NOTES

DUE PROCESS AND THE DOUBLE AFFIRMATION CLAUSE IN UNEMPLOYMENT INSURANCE STATUTES

State unemployment insurance programs, fostered initially by the federal government,[1] have created a number of difficult legal problems centering around procedures of administration.[2] One of these is whether an employer, as a contributor to a state unemployment compensation fund, has a constitutional right to judicial review of an agency decision awarding benefits, before such benefits may be paid from the fund. This problem arises from the "double affirmation" clause, found in many of the statutes, which speeds payment of unemployment compensation by precluding the stay of payments prior to judicial review.

THE DOUBLE AFFIRMATION CLAUSE

The nature and operation of this clause are illustrated by the recent case of *Pennsylvania State Chamber of Commerce v. Torquato*.[3] Westinghouse Electric Corporation workers were unemployed as a result of a labor dispute. The governor of Pennsylvania sent telegrams to the company and the two unions representing the workers requesting that work be resumed and the dispute be submitted to binding arbitration. The unions accepted this proposal, but the company rejected it. The Department of Labor and Industry[4] consequently awarded unemployment benefits to twenty-seven applicants on the grounds that what had previously been a strike had now become a lockout.[5]

At this point the company had the right to appeal the Department's initial decision to a referee.[6] The referee's decision could then be appealed to the three-man Board of Review,[7] or the Board, by its own motion, could

1. For a discussion of the development of federal legislation, see Larson & Murray, *The Development of Unemployment Insurance in the United States*, 8 VAND. L. REV. 181, 186-95 (1955).

2. Rothman, *A Symposium on Unemployment Insurance*, 8 VAND. L. REV. 179 (1955). For general discussions of unemployment compensation administration problems, see Parker, *Administrative Law Problems in the Unemployment Insurance Program*, 8 VAND. L. REV. 436 (1955); Pennock, *Unemployment Compensation and Judicial Review*, 88 U. PA. L. REV. 137 (1939).

3. 386 Pa. 306, 125 A.2d 755 (1956).

4. This department is charged with making initial decisions on all applications. PA. STAT. ANN. tit. 43, § 821 (Purdon 1952).

5. Awards are not to be made if unemployment is caused by a labor dispute, except in cases of lockouts. PA. STAT. ANN. tit. 43, § 802 (Purdon 1952).

6. *Id.* § 822.

7. *Id.* § 824.

directly review either decision.[8] If the Board affirmed an allowance made by the Department or referee, thus producing a double affirmation, payments would be immediately made from the fund.[9] Although the company, as an "aggrieved party," [10] had the right to appeal the Board's decision to the superior court,[11] this appeal would not act as a supersedeas or stay.[12]

Instead of pursuing its statutory right of appeal the company requested and was granted an injunction preventing payment, on the ground that the procedure, by precluding judicial review of all payments made before the appeal to the superior court could be decided, violated due process provisions of both the state and federal constitutions.[13]

Thirty states [14] and the District of Columbia provide for payment of unemployment compensation upon double affirmation. Of these states, eleven have no special provision concerning supersedeas,[15] fifteen grant it only if the agency so orders,[16] and four states and the District of Columbia specifically deny supersedeas.[17] Of the remaining states, two provide for payment upon double affirmation except for claims arising out of labor disputes,[18] two provide that payment upon double affirmation is within the agency's discretion,[19] and two require payment if an appeal board affirms a referee's allowance.[20] Six states prohibit payment upon double affirma-

8. *Ibid.*

9. PA. STAT. ANN. tit. 43, § 821(e) (Purdon 1952). If a referee affirms a Department decision allowing compensation, and there is a further appeal to the Board of Review, compensation is paid after thirty days from the filing of the appeal unless the Board renders a decision prior thereto. *Ibid.*

10. The employer is an aggrieved party under this provision. See Susquehanna Collieries Co. v. Unemployment Compensation Bd. of Review, 338 Pa. 1, 11 A.2d 880 (1940).

