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APPLICATION OF THE EXHAUSTION RULE
IN SELECTIVE SERVICE CASES

Before a Selective Service registrant may assert the invalidity of his classification as a defense to a criminal prosecution for induction refusal, he must show either (1) that he has exhausted his administrative remedies,\(^1\) or (2) that exhaustion of administrative remedies is not required under the circumstances of his case. Since the Selective Service Act\(^2\) has never made the exhaustion of administrative remedies a requirement,\(^3\) whether or not exhaustion is required has depended on judicially evolved criteria.

Since 1943 when the Supreme Court first applied the exhaustion doctrine to a case under the act in *Falbo v. United States*,\(^4\) the courts have gradually come to recognize numerous situations where exhaustion of administrative remedies is not required.\(^5\) In *McKart v. United

1. A registrant who disputes his classification may either appear in person before his local board, 32 C.F.R. §§ 1624.1, 1624.2, 1625.13 (1971), or appeal to an appeal board. *Id.* § 1624.2. A government appeal agent, if he deems it necessary to avoid an injustice, may recommend on the registrant's behalf that the State Director of Selective Service either request the appeal board to reconsider its determination or appeal to the President. *Id.* § 1626.61. When one or more members of the appeal board dissent from the registrant's classification, the registrant may appeal directly to the President. *Id.* § 1627.3.


3. McKart v. United States, 395 U.S. 185, 206 (1969) (concurring opinion). 50 U.S.C. App. § 460(b)(3) (Supp. V, 1970) provides in part: "No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution . . . after the registrant has responded either affirmatively or negatively to an order to report for induction . . . Provided, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant.

4. 320 U.S. 549 (1944).

5. *E.g.*, United States v. Williams, 420 F.2d 288 (10th Cir. 1970) (local board advised defendant that his claim to conscientious objector status was fruitless to pursue); Davis v. United States, 413 F.2d 148 (4th Cir. 1969) (local board failed to inform defendant of his right to appeal); Powers v. Powers, 400 F.2d 438 (5th Cir. 1968) (no application of the doctrine if local board told defendant that appeal was not available or that pursuit of it was not necessary or should be delayed); Wills v. United States, 384 F.2d 943 (9th Cir. 1967) (local board failed to notify defendant that he had been declared delinquent); Donato v. United States, 302 F.2d 468 (9th Cir. 1962) (defendant summoned to fire fighting duty during the appeal period); Glover v. United States, 286 F.2d 84 (8th Cir. 1961) (local board failed to inform defendant of the reason for issuing an unappealed classification that was identical to a previously appealed classification); United States v. Willard, 211 F. Supp. 643 (N.D. Ohio 1962), *aff'd*, 312 F.2d 605 (6th
States6, for example, the Supreme Court held that where the defendant's challenge to the validity of his classification raised a question of statutory interpretation, exhaustion would not be required.7 The Court left open the question whether exhaustion would be required where a defendant's challenge raised purely factual issues, such as the sincerity of a conscientious objector claim.8 But McKart does set forth general policy guidelines9 to be followed in applying the exhaustion doctrine to all Selective Service cases where the administrative process is at an end, and the registrant is attempting to defend against a criminal prosecution.

The thesis of this Note may be summarized as follows: where the defendant in a selective service case challenges the validity of his local-board classification without having first appealed the classification to his selective service appeal board, and where the challenge raises purely factual issues,10 the court's decision whether or not to consider the matter should depend not only on the McKart guidelines, but on the "waiver" or "deliberateness" test as well. "Waiver" implies a deliberate choice to forego a known right; knowledge of the right must include knowing the consequences of the right's abandonment.11 Courts use the waiver test to protect against loss of fundamental constitutional rights.12 Application of the waiver test in Selective Service prosecutions would mean that unless the registrant knowingly and deliberately bypassed the administrative appeal process, which includes knowing the consequences of such action, the bypass would not preclude him from attacking his local-board classification as a defense to a criminal prosecution for refusal to submit to induction.

Thus, when a registrant-defendant raises the unlawfulness of his local-board classification as a defense to a criminal prosecution, denial of judicial review of such a classification would be justified only if there had been a deliberate flouting of the administrative process provided.

Cir. 1963) (defendant obeyed all orders except to report to local board for work assignment); cf. United Sates v. Lansing, 424 F.2d 225 (9th Cir. 1970).

7. See text accompanying notes 16-20 infra.
8. See text accompanying notes 21-22 infra.
9. See text accompanying notes 24-28 infra.
10. But see United States v. Davila, 429 F.2d 481 (5th Cir. 1970), where the court felt that only a legal issue remains once it is established that there are no facts in the registrant's file refuting his claim of conscientious objection. See notes 56 & 83 infra.
11. See text accompanying notes 86-87 infra.
The registrant-defendant would thereby obtain access to a fair hearing on the merits of his case; and his fundamental right of due process, secured by the fifth amendment, would be protected.

In *Lockhart v. United States*, an appeal from a conviction for refusal to submit to induction, the Court of Appeals for the Ninth Circuit, sitting en banc, answered in the affirmative the question that the Supreme Court left open in *McKart*. Defendant Lockhart's failure to exhaust his administrative remedies was held to bar his defense challenging the local board's denial, on the ground of insincerity, of his claim to conscientious objector status. The Ninth Circuit did not apply the waiver test in *Lockhart*. The evidence showed that Lockhart did not know the consequences of foregoing his right to administrative appeal; thus, if a waiver test had been applied, Lockhart's defense would not have been barred.

This Note will analyze the opinion in *Lockhart*, particularly in light of *McKart*, in an attempt to show why, in this type of case, the application of the exhaustion doctrine is so harsh and why the waiver test is a necessary safeguard against deprivation of due process. A discussion of the facts and opinion in *McKart* is necessary to show both the similarities and differences between *McKart* and *Lockhart*.

