Reprisal Discharges of Union Officials

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Title I of the Labor-Management Reporting and Disclosure Act (LMRDA) guarantees certain fundamental rights to all union members. In addition, section 609 of the LMRDA makes it unlawful for a labor organization to discipline its members for exercising any of these rights. These provisions may be enforced by civil action in federal district court.

In order to represent their members properly, labor unions employ a large number of officers and employees. The union membership elects certain officers, who generally have the power, either explicitly under the union constitution or implicitly as part of their executive discretion, to appoint and dismiss subordinate officers and employees. As a result, the elected officers are able to dispense these appointive positions as a form of political patronage.

2 Title I of the LMRDA is entitled, "Bill of Rights of Members of Labor Organizations." It provides that members of labor organizations shall have equal rights and privileges, freedom of speech and assembly, freedom from arbitrary increases in dues and assessments, freedom to sue, and certain due process safeguards against improper disciplinary action. 29 U.S.C. 411(a)(1)-(5) (1970).
3 29 U.S.C. § 529 (1970) provides:
   It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this Act. . . .
5 In 1971, labor organizations employed over 28,000 people. Roughly a third of these employees were clerical and secretarial personnel, while half were organizers or staff representatives. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 1312-9, EMPLOYMENT AND EARNING STATISTICS 1900-1972, at 685 (1973); U.S. BUREAU OF LABOR STATISTICS, Dep't of Labor, Directory of National Unions and Employer Associations 88-91 (1971). In addition to their national and local officers, unions also employ administrative assistants, staff representatives, organizers, and other professional and clerical employees. These employees negotiate collective bargaining agreements, service existing contracts, process grievances, recruit new members, adjust internal disputes, and perform other administrative duties. They also play a significant role in internal union politics, usually by supporting the policies and candidacies of the incumbent union officers. See Note, Union Officers and Employee-Members: Reprisal Discharges As Unlawful Discipline Under Section 609 of the LMRDA, 6 GA. L. REV. 564, 569-72 (1972). See generally J. BABASH, AMERICAN UNIONS; STRUCTURE, GOVERNMENT AND POLITICS 31, 55-63, 81-83, 86-88 (1967); W. LEISERSON, AMERICAN TRADE UNION DEMOCRACY 237-39 (1959).
6 Title IV of the LMRDA requires that officers of local, national, and international unions be elected by the membership. 29 U.S.C. § 481 (1970).
7 See Note, supra note 5, at 569-70. See generally J. BABASH, supra note 5, at 82, 99; W. LEISERSON, supra note 5.
Usually union officers and employees are also members of their union.\(^8\) The dual status of officer-members and employee-members places them in a unique situation under the LMRDA. As union members, they are entitled to the rights enumerated in Title I. As union officers and employees, however, they serve at the pleasure of their superiors. This situation raises the question whether officer- and employee-members have a cause of action under the LMRDA when they are discharged in retaliation for exercising rights protected under Title I.\(^9\) Resolution of this question depends upon whether or not such reprisal discharges violate the provisions of Title I or constitute unlawful discipline within the meaning of section 609.\(^10\) After discussing the judicial decisions dealing with these questions, this article will examine the various policy considerations and will suggest an analysis for resolving the problem.

I. THE JUDICIAL DECISIONS

The federal courts are divided with respect to whether the LMRDA protects officer- and employee-members from reprisal-

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\(^8\) Union constitutions often require that officers and employees also be members of the union. *See e.g.*, **Constitution of the United Auto Workers** art. 10, §§ 2, 6; art. 14, § 3; art. 38, § 3 (1974).

\(^9\) Section 103 of the LMRDA explicitly provides that Title I does not preempt any rights and remedies that union members may have under state law or under the constitution and bylaws of their union. 29 U.S.C. § 413 (1970). Consequently, union officials who are discharged in retaliation for exercising rights protected under Title I may have a cause of action under state law. *See generally* **Summers, Legal Limitations on Union Discipline**, 64 **Harv. L. Rev.** 1049 (1971). This article, however, will only examine whether the LMRDA provides a remedy to these deposed union officials, not whether state law provides a remedy. Although this issue is occasionally phrased in terms of whether the federal courts have jurisdiction to consider complaints dealing with reprisal discharges, the question is actually whether officer- or employee-members have a cause of action under § 102 of the LMRDA when they are discharged for exercising rights enumerated in Title I, but their status as union members is not disturbed. *See Sheridan v. United Bhd. of Carpenters Local 626*, 306 F.2d 152, 156 (3d Cir. 1962).