11. PA. STAT. ANN. tit. 43, § 830 (Purdon 1952). Absent fraud, review is limited to questions of law, with the Board's findings of fact to be conclusive if supported by evidence. These appeals are to be given precedence over all other civil cases except those arising out of the Workman's Compensation Act. *Ibid.*

12. PA. STAT. ANN. tit. 43, § 831 (Purdon 1952).

13. Pennsylvania State Chamber of Commerce v. Torquato, 386 Pa. 306, 326-27, 125 A.2d 755, 765 (1956).

14. Alabama, Arizona, California, Colorado, Florida, Georgia, Idaho, Iowa, Kentucky, Louisiana, Maine, Maryland, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Wyoming. A complete compilation of unemployment insurance statutes may be found in 2-8 CCH UNEMP. INS. REP. (1950).

15. Alabama, California, Colorado, Kentucky, Maryland, New Hampshire, New Jersey, Ohio, Rhode Island, South Dakota, Virginia.

16. Arizona, Florida, Georgia, Iowa, Louisiana, Maine, Massachusetts, Missouri, Montana, New Mexico, North Carolina, Oklahoma, South Carolina, Tennessee, Wyoming.

17. Idaho, Pennsylvania, Texas, Utah.

18. Illinois and Minnesota. Neither state has any special provision concerning supersedeas upon appeal.

19. North Dakota and Wisconsin. In North Dakota, court appeal does not act as supersedeas if an initial decision is affirmed, and only if the agency so orders in other cases. Wisconsin has no special provision.

20. New York and West Virginia. West Virginia excludes labor dispute cases from this provision. New York provides that court appeal does not act as supersedeas. West Virginia has no special provision.

tion,[21] while five have no provision concerning such payment.[22] In one state payments are made if allowed by an appeal tribunal.[23]

Double affirmation clauses in unemployment compensation statutes were first subjected to judicial scrutiny in 1941. In holding the provision valid, the California court, in *Abelleira v. District Court of Appeals,*[24] decreed that immediate payment was a legislative mandate not to be contravened by the courts and found no violation of due process therein.[25] In this same year two other jurisdictions reached a contrary result. The Iowa court concluded that since supersedeas was left to the discretion of an agency under the Iowa statute, the agency was permitted to exercise the judicial power to grant or withhold an injunctive order, thereby violating that state's separation of powers doctrine.[26] Michigan, in *Chrysler Corp. v. Smith,*[27] invalidated the clause, claiming it would "render administrative action superior to recognized judicial powers" [28] and make due process of law "nugatory and a senseless gesture." [29] One year later the same court, in *Chrysler Corp. v. Unemployment Compensation Comm'n,*[30] specifically rejected the *Abelleira* decision in re-affirming its own stand.[31] In ensuing years Indiana struck down the clause [32] while West Virginia upheld it [33] and Texas avoided the issue on procedural grounds.[34] Two contemporary decisions have done little to resolve the problem. The Pennsylvania court, after a detailed analysis of the property interests involved, declared the

21. Arkansas, Connecticut, Delaware, Indiana, Kansas, Michigan.

22. Massachusetts, Nevada, Oregon, Vermont, Washington.

23. Nebraska.

24. 17 Cal. 2d 280, 109 P.2d 942 (1941).

25. In reaching its decision, the court also noted that the district court had no jurisdiction to enjoin payments, *id.* at 291, 109 P.2d at 949, and that the employer had not exhausted his administrative remedies. *Ibid.*

26. Dallas Fuel Co. v. Horne, 230 Iowa 1148, 300 N.W. 303 (1941).

27. 297 Mich. 438, 298 N.W. 87 (1941).

28. *Id.* at 453, 298 N.W. at 92.

29. *Ibid.*

30. 301 Mich. 351, 3 N.W.2d 302 (1942).

31. The court said, "In making our decision on this phase of the instant case we are mindful of the decision rendered in . . . Abelleira. . . . The majority opinion of the California court sustains the double affirmation clause, but for reasons of a humanitarian character and with very limited consideration of its compliance with constitutional requirements. We consider the reasoning of the dissenting opinion more persuasive." *Id.* at 358, 3 N.W.2d at 305.