**McKart v. United States—A Question of Judicial Prerogative**

McKart was indicted and subsequently convicted for failure to report for and submit to induction as ordered. Since he was an only child whose father had been killed in World War II, McKart had been classified as a sole surviving son and hence exempt from military service. But when the local board learned of his mother's death, it reclassified McKart as available for service. The local board interpreted the pertinent provisions of the Selective Service Act to mean that McKart's sole-surviving-son exemption became improper when his family unit ceased to exist upon the death of his mother. McKart failed to appeal the new classification; an order to report for induction followed in due course. McKart's only defense to the prosecution for refusal to submit was that the local board's revocation of his sole-surviving-son exemption was illegal.

Addressing itself to the problems raised by *McKart*, the Supreme Court first recognized the harshness of applying the exhaustion doctrine

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13. 420 F.2d 1143 (9th Cir. 1969), affg on rehearing, No. 21311 (9th Cir. Oct. 23, 1968), affg No. 36052 (C.D. Cal., trial date June 15, 1966).
14. *Id.* at 1147.
15. *Id.* at 1147-48. See note 46 & accompanying text infra.
in a criminal prosecution, after the administrative process is at an end.\textsuperscript{17} The Court then noted that relaxation of the exhaustion requirement in such situations would have a negligible effect on the smooth functioning of the Selective Service System.\textsuperscript{18} With these considerations in mind, the Supreme Court held that since McKart's challenge to his classification merely raised a question of statutory interpretation—which, unlike a factual question, would not require exercise of the particular expertise that the Selective Service appeals boards are assumed to possess\textsuperscript{19}—McKart's failure to appeal would not foreclose his defense challenging the validity of the local board's reclassification.\textsuperscript{20}

As for factual questions requiring the exercise of administrative expertise or discretion—claims to ministerial or conscientious objector exemptions, for example—the Court said that "the Selective Service System and the courts may have a stronger interest in having the question decided in the first instance by the local board and then by the appeal board, which considers the question anew."\textsuperscript{21} Thus the Court reserved the question whether the exhaustion doctrine would apply in a case where the defendant's challenge to his classification raised the factual question of the sincerity of a conscientious objector claim—a question requiring the application of administrative expertise.\textsuperscript{22}

Although the Supreme Court's opinion does not explicitly note that McKart deliberately and knowingly refused to take an administrative appeal, the court of appeals had noted that on more than one occasion McKart had written to his local board stating that he would have nothing to do with the Selective Service System.\textsuperscript{23} The Supreme Court

\textsuperscript{17.} Id. at 197.
\textsuperscript{18.} Id. at 199-200.
\textsuperscript{19.} Id. at 197-98.
\textsuperscript{20.} Id. at 200, 203. Mr. Justice Marshall delivered the opinion of the Court. Justices Douglas and White concurred separately in the result. Justice White disagreed with the majority's view that questions of law are beyond the expertise of the agency, citing Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938), and Udall v. Tallman, 380 U.S. 1 (1965), to show that questions of law are normally routed through the administrative process as are questions of fact. 395 U.S. at 205-06 (concurring opinion). Justice Douglas, however, did question the applicability of that general rule to Selective Service cases. \textit{Id.} at 204. He bases his concurrence on Oestereich v. Selective Serv. Bd., 393 U.S. 233 (1968): "If Oestereich could raise his claim to statutory exemption in a civil suit at a pre-induction stage, it follows a fortiori that petitioner can do so in a criminal prosecution for failure to obey the Act's mandate." 395 U.S. at 204 (concurring opinion). Justice White concurred because the local board's decision on the question of statutory interpretation in McKart's case had been informally reviewed and ratified by the State and National Directors thereby giving "sufficient justification to permit the courts to entertain petitioner's defense." \textit{Id.} at 207.
\textsuperscript{21.} 395 U.S. at 198 n.16 (emphasis added).
\textsuperscript{22.} \textit{Id.} at 198 n.16, 200-01; \textit{accord}, United States v. Davila, 429 F.2d 481, 484 n.4 (5th Cir. 1970); \textit{see} Thompson v. United Sates, 380 F.2d 86 (10th Cir. 1967).
\textsuperscript{23.} 395 F.2d 906, 907 (6th Cir. 1968).
apparently felt that where a question of statutory interpretation was involved, judicial review would be allowed whether or not the failure to exhaust administrative remedies was deliberate.

The McKart Guidelines

In McKart the Supreme Court formulated a basic test to determine the applicability of the exhaustion of administrative remedies doctrine to cases where the "deprivation of judicial review occurs not when the affected person is affirmatively asking for assistance from the courts but when the Government is attempting to impose criminal sanctions on him."24 The Court said that two questions must be asked:

[1] We must ask, then, whether there is in this case a governmental interest compelling enough to outweigh the severe burden placed on petitioner. . . . [2] [W]e must also ask whether allowing all similarly situated registrants to bypass administrative appeal procedures would seriously impair the Selective Service System's ability to perform its functions.25

To assist courts in answering these questions in particular cases, the Court suggested four policy considerations underlying the judicial application of the exhaustion doctrine.26 The first three considerations relate logically to the first basic question (Is there a compelling governmental interest?) that the Court says must be asked. The three considerations are (1) that "judicial review may be hindered by the failure of the litigant to allow the agency to make a factual record, or to exercise its discretion or apply its expertise"; (2) that a complaining party may successfully vindicate his rights without court intervention if he is required to pursue his administrative remedies; (3) that "notions of administrative autonomy require that the agency be given a chance to discover and correct its own errors."27 The fourth consideration, which relates logically to the second basic question (Will the system's ability to perform its functions be impaired?), is that "it is possible that frequent and deliberate flouting of administrative processes could weaken