\(^10\) The fiduciary obligations imposed on union officials under Title V of the LMRDA, 29 U.S.C. §§ 501-504 (1970), encompass the protection of the political rights of all union members, as well as the proper handling of money and property. *See Semancik v. UMW, District 5*, 466 F.2d 144, 155 (3d Cir. 1972); *Bakery & Confectionary Workers Int'l Union*, 335 F.2d 691, 695-96 (D.C. Cir. 1964); *Retail Clerks Local 648 v. Retail Clerks Int'l Ass'n*, 299 F. Supp. 1012, 1021-22 (D.D.C. 1969). *See generally* **Sabolsky v. Budzanoski**, 457 F.2d 1245, 1250-51 (3d Cir. 1972); **Johnson v. Nelson**, 325 F.2d 646, 650-51 (8th Cir. 1963). Reprisal discharges, therefore, may also violate the provisions of Title V. Title V suits generate pressures for settlement, because the union officers are liable for damages and attorney fees in their individual capacities. Consequently, a deposed officer- or employee-member may prefer to sue under Title V rather than under Title I or § 609. The ramifications of proceeding under Title V are beyond the scope of this article. *See Leslie, Federal Courts and Union Fiduciaries*, 76 **Colum. L. Rev.** 1314 (1976).
discharges. The Second, Seventh, Eighth, and Ninth Circuits have held that these union officials may not be removed from their positions for exercising rights protected under Title I. In contrast, the Third and Fifth Circuits have concluded that such reprisal discharges do not violate the LMRDA. District courts considering this issue have been similarly divided.

A. Decisions Finding No Violation of the LMRDA

In Sheridan v. United Brotherhood of Carpenters Local 626, the Third Circuit Court of Appeals decided that the business agent of a local union, who was removed from his elected office by a vote of the membership because he brought criminal charges against another member, was not entitled to reinstatement or damages. Stating that it is the "union-member relationship, not the union-officer or union-employee relationship, that is protected," Judge Kalodner held that the business agent did not have a remedy under sections 101(a)(4) or 609. Relying upon the language and legisla-

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12 Wambles v. International Bhd. of Teamsters, 488 F.2d 888 (5th Cir. 1974) (per curiam); Sewell v. Grand Lodge, Int'l Ass'n of Machinists, 445 F.2d 545 (5th Cir. 1971), cert. denied, 404 U.S. 1024 (1972); Sheridan v. United Bhd. of Carpenters Local 626, 306 F.2d 152 (3d Cir. 1962).


14 206 F.2d 152 (3d Cir. 1962).

15 Id. at 157.

16 Id. at 156-59. Concurring in the result reached by Judge Kalodner, Judge Hastie held that the action was premature because the business agent had failed to exhaust his internal union remedies. Id. at 159-60. Although the opinion of Judge Kalodner in Sheridan represented the views of only a single judge, the Third Circuit has subsequently indicated in dicta that it adheres to his position. In Martire v. Laborers' Local 1058, 410 F.2d 32, 35 (3d Cir. 1969), cert. denied, 396 U.S. 903 (1969), the court interpreted Sheridan as holding that neither Title I nor § 609 affords a remedy to a union official who is removed from office prior to the expiration of his term. Similarly, in Harrison v. Local 54, American Fed'n of State, County, and Mun. Employees, 518 F.2d 1276, 1281, 1284 (3d Cir. 1975), the court cited Sheridan for the proposition that the LMRDA does not provide relief to a union official.
tive history of the LMRDA to justify this conclusion, he observed that the rights enumerated in Title I are described as the rights of union "members," and that no mention is made of the rights of union officers or employees. Moreover, he noted that the word "officer" was deleted from section 101(a)(4) by the Conference Committee. Judge Kalodner also argued that the term "discipline" in section 609 should not be construed to encompass removal from union office, since the three sanctions which are specifically enumerated in that section—fine, suspension, and expulsion—all involve interference with a member's status as a member.

Observing that the basic purpose of the LMRDA is to promote union self-government and union democracy, Judge Kalodner noted that the business agent had been removed by a vote of the membership. Furthermore, Judge Kalodner asserted that there was no meaningful distinction between whether the business agent was acting as an individual member or in an official capacity when he brought criminal charges against his fellow member. Recognizing that an officer's conduct, whether in an individual or official capacity, may significantly affect his ability to maintain the respect of the membership and to function effectively as an officer, Judge Kalodner concluded that an intolerable situation would be created if the membership could not remove an officer in whom they had lost confidence.

for suspension from office or termination of employment. Since Sheridan involved only § 101(a)(4), however, the dicta in Martire and Harrison are overly broad.