32. State *ex rel.* Campbell v. State, 223 Ind. 59, 57 N.E.2d 433 (1944). Without specifically mentioning due process, the court stated that the language of the act could not be "construed as placing the Review Board outside the scope of all judicial control." *Id.* at 61, 57 N.E.2d at 433.

33. State v. Davis, 131 W. Va. 40, 45 S.E.2d 486 (1947). The West Virginia court, without undertaking an independent analysis of the due process issue, claimed the question was "fully answered by the reasoning of the court in the Abelleira case." *Id.* at 43, 45 S.E.2d at 488.

34. Todd Shipyards Corp. v. Texas Employment Comm'n, 245 S.W.2d 371 (Tex. Civ. App. 1951). The Texas court decreed that denial by the lower court of a stay in that case was not violative of due process because the employer's pleadings did not request one. *Ibid.*

clause violative of due process,[35] while Oklahoma, after distinguishing its statutory scheme from that of Pennsylvania, reached the opposite result.[36]

This Note will consider the double affirmation clause in relation to federal due process requirements [37] and will explore alternative procedures by which the legislature might insure rapid payments to unemployed workers.

THE NATURE OF THE INTERESTS INVOLVED

The primary objective of unemployment compensation is to alleviate the financial stress placed upon an unemployed worker.[38] In order to properly effectuate this policy, payments must be made as soon as possible after unemployment arises.[39] However, the attempt to do so may adversely affect certain interests of the employer whose workers are to receive the benefits, depending upon the procedure adopted.

Instead of requiring all employers to contribute a uniform percentage of their payrolls to the unemployment compensation fund, all states now employ some type of sliding scale based upon unemployment experience of the individual employer.[40] Of the five types of "experience-rating" systems in use, all but one [41] reflect the amount of benefits paid to a particular employer's workers in the determination of his contribution rates. Under the "reserve-ratio" plan, the most popular experience-rating device,[42] mem-

35. Pennsylvania State Chamber of Commerce v. Torquato, 386 Pa. 306, 125 A.2d 755 (1956).

36. Abraham v. Van Meter, 303 P.2d 434 (Okla. 1956). It is interesting to note that the Oklahoma court relied, at least in part, upon the Pennsylvania court's apparent assumption that the employer's reserve account is charged regardless of the outcome of judicial review, thereby raising his contribution rate. On this basis a distinction was erected between its own case and the Pennsylvania case. It has been suggested that this distinction is groundless because the Pennsylvania court's assumption was erroneous. See Wagner, *Whose Due Process?*, 61 DICK. L. REV. 275, 276-77 (1957).

37. A number of the cases which have held the double affirmation clause invalid have relied in part on the due process provisions of state constitutions. See, *e.g.*, Chrysler Corp. v. Unemployment Compensation Comm'n, 301 Mich. 351, 3 N.W.2d 302 (1942); Pennsylvania State Chamber of Commerce v. Torquato, 386 Pa. 306, 125 A.2d 755 (1956). This Note will consider the requirements of due process under the Federal Constitution only, without attempting to examine the analogous requirements of the various state constitutions.

38. See the Pennsylvania legislature's declaration of policy, PA. STAT. ANN. tit. 43, § 752 (Purdon 1952).

39. See Wagner, *supra* note 36, at 279.

40. Larson & Murray, *The Development of Unemployment Insurance in the United States*, 8 VAND. L. REV. 181, 205 (1955). Experience rating commenced in most states in the early 1940's, but was adopted as late as 1947 in five states and 1948 in one state. *Ibid.* For a general discussion of experience-rating objectives, see Arnold, *Experience Rating*, 55 YALE L.J. 218, 219-23 (1945).

41. The "payroll variation" plan is used by Mississippi, Rhode Island, Utah, Washington and Alaska. See Teple & Novack, *Experience Rating: Its Objectives, Problems and Economic Implications*, 8 VAND. L. REV. 376, 394 (1955).