24. 395 U.S. at 197.
25. Id.
26. From the language of the Court's opinion, it appears that the reasons should only be used as guidelines, that the existence or nonexistence of any one or more of them would not necessarily be a controlling factor. Where none of the reasons appear, however, the application of the exhaustion doctrine would be difficult to support. See id. at 193-95.
27. "This reason is particularly pertinent where the function of an agency and the particular decision sought to be reviewed involve exercise of discretionary powers granted the agency by Congress, or require application of special expertise." Id. at 194. For discussion of the exhaustion doctrine as an expression of executive and administrative autonomy, see L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 424-58 (1965).
the effectiveness of an agency by encouraging people to ignore its procedures."\(^{28}\)

That these four policy factors are interrelated and that the distinctions between them are not always clear is made manifest by their application both in the majority opinion in *McCart* and in the dissenting opinion in *Lockhart*. For example, both opinions discuss reasons one and four separately while noting the other two sometimes explicitly and sometimes implicitly along the way.\(^{29}\)

**Lockhart v. United States—A Question of Administrative Discretion**

**The Factual Background**

The Ninth Circuit decided *Lockhart* on facts somewhat different from those in *McCart*. On his Classification Questionnaire Lockhart stated that he was a student training for the ministry as a Jehovah's Witness. He then signed the portion of the form claiming conscientious objector status and requesting the Special Form for Conscientious Objectors. The board sent him the Special Form, but Lockhart never returned it. The board shortly thereafter classified him as available for military service. In the notice of classification, the board informed Lockhart of his right to a personal appearance and his right to appeal his classification to the state appeal board. He failed to pursue either of these remedies and some 5 months later wrote to his local board requesting what he termed "a Consciencances rejective form (religiouges status) [sic]."\(^{30}\) The local board complied with Lockhart's request and again sent him the Special Form; this time he completed and returned the form. His file was reopened and his classification reconsidered but not changed. The board notified Lockhart of its action and again gave him notice of his right to appeal.

Lockhart again failed to pursue his administrative remedies, and shortly afterwards was ordered to report for induction. He reported but refused to submit. Lockhart's principal defense to the resulting criminal prosecution was his assertion that the induction order was unlawful because there was no basis in fact for the local board's denial of his request for a conscientious objector classification.\(^{31}\)

Although Lockhart had completed 1 year of junior college,\(^{32}\) his

\(^{28}\) 395 U.S. at 195.

\(^{29}\) *Id.* at 197-200; Lockhart v. United States, 420 F.2d 1143, 1154-56 (9th Cir. 1969) (dissenting opinion).

\(^{30}\) 420 F.2d at 1149 (dissenting opinion).

\(^{31}\) *Id.* at 1144 (majority opinion).

\(^{32}\) Closing Brief for Appellant at 5, Lockhart v. United States, 420 F.2d 1143 (9th Cir. 1969).
communications with his local board indicate that he was only semi-
literate and that his religious views were unsophisticated.\textsuperscript{33} Lockhart's
classification notices also contained notice of his right to appeal,\textsuperscript{34} but
he testified at trial that he did not understand the meaning or signifi-
cance of the word "appeal."\textsuperscript{35}

On appeal from the district court's refusal to consider Lockhart's
defense because of his failure to exhaust administrative remedies, the
Ninth Circuit, sitting en banc and with two judges dissenting, affirmed.\textsuperscript{36}
The court, citing a long line of cases, held that Lockhart was required
to exhaust his administrative remedies prior to seeking judicial review
of his local-board classification because,

[b]y its nature, the question which Lockhart presented to the court
below is one which, for its resolution, necessarily requires the ap-
plication of discretion—discretion which, in the first instance, we
think Congress properly placed with the local and appeal boards
of our Selective Service System.\textsuperscript{37}

The Ninth Circuit emphasized its view that Lockhart's case was clearly
distinguishable from \textit{McKart}.

\textbf{Majority Opinion in Lockhart}

Judge Ely, writing for the Ninth Circuit majority in \textit{Lockhart}, distin-
guished \textit{McKart} on the basis that the question there was one of statu-
tory interpretation—a legal question within the constitutional preroga-
tive of the judiciary and not a factual one committed to the exclusive
discretion or expertise of the Selective Service System.\textsuperscript{38} "Hence, . . .
there was no compelling need for an agency decision in the first in-
stance."\textsuperscript{39}

The Ninth Circuit majority also relied upon \textit{DuVernay v. United
States},\textsuperscript{40} a Supreme Court decision in which the defendant in a prosecu-

\begin{itemize}
  \item \textsuperscript{33} 420 F.2d at 1149 (dissenting opinion). Articulateness is not a qualification
    for conscientious objector status. United States v. James, 417 F.2d 826, 829 (4th Cir.
    1969).
  \item \textsuperscript{34} 420 F.2d at 1144.
  \item \textsuperscript{35} 420 F.2d at 1150 n.3 (dissenting opinion).
  \item \textsuperscript{36} Lockhart v. United States, 420 F.2d 1143 (9th Cir. 1969) (Browning &
    Hamley, JJ., dissenting). See text accompanying notes 45-49 \textit{infra}.
  \item \textsuperscript{37} 420 F.2d at 1145-46.
  \item \textsuperscript{38} \textit{Id.} at 1146. "The resolution of that issue [of statutory interpretation] does
    not require any particular expertise on the part of the appeal board; the proper inter-
    pretations is certainly not a matter of discretion." McKart v. United States, 395 U.S. 185,
    198 (1969). But two Justices questioned the Court's basing its decision on this point.
    See note 20 \textit{supra}.
  \item \textsuperscript{39} 420 F.2d at 1146.
  \item \textsuperscript{40} 394 U.S. 309 (1969), \textit{aff'g} 394 F.2d 979 (5th Cir. 1968). "Oral argument
    in both \textit{DuVernay} and \textit{McKart} was heard by the Supreme Court on the same day, but
    \textit{DuVernay}'s conviction was affirmed by an equally divided court, Mr. Justice Fortas not
    participating." Lockhart v. United States, 420 F.2d 1143, 1147 (9th Cir. 1969).
\end{itemize}
tion for draft refusal had alleged that his indictment was invalid on the following grounds: that Negroes had been systematically excluded from membership on his local board, that the local board's handling of his case deprived him of due process and that the trial judge committed reversible error when he refused to permit questions concerning the Ku Klux Klan affiliations of the local board chairman.41 The defendant's attempt to raise these factual issues, decisions upon which were not within the discretionary functions of the local board, was blocked by the Supreme Court solely because he had failed to exhaust his administrative remedies.42

