justice Thomas suggests that more weight should have been given to the potential prejudice liberated jurors may return with to a re-empaneled jury.⁴⁸ Justice Thomas is especially skeptical whether any acquired prejudice would even be detectable to the astute trial judge, and he raises further concerns about burdening judges with yet another ambiguous, multifactor test.⁴⁹ In his view, not only is the multifactor test vague and unworkable, it will only lead to more litigation,⁵⁰ which will in turn lead to new disagreements among the circuits, until finally the Supreme Court will “be called on again to sort it out.”⁵¹ As a result, Justice Thomas thinks the common law bright-line rule requiring a new trial is more appropriate.⁵² Not only would it make up for inefficiencies in excess litigation, it could also positively influence district court behavior by

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Petitioner’s Brief, *supra* note 20, at 25 (citing *Loveday’s Case*, 77 Eng. Rep. 573 (1608)).

⁴³ *Dietz*, 136 S. Ct. at 1895.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

⁴⁷ *Dietz*, 136 S. Ct. at 1897 (Thomas, J., dissenting).

⁴⁸ *Id.*

⁴⁹ *Id.* at 1898.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

requiring a judge act with greater care and certainty before discharging a jury.⁵³

V. ANALYSIS

As the dissent points out, the Court's departure from the common law has the potential to create more problems than solutions. Instead of settling on a safe, unambiguous, and well-recognized rule, the Court determined that prejudice was best calculated through an exhaustive and untested formula employed by each trial judge. This result fails to acknowledge centuries of common law concerns that have been raised over tainted juries and continues the worrisome trend of expanding lower courts' inherent power.

A. *Constitutionality of Inherent Judicial Power*

The majority admits that any action by a federal court cannot be “contrary to any express grant of or limitation on the district court’s power contained in a rule or statute.”⁵⁴ Further, the Court correctly states that a district judge only has the power to instruct the jury “at any time *before* the jury is discharged.”⁵⁵ Thus, because the jury was discharged, the only option for the court was to use its perceived inherent powers to instruct the jury to return and deliberate anew.

While the dissent rightfully focuses on the potential for prejudice,⁵⁶ a preliminary concern should be whether the continued use of these “beneficial” inherent judicial powers is even constitutional. The majority correctly states that the Supreme Court has never specifically delineated the extent of a federal district court’s inherent power.⁵⁷ Like most judicial concepts in American law, inherent judicial power is the result of long-standing English procedure.⁵⁸ Prior to the early twentieth century and the adoption of the Federal Rules of Civil Procedure, inherent power was the basis for almost all procedural management of cases.⁵⁹ In this sense, the Court rightfully concludes district courts have retained some of their inherent power in spite of the Federal Rules.⁶⁰ However, tension arises when a court, as here, seeks to flex “beneficial” inherent powers rather than “indispensable” or “necessary” inherent powers.⁶¹ Indeed, as

⁵³ *Id.*

⁵⁴ *Dietz*, 136 S. Ct. at 1892 (majority opinion).

⁵⁵ Fed. R. Civ. P. 51(b) (emphasis added).

⁵⁶ *Dietz*, 136 S. Ct. at 1897 (Thomas, J., dissenting).

⁵⁷ *Id.* at 1885 (majority opinion).

⁵⁸ Daniel J. Meador, *Inherent Judicial Authority in the Conduct of Civil Litigation*, 73 TEX. L. REV. 1805, 1806 (1995).

⁵⁹ *Id.*

⁶⁰ *Deitz*, 136 S. Ct. at 1885. See also *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630–32 (1962).

⁶¹ Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 742–43 (2001).

Professor Pushaw points out, the Supreme Court has frequently paid lip service to the principle that “only the least possible power adequate to the end proposed” should be employed, while at the same time acquiescing in an ever broader interpretation of lower court inherent powers.⁶²

In *Deitz*, the Court’s focus on efficiency blinds it to the short constitutional leash which has historically bound inherent judicial power. When the Court first analyzed the power of inferior federal courts following the Judiciary Act of 1789, the Court held that certain implied powers naturally exist alongside those enumerated in the Judiciary Act.⁶³ But these inherent powers exist because they are “*necessary* to the exercise of all other powers vested in the judiciary.”⁶⁴