17 306 F.2d at 156. Judge Kalodner also noted that Title I is entitled "Bill of Rights of Members of Labor Organizations." Contrasting the use of the word "member" in Title I with the numerous references in Title IV to the rights of "any bona fide candidate." Judge Kalodner argued that Congress knew how to use appropriate language when it wanted to grant protection to a special category of union members. Id. at 156-57. It is also noteworthy that Congress provided separate definitions for the terms "member" and "officer, agent, shop steward, or other representative." 29 U.S.C. § 402 (3)(o) and (q) (1970).


19 306 F.2d at 156.


21 306 F.2d at 157-59.
In dissent, Judge McLaughlin argued that the business agent had a remedy under sections 101(a)(4) and 609. Judge McLaughlin stressed that the business agent was removed from office for exercising his right as an individual member to sue, not for misconduct in his official capacity. Viewing the phrase "otherwise discipline" in section 609 as a catchall provision designed to encompass unusual sanctions such as removal from office, Judge McLaughlin contended that the form of the sanction should not obscure the fact that the business agent was disciplined for exercising a membership right protected under Title I.  

The Fifth Circuit has also accepted the view that reprisal discharges do not violate the LMRDA. In Sewell v. Grand Lodge, International Association of Machinists, the court decided that a grand lodge representative who was discharged from his appointed position for opposing a proposed amendment to the union's constitution was not entitled to relief. Although the court held that the suit was barred by the Alabama statute of limitations, in dictum it stated that the dismissal of the grand lodge representative did not violate sections 101(a)(1), 101(a)(2), or 609, because he was guilty of insubordination.

The Sewell court recognized that union members do not forfeit their rights under the LMRDA upon election or appointment to union office. Nevertheless, the court contended that it would be unreasonable to permit a member to enjoy the salary and prestige of union employment and simultaneously to "completely subvert the purposes of his employment by engaging in activities diametrically opposed to the performance of his specified duties." The court stated that all employees owe a basic loyalty to their employer and at times must subordinate their personal opinions to
the responsibilities of their employment. Moreover, denying unions the right to fire employees for insubordination would undermine the cohesiveness of union leadership and thereby impair its ability to bargain collectively with employers.

In *Wambles v. International Brotherhood of Teamsters*, the Fifth Circuit directly confronted the problem of reprisal discharges. The recently elected business manager of a local union dismissed several assistant business managers and a bookkeeper from their appointed positions because they had opposed his candidacy for office. In a per curiam opinion, the court held that the discharged officials did not have a cause of action under sections 101(a)(1) and 101(a)(2).

Noting that the LMRDA did not purport to establish a "civil service-type structure," the *Wambles* court expressed concern that extending the protections of sections 101(a)(1) and 101(a)(2) to appointed union officials would, in effect, freeze them into their positions for life, except on dismissal for cause. The court emphasized that elected union officers, if forced to rely upon subordinates who opposed their election, would face intolerable obstacles in implementing the policies and programs for which they were elected. To prevent union elections from being rendered mean-

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30 *Id.* at 551. The court suggested that an employee should resign if he can no longer discharge his duties in good conscience. *Id.* A strict analogy between corporate directors and officers, and union officers and employees would dictate that union employees should be subject to discharge for any reason by the officers or the membership, whereas union officers should be subject to discharge without cause only by the membership. *See*, e.g., *Frank v. Anthony*, 107 So.2d 136 (Fla. Dist. Ct. App. 1958); *ABA-ALI MODEL BUS. CORP. ACT §§ 39, 51 (1953); DEL. CODE tit. VIII, § 142(b) (1974); *N.Y. BUS CORP. LAW*, §§ 706, 716 (McKinney 1963); 3 I. KANTROWITZ & S. SLUTSKY, *WHITE ON NEW YORK CORPORATIONS* § 706.03 (13th ed. 1968); *Travers, Removal of the Corporate Director During His Term of Office*, 53 *IOWA L. REV.* 389 (1967).