The Ninth Circuit further determined that Lockhart's ignorance of the fact that failure to appeal his classification would bar a later challenge to its validity could not be equated with the "rare and compelling" reasons which, according to dicta in Donato v. United States,43 a prior Ninth Circuit decision, might justify relaxation of the exhaustion requirement.44

The Dissenting Opinion in Lockhart

The two dissenting judges first determined that the induction order was unlawful because the board's classification had no basis in fact.45 From Lockhart's record testimony, the dissenters concluded that he had no notice that his failure "to exercise the right to administrative review" would later bar collateral attack upon the validity of his induction or-

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41. DuVernay v. United States, 394 F.2d 979, 980 (5th Cir. 1968).
42. 394 U.S. 309 (1969), aff'g 394 F.2d 979 (5th Cir. 1968).
43. 302 F.2d 468, 469-70 (9th Cir. 1962). In Donato the defendant testified that he had failed to appeal because he had been called to fire fighting duty and upon his return, because the appeal period had expired, he believed his rights to appeal were lost. Id. at 470. In fact the local board may permit a registrant to appeal "even though the period for taking an appeal has elapsed, if it is satisfied that the failure of such person to appeal within such period was due to a lack of understanding of the right to appeal or to some cause beyond the control of such person." 32 C.F.R. § 1626.2(d) (1971).
44. Lockhart v. United States, 420 F.2d 1143, 1147-48 (9th Cir. 1969). The interpretation of Donato by the Lockhart court is open to question even though it could be said that it was interpreting its own prior decision. The Donato holding appears to turn on the question of whether or not the failure to appeal was "a deliberate and intentional rejection" of that right and not the physical inability of Donato to appeal during the allowable period. See Donato v. United States, 302 F.2d 468, 470 (9th Cir. 1962). See text accompanying note 100 infra.
45. 420 F.2d at 1149-50 (dissenting opinion). The dissenting judges found that since Lockhart's claims, if true, met the statutory criteria for exemption, 50 U.S.C. App. § 456(j) (Supp. V, 1970), the board could deny the requested classification only on the basis of insincerity. There were no facts in the record to support a finding of insincerity and no required statement of this disbelief in support of the board's decision. 420 F.2d at 1147-48 & cases cited. This determination of unlawfulness of the board's order is notable because it brings into sharp focus the validity of Lockhart's defense and, thus, the very harshness of applying the exhaustion doctrine in this case.
They noted that the case presented a question of first impression and cited from McKart the basic test for determining whether or not the exhaustion doctrine is to be applied in a particular case. Applying the doctrine can serve no useful purpose, the dissenters argued, when the administrative process is at an end and when registrants are not aware of the potential denial of judicial review when the decision to appeal is still open to them. They further urged that the doctrine should be operative in this situation only if the defendant has forfeited his defense to a criminal prosecution by a deliberate bypassing of administrative procedure. The dissenters concluded that Lockhart, who did not understand his right to appeal or the consequences of relinquishing it, did not waive the right and therefore should not have been barred from his only defense.

Analysis of the Ninth Circuit's Decision

It is important to emphasize the harshness of applying the exhaustion doctrine to foreclose the registrant from raising a valid defense to a criminal prosecution after the administrative process is at an end. This is the basis of the Court's statement in McKart that there must be "a governmental interest compelling enough to outweigh the severe burden" which such application of the doctrine would place on the defendant. The Lockhart dissenters concluded that the four policy objectives behind the exhaustion doctrine cannot be achieved as to defendant Lockhart and other registrants who have completed the administrative process. For them the administrative process is irrevocably closed...
Such summary disposition of the policy considerations is questionable. To see this, it is necessary to examine the McKart considerations within the Lockhart context in order to determine the extent of their application.

Hindrance to Judicial Review

If Lockhart had taken an administrative appeal, a fuller development of the factual record would have resulted. At the time of his local board classification (1965), the Department of Justice would have been required to conduct an inquiry and hearing.53 The dissenters in Lockhart recognize this,54 but as they also point out, these procedures have since been abolished. Currently, the record on appeal is effectively confined to the record before the local board.55

53. "Prior to [the 1967 amendments to the Selective Service Act] the Department of Justice was required to conduct an inquiry and hearing whenever a registrant appealed a local board's denial of a conscientious objector claim, and the appeal board tentatively determined that he was not entitled to a I-O or lower classification." Lockhart v. United States, 420 F.2d 1143, 1157 (9th Cir. 1969) (dissenting opinion); accord, United States v. Davila, 429 F.2d 481, 484 n.5 (5th Cir. 1970); compare Selective Service Act of 1948, ch. 625, tit. I, § 6(j), 62 Stat. 612 with 50 U.S.C. APP. § 456(j) (Supp. V, 1970).

54. See note 53 supra.

55. The requirement of a Justice Department inquiry and hearing was deleted from the Selective Service Act in 1967. Act of June 30, 1967, Pub. L. No. 90-40, § 1(7), 81 Stat. 104 (codified at 50 U.S.C. APP. § 456(j) Supp. V, 1970). Now the appeal is confined to (1) a written statement that the registrant is permitted to file with the appeal board in which he "may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file," 32 C.F.R. § 1626.12 (1971); (2) the record before the local board; and (3) "general information concerning economic, industrial and social conditions," 32 C.F.R. § 1626.24 (b) (1971). Note that the registrant may neither appear before the appeal board nor be represented by counsel before such board. Lockhart v. United States, 420 F.2d 1143, 1157 & n.18 (9th Cir. 1969) (dissenting opinion); see 32 C.F.R. § 1626.24(b) (1971). By Lockhart's failure to appeal, however, it is not true that the Selective Service System was precluded from correcting its error or developing a record in support of its decision.