Some on the Court have previously questioned the broad reading of these “natural” and “necessary” limits. For instance, in addition to joining the dissent in *Deitz*, Justice Kennedy has previously remarked that “[i]nherent powers are the exception, not the rule, and their assertion requires special justification in each case.”⁶⁵ Similarly, inherent powers have been described as only those “necessary to permit the courts to function.”⁶⁶ In *Deitz*, the Court gives short shrift to any semblance of justification by quickly concluding that re-empanelment is a “reasonable response to a specific problem,”⁶⁷ and therefore completely appropriate. But this reasoning misses the point, as previous decisions have routinely emphasized that the powers only exist to allow lower courts the ability to “protect their proceedings and judgments in the course of discharging their *traditional* responsibilities.”⁶⁸ In this regard, courts have veered substantially off course from this limited conception of inherent power. Most notably, courts have gone so far as to use their perceived power to compel attorney representation in civil proceedings.⁶⁹ While not nearly as expansive as compelled representation, re-empaneling jurors is simply one more link in the growing “limited” powers leash, allowing for broader and more far-reaching results, while at the same time emboldening federal judges to continue pushing the limits of their “limited” inherent power.

B. Actual or Perceived Prejudice

While the majority rule gives judges considerable freedom in determining the extent of potential prejudice received by a jury, the dissent rightfully describes the test as a source of confusion which will inevitably

⁶² *Id.* at 769.

⁶³ *Hudson*, 11 U.S. (7 Cranch) at 34 (emphasis added).

⁶⁴ *Id.*

⁶⁵ *Chambers v. NASCO, Inc.*, 501 U.S. 32, 64 (1991) (Kennedy, J., dissenting).

⁶⁶ *Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787, 819–20 (Scalia, J., concurring).

⁶⁷ *Deitz*, 136 S. Ct. at 1892 (majority opinion).

⁶⁸ *Degen*, 517 U.S. at 823 (citing *Chambers*, 43–46) (emphasis added).

⁶⁹ *See, e.g., Bothwell v. Republic Tobacco Co.*, 912 F. Supp. 1221 (D. Neb. 1995).

lead to more questions than answers.⁷⁰ For instance, what constitutes “any suggestion”⁷¹ of prejudice? “Prejudice” is defined by Black’s Law Dictionary as “the harm resulting from a fact-trier’s being exposed to evidence that is persuasive but inadmissible...or that so arouses the emotions that calm and logical reasoning is abandoned.”⁷² Accordingly, any whisper from the gallery regarding the case or access to modern devices, as the Court points out,⁷³ could easily satisfy the definition of “prejudice.” In this regard, the Court ignored the method historically taken by courts to limit its effect. The historic “better safe than sorry” approach can be traced back as far as *Loveday’s Case* in 1608.⁷⁴ There, following an incorrect verdict by the jury, it was held that the court “shall award a *venire facias de novo*, to try the said issue by others.”⁷⁵

In addition to brushing aside long standing precedent such as *Loveday*, the Court disregarded the effect that a re-empaneled jury could have on the public’s trust in our impartial jury model. As Justice Thomas points out, “a litigant who suddenly finds himself on the losing end of a materially different verdict [after the jury is re-empaneled] may be left to wonder what may have happened in the interval between the jury’s discharge and its new verdict.”⁷⁶ Even if prejudice isn’t a factor in a re-empaneled jury’s new deliberations, the lingering doubt alone should be sufficient to ward against it. “When we allow the desire to reduce court congestion to justify the sacrifice of substantial rights,” warned Justice Black, “we attempt to promote speed in adjudication, which is desirable, at the expense of justice, which is indispensable to any court system worthy of its name.”⁷⁷

VI. CONCLUSION

While modern case management certainly requires discriminate use of time-consuming practices whose purpose has long since been forgotten, those practices which are still relevant should be left undisturbed. More importantly, practices which potentially infringe on the tripartite powers of government, while convenient and efficient, should be viewed with a suspicious eye more exacting than that given by the Court in *Dietz*, lest we continue down Justice Thomas’s “murky path.”⁷⁸

⁷⁰ *Dietz*, 136 S. Ct. at 1897 (Thomas, J., dissenting).

⁷¹ *Id.* at 1894.

⁷² BLACK’S LAW DICTIONARY 1370 (Bryan A. Garner ed., 10th ed. 2014).

⁷³ *Dietz*, 136 S. Ct. at 1895 (majority opinion).

⁷⁴ *Loveday’s Case*, 77 Eng. Rep. 573 (1608).

⁷⁵ *Id.* at 574.

⁷⁶ *Dietz*, 136 S. Ct. at 1897 (Thomas, J., dissenting).

⁷⁷ *Link*, 370 U.S. at 648–49 (Black, J., dissenting).

⁷⁸ *Dietz*, 136 S. Ct. at 1897.