42. This plan is used by thirty-three states. Teple & Novack, *supra* note 41, at 391. "Ordinarily, the reserve in these plans is the difference between the employer's total contributions and the total benefits received by his workers since the law became effective. Such a reserve is computed as a proportion of the employer's taxable payroll in determining his 'reserve-ratio.' The size of the reserve ratio determines the employer's tax rate, with rates declining as the ratio rises usually according to a prescribed schedule." Larson & Murray, *supra* note 40, at 205.

orandum accounts are created for each employer. Used solely for measuring the risk of unemployment, they do not represent an actual equity in the fund.[43] However, since an agency's allowance of benefits is charged to the employer's memorandum account, which in turn is the most important factor in determining his contribution rates, his economic interest in the account becomes real.[44]

Although the amount of benefits paid is important in determining contribution rates under experience-rating formulas, contribution rates are also affected by the total balance of the general pooled fund out of which payments are made. The Pennsylvania statute, for example, provides for five separate rate schedules, each of which goes into effect at a predetermined fund balance, and operates to set contribution rates after the employer's experience rating has already been determined.[45] The contribution rates increase as the fund's balance decreases.[46]

In addition to the employer's interest in the effect disbursements may have upon future contributions, his interest as a taxpayer[47] in seeing that the fund is properly disbursed has been heavily relied upon by those cases holding double affirmation clauses unconstitutional.[48] This interest becomes especially important in claims arising out of labor disputes if the jurisdiction is one which prohibits payments in such cases or prohibits those arising from strikes as contrasted with lockouts. Improper agency allowance of benefits may place the employer in the anomalous position of supporting, through his own contributions, workers who are striking against him.[49] Failure to

43. Teple & Novack, *supra* note 41, at 391-92.

44. *Id.* at 392.

45. See, *e.g.*, PA. STAT. ANN. tit. 43, § 781(A) (Purdon 1952). Different rates are applicable if the fund balance stands at $250 million, $340 million or $420 million. If the balance falls below $250 million, or 1½ times the highest amount paid out for compensation less any refunds during any 12 consecutive months within the last 120 consecutive months, whichever amount is greater, then the contribution rate of all employers is set at 2.7%. If the balance reaches $670 million, certain additional reductions in rates are made. *Ibid.*

46. *Ibid.*

47. Contributions to unemployment insurance funds are deemed a form of tax. Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1936). The taxing features are, however, considered incidental to the paramount features of the act. See, *e.g.*, Boyertown Burial Casket Co. v. Board of Review, 162 Pa. Super. 98 (1948).

48. See Chrysler Corp. v. Smith, 297 Mich. 438, 453, 298 N.W. 87, 92-93 (1941). The proposition that a taxpayer paying into a local fund for a specific purpose has an interest in the proper disbursement of the fund is indicated by the fact that most state courts in this situation would give a taxpayer standing in a suit complaining of improper payment from the fund. See, *e.g.*, Reid v. Smith, 375 Ill. 147, 30 N.E.2d 908 (1940); Ashmore v. Greater Greenville Sewer Dist., 211 S.C. 77, 44 S.E.2d 88 (1947). In fact it has been suggested that it is not only a contributor's right but his duty to see that the "purpose and full integrity" of the fund is preserved. Chrysler Corp. v. Smith, *supra* at 453, 298 N.W. at 92-93.

49. "(T)he policy of denying access to the fund as a means of sustenance to those unemployed because of participation in a labor dispute is outstanding; and it would seem to be axiomatic that the employer also has a special interest sufficient to justify his interposition to prevent the use of the fund, created to relieve unemployment that is in fact involuntary, and made up in substantial part by his contributions . . . for the advancement of the interests of the adversary parties to the labor controversy, and so to preclude misuse of the fund constituting in effect governmental intervention in the aid of a party to a labor dispute in violation of the clear legislative policy." Tube Reducing Corp. v. Unemployment Compensation Comm'n, 1 N.J. 177, 182, 62 A.2d 473, 475 (1948).

permit interposition of the employer may frustrate the legislative attempt to prevent use of unemployment compensation as a tool in labor-management bargaining.[50]

ALTERNATIVE FUND DISBURSEMENT PROCEDURES

Due process ramifications of double affirmation clauses can best be understood in light of the alternatives available to the legislature.