31 455 F.2d at 551-52. Congress indicated that the LMRDA was not designed to impair the rights of employees to organize and to bargain collectively with their employers. 29 U.S.C. § 401(a) (1970); *S. REP. No. 187, 86th Cong., 1st Sess. 5 (1959), reprinted in 1 NLRB LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT*, at 401 (1959). In enacting the LMRDA, however, Congress also rejected the idea that only autocratic unions can deal effectively with employers. *See* *Beaird & Player, Free Speech and the Landrum-Griffin Act*, 25 *ALA. L. REV.* 577, 610 (1973); *Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 *MICH. L. REV.* 819, 829-31 (1960). Consequently, the courts have refused to limit the Title I rights of union members in order to preserve the monolithic bargaining posture of labor organizations. *See*, e.g., *Navarro v. Gannon*, 385 F. 2d 512, 518 (2d Cir. 1967); *Salzhandler v. Caputo*, 316 F.2d 445, 451 (2d Cir. 1963), *cert. denied*, 375 U.S. 946 (1963). Nevertheless, since disagreement among the leaders of a union may have a more severe impact on its bargaining position than rank and file dissension, it can be argued that restricting the exercise of Title I rights by union officials is proper.

32 488 F.2d 888 (5th Cir. 1974) (per curiam).

33 One of the assistant business managers was the opposing candidate for the office of business manager. *Id.* at 489.

34 The court appended the opinion of the district court to its per curiam opinion.

35 488 F.2d at 889-90.

36 *Id.* at 890. The court asserted that the friction generated during election campaigns would invariably impede the ability of elected officers to implement their programs. *Id.* at 889.
ingless by the obstructionism of disgruntled appointed officials, elected officers must have the power to discharge their subordinates "without cause or for any reason." The court compared the right of elected union officers to discharge their subordinates with the right of elected public representatives to dismiss appointed government officials. Moreover, it suggested that the courts would be plunged into a "thicket of subtleties and hypocrisies of charges" if they had to determine whether there were bona fide grounds to warrant discharging an appointed official for cause.

**B. Decisions Finding a Violation of the LMRDA**

The leading decision protecting union officers and employees from reprisal discharges is *Grand Lodge, International Association of Machinists v. King*. King and five other grand lodge representatives alleged that they were summarily discharged from their appointed positions because they had actively supported the unsuccessful candidate for secretary-treasurer of the union. Concluding that Congress did not intend section 101(a)(5) to preclude the summary removal or suspension of a member from union office, 41

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37 Id. at 889. The court stated that the loyalties of appointed officials should belong to their elected superiors, not to a "personal fiefdom beyond the reach of the membership." Id. at 890.

38 Id. at 890. Traditionally, the courts held that non-civil service government employees served at the pleasure of their superiors. see Myers v. United States, 272 U.S. 52 (1926); Shurtleff v. United States, 189 U.S. 311 (1903); Parsons v. United States, 167 U.S. 324 (1897); Ex parte Hennen, 38 U.S. (13 Pet.) 230 (1839); Frug, Does the Constitution Prevent the Discharge of Civil Service Employees?, 124 U. Pa. L. REV. 942, 961 (1976), and that patronage dismissals of these employees were lawful, see Alomar v. Dwyer, 447 F.2d 482 (2d Cir. 1971); American Fed'n of State, County, & Mun. Employees v. Shapp, 443 Pa. 527, 280 A.2d 375 (1971). In Elrod v. Burns, 427 U.S. 347 (1976), however, the Supreme Court held that patronage dismissals of nonpolicy-making, nonconfidential government employees violated the first and fourteenth amendments. The issues in *Elrod* are similar to the issues in cases involving reprisal discharges of union officials.

39 488 F.2d at 890. The court suggested that appointed officials might deliberately oppose any candidate for union office who threatened to dismiss them in order to cloud the issue of cause with free speech questions. Id.

40 335 F.2d 340 (9th Cir. 1964), cert. denied, 379 U.S. 920 (1964).

41 Id. at 341-42. During the congressional debates on Title I, several representatives expressed concern that § 101(a)(5) would impair unions' ability to remove officials suspected of misconduct expeditiously. 105 CONG. REC. 17870 (1959), reprinted in II NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT, at 1414-15 (1959) (remarks of Sen. Morse); 105 CONG. REC. 15537 (1959), reprinted in II NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT, at 1573 (1959) (remarks of Rep. Thompson). Responding to these objections the Conference Committee inserted language in the Conference Report limiting the scope of § 101(a)(5). The Report explicitly stated that section 101(a)(5) "applies only to suspension of membership in the union: it does not refer to suspension of a member's status as an officer in the union." H.R. REP. No. 1147, 86th Cong., 1st Sess. 31 (1959), reprinted in II NLRB,
the Ninth Circuit held that the allegations of these union officials failed to state a claim under that section. The court further held, however, that the allegations stated a cause of action under sections 101(a)(1), 101(a)(2), and 609.