The local board on its own initiative has the power to call the registrant and others to appear before it and to produce evidence, 32 C.F.R. § 1621.15 (1971), to obtain information from local, state and national governmental agencies, id. § 1621.14 (1971), and to call on the investigative agencies of the Federal Government. Dickinson v. United States, 346 U.S. 389, 396-97 (1954); accord, Lockhart v. United States, 420 F.2d 1143, 1156 (9th Cir. 1969) (dissenting opinion). Besides these powers to develop a fuller factual record, the agency has the power, on its own initiative, to correct its own errors. First, regulations require the local board to reopen a registrant's classification upon the written request of the State or National Director. McKart v. United States, 395 U.S. 185, 189 n.4, 199 n.17 (1969); 32 C.F.R. § 1625.3(a) (1971). Second, the Government appeal agent is expressly authorized to "appeal to an appeal board from the classification of a registrant by the local board." Lockhart v. United States, 420 F.2d 1143, 1156-57 (9th Cir. 1969) (dissenting opinion), quoting 32 C.F.R. § 1626.2(b) (1971). Although the agent is required to be "equally diligent in protecting the in-
An appeal by Lockhart would have also allowed the System to re-exercise its discretion or reapply its expertise. The *Lockhart* majority points out that the factual question of the sincerity of Lockhart's beliefs "is simply not amenable to unerring objective determination," and therefore "necessarily requires the application of discretion." And as the Supreme Court emphasized in *McKart*, "[t]he Selective Service System is empowered by Congress to make such discretionary determinations and only the local and appeal boards have the necessary expertise." This follows from a section of the Selective Service Act providing (1) that the System has the power to "hear and determine, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this title" and (2) that judi-

terests of the Government and the rights of the registrant in all matters," 32 C.F.R. § 1604.71(d)(5) (1971), the probability of action by an appeal agent is quite low; in the past, appeal agents have been almost totally inactive. *Lockhart v. United States*, 420 F.2d 1143, 1153 n.9, 1156-57 (9th Cir. 1969) (dissenting opinion), citing NATIONAL ADVISORY COMM'N ON SELECTIVE SERVICE, IN PURSUIT OF EQUITY: WHO SERVES IF NOT ALL SERVE? 28-29 (1967).

56. Recently, another circuit has come to the opposite result from that reached by the Ninth Circuit. In *United States v. Davila*, 429 F.2d 481 (5th Cir. 1970), a case decided after *Lockhart* on very similar facts, the Fifth Circuit took a different approach to the legal versus fact issue in its application of the *McKart* guidelines and reversed Davila's conviction. The court noted that the defendant had no excuse for failing to exhaust administrative remedies, but it did not consider this important. *Id.* at 483 n.1. It distinguished *Lockhart* only on the basis of the existence of the 1967 amendments to the Selective Service Act at the time of Davila's failure to appeal. *Id.* at 484 n.5. See note 53 infra. The court felt that once it is established that there are no facts in the registrant's file refuting his claim of conscientious objection, "the only question remaining is the legal issue of whether or not the registrant has made out a prima facie case for exemption . . . . The appeal board can bring no special expertise to bear on this question, and the Selective Service System's discretion is explicitly limited by the legal standard that a given minimal showing requires exemption." *Id.* at 484; accord, *United States v. Carson*, 282 F. Supp. 261, 271 (E.D. Ark. 1968). By this route the Fifth Circuit avoids the complicated issue of deliberateness and thus minimizes its significance when the question concerns the existence of a prima facie case for exemption. The conflict between *Lockhart* and *Davila* points to a need for clarification by the Supreme Court. Such a clarification may soon occur since the Supreme Court has recently granted certiorari in a Selective Service case similar to *Davila*, *McGee v. United States*, 426 F.2d 691 (2d Cir.), cert. granted, 91 S. Ct. 101 (1970), where one of the questions to be answered is whether the exhaustion of administrative remedies doctrine should be applied where denial of the registrant's claimed conscientious objector status by the local board had no basis in fact. There is a summary of the petition in *McGee* in 39 U.S.L.W. 3161 (U.S. Oct. 20, 1970).

57. *Id.; see, e.g.*, Witmer v. United States, 348 U.S. 375, 381 (1955); Bishop v. United States, 412 F.2d 1064, 1067 (9th Cir. 1969). See also *Bradley v. United States*, 218 F.2d 657, 661 (9th Cir. 1954).


cial review “shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification” of registrants.60

Vindication of Rights at the Administrative Level

Certainly Lockhart might have been successful on appeal: The appeal board might have reclassified Lockhart as a conscientious objector and thereby vindicated his claim. Although evidence that an administrative appeal would have appeared futile to the defendant may preclude application of the exhaustion doctrine,61 in Lockhart there was no showing that the defendant could have reasonably assumed or believed (1) that no appeal to the appeal board was required, or (2) that an appeal was fruitless.

Preservation of Administrative Autonomy

The third consideration is relevant only if it is determined that the question for review is within the System’s discretion or expertise. If the latter situation exists, then it is in the interest of efficient System operation and judicial administration to allow the System to correct its own errors.62 As stated by the majority in Lockhart, avoidable interference by the courts “would quickly lead the courts to exercise their judicial discretion in areas wherein they should be powerless to act.”63

Lockhart’s conscientious objector claim would appear to be an example of a question requiring the application of discretion or expertise64—discretion reposed by Congress in the Selective Service System.65 An appeal by Lockhart would have given the system the chance to discover and correct its own error; application of the exhaustion requirement in Lockhart would thereby further administrative autonomy.