Suspension of All Payments Pending Judicial Review

At the one extreme, all payments might be made subject to prior judicial review of the administrative determination.[51] This procedure affords maximum protection to the employer, but concomitantly works to the detriment of the employee because of the probable increase in time between the creation of unemployment and the payment of benefits. Under the present Pennsylvania system the two separate administrative appeals alone may require ten weeks,[52] with the time period extended to over four months if judicial review is required.[53]

The time lag could, of course, be reduced by sharply limiting the time within which administrative appeals must be brought, by requiring that agency decisions be forthcoming within a specified period or by reducing the number of procedural steps in the agency process necessarily preliminary to judicial review.[54] Limiting the period within which administrative appeals must be brought is the only one of these alternatives not accompanied by substantial disadvantage.[55] Speeding agency deliberation may tend to produce more administrative errors and consequently an increase in resort to judicial review.[56] While delay might be lessened in an individual case, delay in a greater number of cases might result. Elimination of one or more steps in the administrative process would also increase the number of cases appealed to the courts.[57] Moreover, by reducing the

50. *But see* discussion in Williams, *The Labor Dispute Disqualification—A Primer and Some Problems,* 8 VAND. L. REV. 338, 353-58 (1955), pointing up arguments made that payment of benefits to strikers would not be a form of control of the collective bargaining process. Professor Williams concludes, however, that payments would add financial strength to unions and to that extent would benefit striking workers. Williams, *supra* at 357.

51. See, *e.g.,* Arkansas, Connecticut, Delaware, Indiana, Kansas, Michigan. A complete compilation of unemployment insurance statutes may be found in 2-8 CCH UNEMP. INS. REP. (1950).

52. See time-table in Brief for Appellants, p. 12, Pennsylvania State Chamber of Commerce v. Torquato, 386 Pa. 306, 125 A.2d 755 (1956).

53. See Wagner, *Whose Due Process?,* 61 DICK. L. REV. 275, 279 (1957).

54. This is suggested in Pennsylvania State Chamber of Commerce v. Torquato, 386 Pa. 306, 330, 125 A.2d 755, 767 (1956).

55. Even this alternative presents the danger that attorneys would not have adequate time in which to prepare their cases.

56. Wagner, *supra* note 53, at 280.

57. *Id.* at 279.

development of issues through agency review, more time would be required for judicial decision.[58]

Complete Preclusion of Judicial Review

At the other extreme from a procedure staying payment prior to judicial review would be one precluding judicial review entirely. While this method would clearly facilitate quick payments, it would offer the employer a minimum amount of protection. As a result of agency action alone he might be subjected to higher contribution rates both through charges to his experience-rating account and a decrease in the fund balance, as well as to harm through improper disbursement of the fund to striking workers. If payment upon double affirmation but with eventual judicial review poses due process questions, a fortiori this procedure would raise constitutional problems.

Limited Preclusion of Judicial Review

In the middle ground are those procedures permitting immediate payment upon agency determination, but providing for eventual judicial review. If judicial review results in agency reversal, aside from suspension of further payments, three results may follow: the employee may be forced to disgorge prior payments, thus returning the fund to the status quo; or the employee may be permitted to retain prior payments without adjustment in the employer's memorandum account; or the employee may be permitted to retain prior payments, but with an adjustment made in the employer's memorandum account, thus restoring that account to the status quo.

Were the employee forced to disgorge prior payments upon reversal of the agency decision,[59] the employer would suffer no harm: both the fund balance and his memorandum account would be restored to their proper level.[60] Furthermore, improper disbursement would have a less serious effect upon the employer's bargaining position in a labor dispute. If the employee knows that he is charged with repaying awards reversed upon judicial review, or that he will at least be subject to a judgment that might result in attachment of property he may acquire in the future, he will be more prone to settlement than if such awards were made free and clear.