The court noted that these sections guarantee equal political rights and freedom of speech and assembly to "every" union member and that the statutory language does not except officer- or employee-members from its coverage. Concluding that the deletion of the word "officials" from section 101(a)(4) in conference merely represented an elimination of surplusage and not a substantive change in the scope of Title I rights, the court further deter-

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42 335 F.2d at 342-43. The court reached this result by interpreting the phrase "otherwise disciplined" in § 101(a)(5) as not including removal from union office, rather than by construing the word "member" in that section as excluding union officers. 335 F.2d at 343 n.11. While recognizing that Congress placed a limiting gloss on § 101(a)(5) primarily to preserve union power to remove summarily union officials suspected of misfeasance, the court concluded that Congress wholly excluded removal from union office from the scope of this section in order to accomplish its purpose. 335 F.2d at 343. The courts have adopted this position with virtual unanimity. See, e.g., Gabauer v. Woodcock, 520 F.2d 1084 (8th Cir. 1975), cert. denied, 423 U.S. 1061 (1976); Schonfeld v. Penza, 477 F.2d 899 (2d Cir. 1973); Martire v. Laborer's Local 1085, 410 F.2d 32 (3d Cir.), cert. denied, 396 U.S. 903 (1969); Nelmis v. United Ass'n of Plumbing & Pipefitters Indus., 405 F.2d 715 (5th Cir. 1968); Airline Stewards Local 550 v. Transport Workers Union, 334 F.2d 805 (7th Cir. 1964), cert. denied, 379 U.S. 972 (1965); Grand Lodge, Int'l Ass'n of Machinists v. King, 335 F.2d 340 (9th Cir.), cert. denied, 379 U.S. 920 (1964). But see DeCampli v. Greeley, 293 F. Supp. 746, 753 (D.C.N.J. 1968); Burton v. Independent Packing House Workers Union Local 12, 196 F. Supp. 138, 140 (D. Kansas 1961). See also Wood v. Dennis, 489 F.2d 849, 858 n.4 (7th Cir. 1973), cert. denied, 415 U.S. 960 (1974) (Stevens, J., concurring).

43 In Cooke v. Orange Belt Dist. Council of Painters 48, 529 F.2d 815 (9th Cir. 1976), the Ninth Circuit subsequently held that the LMRDA protects union officials from retaliatory reassignments as well as removal from office. Relying on King, the court found that an elected business representative who alleged that he had been reassigned to service the membership of a local 167 miles from his residence as a result of his support for a losing candidate stated a valid cause of action under Title I and § 609. See also Cefalo v. International Union of Dist. 50, UMW, 311 F. Supp. 946 (D.D.C. 1970).

44 335 F.2d at 343. The position that the protections of the "Bill of Rights" extend to all union members, including those who are also union officials, is not necessarily inconsistent with the view that union-officer and union-employee relationships are not protected by the provisions of Title I. Although union members do not forfeit their Title I rights when they become union officials, they do not acquire additional or expanded rights. Thus, reprisals which interfere solely with their status as officers or employees do not encroach directly upon the protections afforded by the "Bill of Rights."

mined that the legislative history did not reveal a congressional intent to deny Title I rights to officer- or employee-members.\footnote{335 F.2d at 343-44.}

The King court also found that section 609 prohibited the union from dismissing the grand lodge representatives for exercising their rights under Title I. While interpreting the phrase "otherwise discipline" in section 101(a)(5) as not including removal from union office, the court asserted that the same words in section 609 encompassed such removals.\footnote{Id. at 344-45. The court recognized that "it is natural to suppose that within a single statute the same words will be used with the same meaning." Nonetheless, it noted that identical words are commonly used with different meanings in the same statute. Id. at 344.} The court observed that Congress imposed a limiting gloss on the words "otherwise discipline" in section 101(a)(5) in order to preserve union power to summarily remove wrongdoing union officials.\footnote{See notes 41 and 42 and accompanying text supra.} Since section 609 is a general enforcement provision, not a guarantee of procedural due process rights like section 101(a)(5), imposing a similar restriction on section 609 would not further this legislative purpose. Finding that the legislative history did not reflect a congressional intent to preserve the right of unions to discipline their officials for exercising Title I rights, the court concluded that excluding removal from office as outside of the scope of section 609 would expose union officials to an effective weapon of reprisal without serving any apparent legislative purpose.\footnote{335 F.2d at 345. Noting that Congress expressly preserved the right of the membership to remove wrongdoing union officials, 29 U.S.C. § 481(h) (1970), the court distinguished this right from the power of controlling union officers to discharge subordinate officials for exercising their Title I rights. Id. at 345-46 & n.21.}