Consideration of the first three of the McKart policy guidelines66

61. See Glover v. United States, 286 F.2d 84 (8th Cir. 1961). The court did not apply the exhaustion rule where the local board failed to inform the defendant of the reason for issuing an unappealed classification order, which was identical to one previously appealed. The court stated: “Under the facts of this case we believe defendant was amply justified, as a reasonable person, in feeling that nothing further could be accomplished by appellate procedure.” Id. at 90.
62. See note 27 supra.
63. Lockhart v. United States, 420 F.2d 1143, 1145 (9th Cir. 1969).
65. See text accompanying note 59 supra. The majority in Lockhart was more definite in its conclusion: “Here, where evaluation of Lockhart’s claim would involve the court in matters clearly committed to the discretion of local and appeal boards within the Selective Service System, application of the doctrine serves the important objectives supporting the rule.” 420 F.2d at 1147 (footnotes omitted).
66. See text accompanying note 27 supra.
clearly supports the result of the *Lockhart* majority. It must be noted, however, that all three of these guidelines refer only to the first step of the two-step test—the sufficiency of a governmental interest in applying the exhaustion doctrine.

The last guideline to be considered relates to the other portion of the test—the extent to which the Selective Service’s ability to perform its function would be impaired by allowing judicial review. Even if a compelling governmental interest does exist, the right of a criminal defendant to assert a defense should be recognized, especially in the absence of serious impairment of the operation of the Selective Service System.

**Impairment of the Agency’s Function**

The primary function of the Selective Service System is the rapid mobilization of manpower. Will relaxation of the exhaustion requirement in cases involving administrative discretion or expertise adversely affect that function? The majority in *Lockhart* did not deal with this question, but the dissenting judges discussed it—as did the Supreme Court in *McKart*, which provided the answer:

In short, we simply do not think that the exhaustion doctrine contributes significantly to the fairly low number of registrants who decide to subject themselves to criminal prosecution for failure to submit to induction.

The Supreme Court gave three reasons for its conclusion. First, the threat of criminal sanctions will insure that the “great majority” of registrants will exhaust all available administrative remedies. The *Lockhart* dissenters also pointed out that possible denial of judicial review will effectively deter bypassing of the administrative appeal process only “if registrants were aware of the potential penalty at the time they were called upon to decide whether or not to appeal.” Most likely, few are aware, the dissenters argued, since neither the act, the regulations nor the notices given to registrants by the agency suggest that failure to appeal will bar subsequent judicial review. Second, the *McKart* rule applies only to those registrants whose classifications do not require exercise of administrative discretion and expertise. Third,
the Supreme Court was not convinced that many registrants would bypass the System's procedures "with the thought that their ultimate chances of success in the courts are enhanced thereby." Some reasons for this conclusion were suggested by the dissenting judges in Lockhart: (1) While an administrative appeal is pending, the registrant cannot be inducted; (2) he may submit evidence to the appeal board to rectify omissions in the administrative record; (3) the board is required to make a de novo determination of the classification; (4) the majority of refusals to grant conscientious objector status that are appealed are granted; (5) in a criminal prosecution, judicial review is effectively confined to the administrative record; and (6) the scope of the review is very limited. Thus, it cannot be reasonably concluded that allowing judicial review in the absence of exhausting administrative appeals will seriously impair the Selective Service's performance of its function.

Even if the System's operation were impaired, the right of a defendant to assert a defense in a criminal prosecution must be taken into account. This requires a consideration of the deliberateness of his failure to exhaust administrative remedies.

The Waiver Test and the Need to Apply It

Requiring a finding of deliberateness in failing to exhaust administrative remedies and an understanding of the consequences before application of the exhaustion rule will insure the protection of the right to assert a defense to a criminal prosecution. This protection should be required to safeguard the accused's fundamental right to due process. This can best be done by testing the failure to exhaust by a determination of whether or not a waiver has occurred. The classic definition

75. Id.
76. 420 F.2d at 1154 (dissenting opinion).
77. 32 C.F.R. §§ 1626.41, 1627.8 (1971).
78. Id. § 1626.12.
79. Id. § 1626.26(a).
80. 420 F.2d at 1154 n.11 (dissenting opinion).
82. See 50 U.S.C. APP. § 460(b)(3) (Supp. V, 1970), which is reproduced in part at note 3 supra.
83. United States v. Davila, 429 F.2d 481 (5th Cir. 1970), was a case decided upon essentially the same facts as were found in Lockhart, except that no excuse for failure to appeal was offered by the defendant. The court there reversed the appellant's conviction while agreeing with McKart that exercising judicial review would "not significantly encourage circumventing the administrative process ... [since] the opportunity to appeal is one that few registrants will knowingly forego, because of the risk incident to determining the issue of classification in court under the strict basis in fact test with the possibility of criminal conviction." Id. at 485. See note 56 supra.
84. For the purpose of analogy, it is interesting to note that the administrative
of waiver was given in Johnson v. Zerbst, which involved a defendant’s right to counsel. "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." Before a valid waiver can take place, knowledge of the consequences of foregoing the waived privilege is essential, for “[i]t is only through awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege.” The waiver rule should not be applied, however, (1) if it appears from the circumstances that exercise of the privilege would have been futile, (2) if failure to exercise the privilege was excusable or (3) if the forfeiture imposed by application of the rule would be great.

Waiver is closely related to the doctrine of exhaustion. The reasons for refusing to apply the concepts in particular cases are similar. Discretionary denial of a state prisoner's petition for federal habeas corpus is limited to instances where there has been a deliberate and understanding waiver of a state court remedy. The reasons for this

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rules established for the guidance of local boards include a waiver rule. This rule may be relaxed by the local board for allowing an appeal to an appeal board or to the President if the board is satisfied that the registrant's failure to appeal within the required time was due either to a "lack of understanding of the right to appeal" or to some cause "beyond the control of such person." 32 C.F.R. §§ 1626.2(d), 1627.3 (1971). The waiver rule is set forth in 32 C.F.R. § 1641.2(b) (1971) which provides: "If a registrant or any other person concerned fails to claim and exercise any right or privilege within the required time, he shall be deemed to have waived the right or privilege."