However, the impact of recoupment upon the employee renders this alternative unpalatable. In all probability he will already have spent payments made. Recoupment would, therefore, have to take the form of either requiring equal reductions from payments due the particular employee when

58. *Ibid.* The excessive burden thus placed on the court might be circumvented by the creation of a new judicial rather than administrative court to handle such appeals, or by providing for review by any of a state's existing trial courts.

59. This procedure has recently been adopted in Tennessee. TENN. PUB. ACTS c. 146 (1957). For support of this alternative, see 10 VAND. L. REV. 871 (1957).

60. This is true even though the claim against the employee is not reduced to judgment and actually collected. The claim itself might be used as an asset in determining the fund balance and the memorandum account level. This would, however, create a disparity between the dollar balance of the fund and the accounts and their stated balance. In view of the large sum in the fund, and the fact that the judgment may in many cases be collected, it is doubtful whether this disparity would be of significance. See Wagner, *supra* note 53, at 278, for a discussion pointing up disparities between the total of reserve-account balances and the fund's true balance in Pennsylvania, which has no recoupment provision for this purpose.

he is unemployed in the future or requiring payment from whatever other assets he might have.[61] In the former case, by depriving the employee of benefits in a future period of unemployment the major purpose of the statutory scheme—relief in time of need—would then be defeated. The latter would impose an additional burden on the employee and his resource sharers during a period when his resources have been depleted.[62]

Suspension of payments upon judicial reversal of an agency award, but without recoupment and without adjustment of the employer's experience-rating account, would satisfy the employee insofar as he could retain prior payments. But the employer, of course, would be adversely affected by unreviewed agency action to the extent such payments force an increase in his contribution rates. A procedure of this sort was held unconstitutional as a deprivation of due process in *Pennsylvania State Chamber of Commerce v. Torquato.*[63] The Pennsylvania act provides for no recoupment unless the employee is at fault in receiving payments to which he is not entitled.[64] Although it was argued that an employer's experience rating would not be charged if the agency's allowance was reversed upon judicial review,[65] the court did not so construe the act.[66]

The third alternative would provide for adjustment of charges to the employer's experience-rating account, but not for recoupment of payments already made.[67] Thus, the only injury to the employer through increased contribution rates caused solely by administrative action would be that resulting from a decrease in the general fund balance. The employer would argue that a decrease in the fund balance would either result directly in a higher rate or would prevent the fund's balance from building up to a level permitting decreased rates. However, since there may be a large range in fund balances before a new rate schedule becomes effective,[68] it would be difficult for the employer to demonstrate that any individual payment had more than a *de minimis* effect upon contribution rates.[69] And neither could the employer claim special injury, since a rate change resulting from

61. See, *e.g.,* TENN. PUB. ACTS c. 146 (1957).

62. In the context of labor disputes, this judgment would seem proper, for if the legislature so desired, there is nothing to prevent it from awarding benefits whether or not unemployment results from a labor dispute in any form. See Wiliams, *The Labor Dispute Disqualification—A Primer and Some Problems,* 8 VAND. L. REV. 338, 353 (1955); Note, 10 OHIO ST. L.J. 238, 239 (1949).

63. 386 Pa. 306, 125 A.2d 755 (1956).

64. PA. STAT. ANN. tit. 43, § 874 (Purdon 1955).

65. See Wagner, *supra* note 53, at 276-78; Brief for Appellant, pp. 18-19, Pennsylvania State Chamber of Commerce v. Torquato, 386 Pa. 306, 125 A.2d 755 (1956).

66. Pennsylvania State Chamber of Commerce v. Torquato, 386 Pa. 306, 315, 125 A.2d 755, 759 (1956).

67. The following states have adopted this procedure: Alabama, Arizona, California, Colorado, Florida, Georgia, Idaho, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Minnesota, Massachusetts, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, West Virginia, Wisconsin, Wyoming. A complete compilation of unemployment insurance statutes may be found in 2-8 CCH UNEMP. INS. REP. (1950).

