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American courts have agonized over the due process problems created in recent years by the doctrine of judicial immunity.⁵² A variety of ill-conceived approaches to the issue have resulted in “tests” that grant immunity to state-court judges in such sweeping terms as to amount to no test at all. The Supreme Court, troubled by threats to judicial independence, has developed its own test that invests judges with immunity for any act performed in an official capacity where the act itself is not expressly prohibited by existing law. Under this approach, corrupt and malicious local judges may easily shield even the most serious abuses behind a wall of immunity, leaving the victim unable to seek compensation from the state and its insurers.

Yet a state court’s jurisdiction is limited by due process guarantees of notice and a chance for an impartial hearing. Ignoring this fact, the Supreme Court has misconceived the problem by basing judicial immunity purely on statutory concerns and distorted readings of common law history. Like the jurisdiction of local courts, immunity itself – a judge-made doctrine – must be limited by due process, which is of constitutional dimension. The supremacy clause unquestionably nullifies even the most ancient of common law principles and even the most popular of state statutes to the extent they are inconsistent with due process.

The best solution is to give judicial immunity a firm root in due process guarantees. To achieve this result, the simplest approach is to create an irrebuttable presumption of immunity where the state court judge’s acts did not deliberately terminate a citizen’s rights without notice, hearing, and opportunity to appeal. Of these three requirements, the chance to appeal is the most important because it provides a means of curing defects in any other due process violation. A judge thus remains unquestionably immune as long as he does not take actions that intentionally and plainly prevent further review. The duty imposed on a state-court judge, then, is only to recognize that his own decisions may sometimes be in error and to ensure that orders affecting important constitutional rights can be reviewed in another court.

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Footnotes

⁵² One of the cleanest examples was in *Dykes v. Hosemann*, where the Eleventh Circuit at first stripped a Florida judge of judicial immunity for actions clearly violating the due process clause (743 F.2d 1488, 1496 [11th Cir. 1984]). Then, in a rehearing en banc, the full panel completely reversed the prior decision and held that judicial independence was so strong a concern that due process must yield before it (776 F.2d 942, 949 [11th Cir. 1985]). In a sharp dissent, Judge Hatchett criticized the majority for holding everyone liable for due process violations except the very people trained in due process — judges (Id. at 954—55).