85. 304 U.S. 458 (1938).
86. Id. at 464. The Court stated further that “[t]he determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.” Id.
89. L. Jaffe, Judicial Control of Administrative Action 455 (1965).
90. Id. at 454.
91. Compare id. at 455 with Glover v. United States, 286 F.2d 84, 90 (8th Cir. 1961) (futility in exhaustion) and Donato v. United States, 302 F.2d 468, 470 (9th Cir. 1962) (excusable failure) and McKart v. United States, 395 U.S. 185, 197 (1969) (burden imposed by forfeiture) (dictum).
92. Lockhart v. United States, 420 F.2d 1143, 1155 (9th Cir. 1969) (dissenting opinion), citing Fay v. Noia, 372 U.S. 391, 438-39 (1963). "[T]he federal judge has the discretion to deny relief to one who has deliberately sought to subvert or evade the orderly adjudication of his federal defenses in the state courts. Surely no stricter rule is a realistic necessity. A man under conviction for crime has an obvious inducement to do his very best to keep his state remedies open, and not stake his all on the outcome of a federal habeas proceeding which, in many respects, may be less advantageous to him
"apply equally to limit forfeiture of a registrant's defense to a criminal accusation to instances in which there has been a deliberate and understanding waiver of an administrative remedy." In both situations the purpose of the exhaustion requirement is the same—to punish the litigant for his default and to deter others who might do the same in the future, thereby preserving an orderly procedure. In both the forfeited right is a fundamental one.

The Departure in Lockhart

In affirming the district court's decision against the defendant, the Ninth Circuit in Lockhart expressly held that both courts were applying a "well-established" rule in Selective Service cases. However, virtually all the cases cited by the court are distinguishable from Lockhart on a factual basis. In some it was found that the registrant understood the nature of his right to an administrative appeal, thus implying that his failure was deliberate and knowing. In the others the district courts had rejected as factually untrue allegations of ignorance of the right or of inability to exercise it. The court's failure to distinguish these former decisions is all the more striking because the distinction was clearly recognized in the Ninth Circuit's opinion in Donato v. United States:

This court's strict adherence to the rule that administrative remedies must be exhausted has been (as in Prohoroff v. United States, 9 Cir., 1958, 259 F.2d 694, and Evans v. United States, 9 Cir., 1958, 252 F.2d 509) in cases where failure to appeal appeared to be a deliberate and intentional rejection of the administrative review than a state court proceeding. [Citation omitted.] And if because of inadvertence or neglect he runs afoul of a state procedural requirement, and thereby forfeits his state remedies, . . . those consequences should be sufficient to vindicate the State's valid interest in orderly procedure. Whatever residuum of state interest there may be under such circumstances is manifestly insufficient in the face of the federal policy . . . of affording an effective remedy for restraints contrary to the Constitution." 372 U.S. at 433-34.

93. See note 92 supra.
94. Lockhart v. United States, 420 F.2d 1143, 1155-56 (9th Cir. 1969) (dissenting opinion).
96. Lockhart v. United States, 420 F.2d 1143, 1145-47 (9th Cir. 1969).
97. Edwards v. United States, 395 F.2d 453 (9th Cir.), cert. denied, 393 U.S. 845 (1968); Badger v. United States, 322 F.2d 902 (9th Cir. 1963), cert. denied, 376 U.S. 914 (1964); Prohoroff v. United States, 259 F.2d 694, (9th Cir. 1958), cert. denied, 359 U.S. 907 (1959); Evans v. United States, 252 F.2d 509 (9th Cir. 1958).
98. Woo v. United States, 350 F.2d 992 (9th Cir. 1965); Greiff v. United States, 348 F.2d 914 (9th Cir. 1965).
99. 302 F.2d 468 (9th Cir. 1962).
which had been provided. An area does remain, however, within which relaxation of the rule can be found to be just and proper.\textsuperscript{100}

The majority in \textit{Lockhart} failed to distinguish, on this same basis, a recent case decided by the Supreme Court and heavily relied upon by the majority—\textit{DuVernay v. United States}.\textsuperscript{101} An equally divided court affirmed a court of appeals decision that had held that collateral attack on the registrant's classification was foreclosed by failure of the registrant to pursue his administrative remedies. However, the lower court had emphasized that there was no evidence that DuVernay was unfamiliar with the administrative procedure or was "incapable of understanding" it. The court indicated that DuVernay's previous actions showed he understood the importance of taking immediate steps to correct a classification he believed erroneous.\textsuperscript{102}

A district court within the Ninth Circuit decided a case prior to \textit{Lockhart}, but not cited therein, that lends much support to the contention that the exhaustion requirement should be relaxed where the defendant fails to administratively appeal his local-board classification because of illiteracy. In \textit{United States v. Harris}\textsuperscript{103} the district court, citing the earlier Ninth Circuit three-judge panel decision in \textit{Lockhart},\textsuperscript{104} held that exceptional circumstances precluded the application of the exhaustion rule:

\begin{quote}
This rule is not inflexible, and it should be relaxed in exceptional circumstances. . . . I find that this is such a case. Defendant has a limited education. He did not finish the eighth grade until age 16. He reads with difficulty. He has not been employed regularly since he left school, and when he has worked it has been at menial jobs. Defendant has very little money, and he did not have the
\end{quote}

\textsuperscript{100} \textit{Id.} at 470. \textit{See also} Daniels v. United States, 372 F.2d 407, 414 (9th Cir. 1967), where the court left open the question of lack of due process as a result of lack of notice that failure to report to the local board for a civilian work assignment would bar later collateral attack on the validity of the registrant's classification.