68. See note 45 *supra.*

69. *Cf.* Railway Express Agency v. Kennedy, 189 F.2d 801, 804-05 (7th Cir. 1951). See Pennock, *Unemployment Compensation and Judicial Review,* 88 U. PA. L. REV. 137, 142 (1939).

fluctuation in the fund level would affect all employers paying into the fund in the same manner.

Thus, this procedure would appear to be the most reasonable compromise available to the legislature since it minimizes injury to the employer caused by unreviewable administrative action, yet facilitates rapid payment of compensation without subjecting workers to the hardship of recoupment. Nevertheless, this procedure has met with judicial opposition on the ground that it amounts to a usurpation of judicial power to review administrative action and consequently is a denial of procedural due process.[70]

LIMITED PRECLUSION OF JUDICIAL REVIEW AS A DENIAL OF DUE PROCESS

Any determination of whether limited preclusion of judicial review violates procedural due process must take into account the protection which the administrative process itself affords the interested parties. Administrative agencies have been criticized by some for being "incautiously careless of litigants' rights in ways that fair-minded judges would have avoided." [71] More specifically, it has been suggested that agency personnel may be more vulnerable to political pressures than the judiciary and that the agency may not be able to attract men whose ability is equal to those attracted to judicial service.[72] In addition, agency work is subjected to less effective public scrutiny than is that of the judiciary.[73]

Notwithstanding these criticisms, an agency charged with administering the unemployment compensation statute will presumably acquire a certain amount of expertise in dealing with the specialized factual situations presented by unemployment compensation claims. This, combined with its familiarity with the statute and the legislative goals which the statute seeks to effectuate, may make it possible for the agency to render decisions just as competently as would a court. Moreover, the double affirmation clause statutes insure that the initial agency decision will be reviewed once and perhaps twice before any disbursement is made from the fund. Thus a measure of protection is afforded the employer's interest at the administrative level.

Positing some protection through the administrative process, the Supreme Court has indicated that due process may be sufficiently flexible as to permit limited preclusion of judicial review under special circumstances where there is a compelling need for such preclusion. For example, under the Selective Training and Service Act of 1940 [74] the President was authorized to establish civilian agencies, including local and appeal boards, to carry out the drafting of civilians for military service. Civilians were classified by the local board and could appeal these classifications to an appeal board. The act made no provision for judicial review.

70. See, *e.g.*, Chrysler Corp. v. Smith, 297 Mich. 438, 453, 298 N.W. 87, 92 (1941).
71. GELLHORN, INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS 4 (1956).
72. For a discussion of these considerations, see Schwartz, *Legal Restrictions of Competition in the Regulated Industries*, 67 HARV. L. REV. 436, 471-75 (1954).
73. Schwartz, *supra* note 72, at 474.
74. 54 STAT. 885 (1940), 50 U.S.C. App. §§ 321-30, 460 (1952).

In *Estep v. United States*,[75] in which petitioner was indicted for refusing to submit to induction, the Court sustained the defense that the board had acted beyond its jurisdiction. In so doing, however, the Court severely limited the scope of judicial review of board classifications. The question of jurisdiction was said to be reached "only if there is no basis in fact for the classification which [the board] gave the registrant." [76] The fact that a board's classification was erroneous was not subject to attack.[77]

The special circumstance thought to justify the circumvention of judicial review in the selective service area was the "urgent need of mobilizing the manpower of the nation for emergency purposes and the dire consequences of delay in that process. . . ." [78] Although the Court did not allow complete preclusion, its due process holding is particularly significant in light of the questionable need for preclusion [79] and the fact that the petitioner's personal liberty was at stake.