The King court emphasized that exposing officer- and employee-members to reprisal discharges would leave unprotected those members whose uninhibited exercise of freedom of speech and assembly is most important to the promotion of union democracy.\footnote{Id. at 345. The court also noted that union officials are best equipped to keep union government vigorously democratic. Id. at 344. See notes 96 and 97 and accompanying text infra.} Responding to the argument that elected union officers must have the power to discharge subordinate officials who express support for their opponents and to replace them with persons who are in accord with their views and will assist in carrying out the responsibilities of their positions, the court contended that this was tantamount to arguing that appointed officials must abstain from intra-union politics. Although recognizing that the "reason-
able rules and regulations" provisions of sections 101(a)(1) and 101(a)(2) might permit unions to require that appointed officials remain politically neutral in order to promote efficient administration, the King court noted that the defendant union had not established such a rule.51

In Wood v. Dennis,52 the president of a union division alleged that he was removed from his elected office for expressing his views concerning the rights of members of the union division, and for announcing his intention to become a candidate for the presidency of the entire union.53 A divided Seventh Circuit held that the allegations of the deposed officer stated a cause of action under sections 101(a)(2) and 609.54 The court endorsed the Ninth Circuit's analysis of the relevant legislative history and its conclusion that the words "otherwise discipline" should be interpreted differently in section 609 and 101(a)(5). Moreover, declaring that the legislative history did not suggest that union members forfeit their rights under Title I upon becoming union officials, the Seventh Circuit observed that reprisal discharges exerted a chilling effect on the exercise of membership rights and thereby undermined union democracy. Even though the president of the subsidiary union was not precluded from speaking out as a member, in the court's view, his freedom of speech had been impaired because

51 Id. at 346. The court analogized such rules to the Hatch Act, which forbids federal employees to engage in partisan politics. Id. Since the active participation of officer- and employee-members in union politics is needed in order to promote effective union democracy, however, it can be argued that requiring political neutrality as a condition of union employment violates the spirit of the LMRDA. See Note, supra note 5, at 606.

52 489 F.2d 849 (7th Cir. 1973), cert. denied, 415 U.S. 960 (1974).

53 Id. at 851-52. Lowry, the president of the Transportation-Communication Employees Union (TCEU) negotiated a merger of that union with the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC). The provisions of the merger agreement provided that the president of the Transportation-Communication Division of BRAC (T-C Division) would be elected independently by the members of the Division and that the Division would continue to handle its own affairs. Lowry later disagreed with Dennis, the president of BRAC, concerning the operation of the merger agreement. After Lowry informed Dennis that he intended to become a candidate for the presidency of BRAC in the next election, Dennis dismissed Lowry from his elected position as president of the T-C Division. Id.