\textsuperscript{101} 394 U.S. 309 (1969), \textit{affg} 394 F.2d 979 (5th Cir. 1968). This decision is difficult to reconcile with \textit{McKart} since DuVernay's defense was also clearly nondiscretionary in nature. \textit{See text accompanying notes 40-42 supra.}

\textsuperscript{102} DuVernay v. United States, 394 U.S. 309 (1969). One court has distinguished \textit{DuVernay} "as a case where petitioner failed in the criminal prosecution to raise as a defense the local board's refusal to reopen his classification based upon claims of student deferment, then a hardship deferment and finally an occupational deferment, . . . thereby cutting off the possibility that a favorable disposition of any one of the classification claims would have left no remnant of his other constitutional claims." \textit{United States v. Branigan}, 299 F. Supp. 225, 235 n.58 (S.D.N.Y. 1969). \textit{See also} McNeil v. United States, 395 U.S. 463 (1969), where the Court remanded for reconsideration in light of \textit{McKart}. The court of appeals had applied the exhaustion doctrine and thus barred the defendant from attacking his local board's denial of his conscientious objector claim. The defendant had not given any reason for his failure to appeal. McNeil v. United States, 401 F.2d 527 (4th Cir. 1968).


\textsuperscript{104} \textit{Lockhart v. United States}, No. 21311 (9th Cir. Oct. 23, 1968).
assistance of a lawyer until the Government filed this action. He cannot reasonably be charged with knowledge of his right to appeal, and therefore it would be unconscionable to decline review of his classification because he did not exhaust his administrative remedies.\(^{105}\)

**Conclusion**

Use of the exhaustion doctrine in the *Lockhart* situation would be exceedingly harsh.

The defendant is . . . stripped of his only defense; he must go to jail without having any judicial review of an assertedly invalid order. This deprivation of judicial review occurs not when the affected person is affirmatively asking for assistance from the courts but when the Government is attempting to impose criminal sanctions on him.\(^{106}\)

The severe burden placed on the unknowing registrant demands a compelling governmental interest to outweigh it. Such a compelling interest has not been convincingly demonstrated in *Lockhart*.

Even if the *McKart* policy considerations do not compel the relaxation of the exhaustion doctrine in *Lockhart*, application of the waiver rule would demand such a result.

Applying the waiver test in Selective Service prosecutions will insure equal protection for the poor, the ignorant and the illiterate.\(^{107}\) Such discrimination against the unsophisticated was recognized in *Miranda v. Arizona*,\(^{108}\) which involved the right to counsel:

Finally, we must realize the imposition of the requirement for the request [for counsel] would discriminate against the defendant who does not know his rights. . . . To require the request would be to favor the defendant whose sophistication or status has fortuitously prompted him to make it.\(^{109}\)

Without the waiver rule in the *Lockhart*-type situation, the law discriminates against the person who does not know his rights or who cannot afford counsel to guide him through the procedural complexities of perfecting a conscientious objector claim.\(^{110}\) The Selective Service Act provides that the system of classification and selection should be "just

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\(^{105}\) 302 F. Supp. at 1196.


\(^{110}\) This point was argued unsuccessfully in Opening Brief for Appellant at 13, *Lockhart v. United States*, 420 F.2d 1143 (9th Cir. 1969).
and fair”;\textsuperscript{111} the Supreme Court long ago declared that the “customary safeguards” for the protection of an accused must apply to cases under the act.\textsuperscript{112} In view of the intricate bureaucratic procedures that confront a registrant\textsuperscript{113} and the illusory nature of the assistance the System provides,\textsuperscript{114} the importance of safeguarding the rights of the accused cannot be overemphasized. Only a concrete standard such as the waiver test, which limits the application of the exhaustion rule, can insure the maintenance of a registrant’s constitutional rights.

The Selective Service System makes few efforts to assist registrants who are left alone, untutored and ignorant, to confront its labyrinthine bureaucracy. The rights of the poor, the uneducated and the illiterate are most vulnerable. The courts exist to protect the individual’s constitutional rights and to act as a check against both the overzealousness and indifference of executive agencies. The Ninth Circuit’s failure to apply the waiver test in Lockhart may well have resulted in a deprivation of due process and has set an unhappy precedent.\textsuperscript{115}

\textit{J. Kendrick Kresse*}

\textsuperscript{112} Estep v. United States, 327 U.S. 114, 122 (1946).
\textsuperscript{113} Lockhart v. United States, 420 F.2d 1143, 1152, \& n.5 (9th Cir. 1969) (dissenting opinion).
\textsuperscript{114} The regulations state that advisors “may” be appointed “to advise and assist registrants,” 32 C.F.R. \textsection 1604.41 (1971), but none had been so appointed in California at the time of Lockhart’s prosecution; nor have the System’s appeal agents been diligent in their duties. Lockhart v. United States, 420 F.2d 1143, 1152-53 \& n.9 (9th Cir. 1969) (dissenting opinion). See note 55 supra.
\textsuperscript{115} See United States v. Powell, 421 F.2d 697 (9th Cir. 1970). Citing Lockhart the court held that by failing to avail himself of the right to appeal his classification, after being advised of such right, the registrant failed to exhaust administrative remedies and could not challenge his classification in a criminal prosecution for refusing to submit to induction. \textit{Id.} At trial, Powell did testify that he received his classification form (which contains a notice of right to appeal), but that he did not remember whether or not he read the form. Brief for Appellee at 5.

\textbf{Powell} indicates the willingness of the Ninth Circuit to rely indiscriminately on Lockhart as precedent. The facts in Powell show a lack of diligence in the petitioner, not found in Lockhart, that justify the Powell decision in light of other Ninth Circuit cases. See, \textit{e.g.}, Greiff v. United States, 348 F.2d 914 (9th Cir. 1965).

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