In the Emergency Price Control Act of 1942,[80] the Court was faced with a legislative attempt to preclude judicial review of administrative price determinations for a limited period. The act provided for promulgation of maximum prices by an administrator. The prices so set could be protested to the administrator by an aggrieved party, and a denial of such a protest by the administrator could be appealed to the Emergency Court of Appeals. However, neither this court nor any other could stay, prior to review, the effectiveness of the administrator's price regulation once it was set. The Court said in *Yakus v. United States*,[81] that if the alternatives "were war-time inflation or the imposition on individuals of the burden of complying with a price regulation while its validity is being determined, Congress could constitutionally make the choice in favor of the protection of the public interest from the dangers of inflation." [82] Thus the prohibition of a temporary stay or injunction was held not to be a denial of due process in that situation. Such injury as was caused during the interim period would be irremediable.

Similarly, in the case of unemployment compensation awards, if the alternatives are ineffectiveness of unemployment payments because of delay, or imposition of the "burden" of complying with the administrative determination while its validity is being determined, it would seem that the legislature should constitutionally be able to make the choice in favor of the latter. Particularly does this appear reasonable where the statutory scheme provides for adjustment of the employer's experience-rating account, thus minimizing the impact upon his economic interests resulting from un-

75. 327 U.S. 114 (1946).
76. *Id.* at 122-23.
77. *Id.* at 122.
78. *Id.* at 128 (concurring opinion by Justice Murphy).
79. See *id.* at 128-29.
80. 56 STAT. 23 (1942), 50 U.S.C. App. § 901 (Supp. II, 1954).
81. 321 U.S. 414 (1944).
82. *Id.* at 439.

reviewed agency action. The strong need for preclusion, the insubstantial effect on the employer's interests, and the protection afforded by the administrative process combine to dictate a holding that procedural due process is not violated. And it is likely that a federal court on the basis of the *Estep* and *Yakus* cases would so hold.

Nevertheless, the courts in some states have already declared double affirmation clauses unconstitutional.[83] In some of these cases the decision was based in part on the due process clause of the applicable state constitution.[84] Since these state due process clauses may be interpreted more stringently than the federal provision, it appears that double affirmation statutes may be found invalid in other states where they have not yet been challenged. Assuming that rapid payment is still considered necessary by the legislature, an alternative method of speeding payment is to limit the scope of review.

A Limited Scope of Review as a Substitute for Limited Preclusion

In those jurisdictions finding preclusion of judicial review unconstitutional, the courts do not indicate what scope of review is required. In light of the interests involved and the protection afforded those interests at the administrative level, the way seems open for a limited scope of review.[85] Thus, the statute might provide for immediate payment upon double affirmation, without provision for judicial review except in those cases where there is an act in excess of the agency's jurisdiction or an alleged procedural unfairness, involving, for instance, lack of adequate notice or arbitrary and capricious action by the agency.[86]

Although even a limited scope of review might offer the possibility of a break-down in the process of insuring quick payments because of fraudulent allegations of procedural defects, the interference would probably be minimal. On the other hand, even a severely limited scope of review would offer definite advantages to an employer acting in good faith. The fact that the agency's procedure may be subjected to surveillance by a reviewing court before payments are made may result in the exercise of greater care by the agency in its procedure, which in turn would be reflected in more accurate substantive determinations. Furthermore, such review would tend to bolster the confidence of a claimant that he will be accorded fair treatment, though he may not agree with the final decision reached.

I. J. W.

83. See text and notes at notes 26-32 *supra*.

84. See, *e.g.*, Chrysler Corp. v. Smith, 297 Mich. 438, 298 N.W. 87 (1941); Pennsylvania State Chamber of Commerce v. Torquato, 386 Pa. 306, 125 A.2d 755 (1956).

85. For a general discussion of entire preclusion of judicial review, see Davis, *Unreviewable Administrative Action*, 15 F.R.D. 411 (1954). Professor Davis suggests that the formulation of a principle in that area might be built around the advantages of a limited scope of review. Davis, *supra* at 451-52.

86. The feasability of a severely limited scope of review is suggested by Crand v. Hahlo, 258 U.S. 142 (1922). A state court's limitation of judicial review of an administrative determination of damages to questions of jurisdiction, fraud and wilful misconduct was held to be ample protection to satisfy due process requirements.