54 Id. at 853. The court also held that several members of the subsidiary union who alleged that their voting rights were nullified by the removal of Lowry from office, did not have a cause of action under section 101(a)(1). The court rejected the view that the voting rights provisions of section 101(a)(1) are violated whenever an elected union officer is removed from his position. The court reasoned that the summary removal of union officials, which is permitted under section 101(a)(5), is inconsistent with the notion that union members have an absolute right to their elected officials. Furthermore, the court noted that there was no indication from the record that the removal of Lowry from office was designed to intimidate the membership. Id. at 857. See generally Schonfeld v. Penza, 447 F.2d 899 (2d Cir. 1973); notes 76-82 and accompanying text infra.
dismissal from office had reduced the effectiveness of his speech.\textsuperscript{55} The court distinguished \textit{Sheridan}\textsuperscript{56} on the ground that it involved the removal of a business agent from office by democratic vote of the union membership, whereas in \textit{Wood} the deposed official was simply discharged by his nominal superior.\textsuperscript{57} The \textit{Wood} court also distinguished \textit{Sewell},\textsuperscript{58} maintaining that only appointed officials, not elected officials, could be guilty of insubordination.\textsuperscript{59} Judge Stevens concurred in the result,\textsuperscript{60} but refused to adopt the statutory interpretation enunciated in \textit{King}.\textsuperscript{61} Focusing on the parallel between the language of sections 609 and 101(a)(5), Judge Stevens stated that if Congress had intended section 609 to have a broader scope than section 101(a)(5), it would have expressed this intent more clearly.\textsuperscript{62} Furthermore, while doubting that Congress intended to address the problem of patronage discharges when it enacted the LMRDA, Judge Stevens suggested that if Congress had considered the issue, it would have allowed appointed, policymaking officials to be removed by their superiors.\textsuperscript{63} Similarly, the dissenting judges argued that the legislative history of section 609 clearly revealed that Congress intended this section to be merely a general enforcement provision, not a guarantee of additional, substantive rights.\textsuperscript{64}

\begin{itemize}
\item \textsuperscript{55} 489 F.2d at 853-55.
\item \textsuperscript{56} See notes 14-23 and accompanying text supra.
\item \textsuperscript{57} 489 F.2d at 854. This distinction is explored in Part III A infra. The court also noted that Judge Kalodner's opinion in \textit{Sewell} was not supported by the other members of the panel, and that although Martire v. Laborers' Local 1058, 410 F.2d 32 (3d Cir. 1969), cert. denied, 396 U.S. 903 (1969), appeared to endorse his opinion, see note 16 supra, its holding actually was limited to section 101(a)(5). \textit{Id}. \\
\item \textsuperscript{58} See notes 24-31 and accompanying text supra.
\item \textsuperscript{59} 489 F.2d at 855-56. The court also indicated that it lacked the substantial, undisputed factual information which had enabled the Fifth Circuit to draw the fine distinction between free speech and insubordination in \textit{Sewell}. \textit{Id}. at 857-58. Judge Stevens agreed with the majority that the district court's dismissal of the complaint should be reversed and that the case should be remanded for further proceedings. Noting that the district court had refused to consider evidence tendered by the plaintiffs at a preliminary hearing, Judge Stevens indicated that additional acts of reprisal might constitute unlawful discipline. He also suggested that since the deposed official was elected rather than appointed, the controversy might come within the rationale of \textit{Schonfeld} v. Penza, 447 F.2d 899 (2d Cir. 1973). See notes 76-82 and accompanying text infra.
\item \textsuperscript{60} \textit{Id}. at 857-58. In a footnote, however, Judge Stevens observed that the risk of financial misconduct, which led Congress to impose a limiting gloss on § 101(a)(5), could be avoided by excluding only the temporary suspension of union officials, not their permanent removal from the coverage of this section. \textit{Id}. at 858 n.4.
\item \textsuperscript{61} See notes 40-51 and accompanying text supra.
\item \textsuperscript{62} 489 F.2d at 857-58. In a footnote, however, Judge Stevens observed that the risk of financial misconduct, which led Congress to impose a limiting gloss on § 101(a)(5), could be avoided by excluding only the temporary suspension of union officials, not their permanent removal from the coverage of this section. \textit{Id}. at 858 n.4.
\item \textsuperscript{63} 489 F.2d at 858. In a footnote, Judge Stevens also stated, "Since I do not believe Congress intended to address the patronage issue in this statute, I also doubt the validity of the implied exception permitting disciplinary discharges for insubordination." \textit{Id}. at 858 n.3.
\item \textsuperscript{64} 489 F.2d at 858-59. As the legislative history reveals, Congress did not discuss the meaning of the words "otherwise discipline" or whether § 609 applied to the removal of members from union office. Most of the debate over § 609 centered on the question
\end{itemize}
In *Gabauer v. Woodcock*, the chairman of a shop committee and a district committeeman alleged that they were summarily removed from their elected positions and deprived of their right to seek elective office because they had expressed their opposition to a strike and the subsequent imposition of a trusteeship on their local. Relying on *Wood* and *King* and their interpretation of the relevant legislative history, the Eighth Circuit held that section 609 protected union officials from being discharged for exercising rights protected under section 101(a)(2) and that the allegations of the deposed officials therefore stated a cause of action under those sections. The court also suggested that their allegations might state a cause of action under section 101(a)(5) on the ground that the deprivation of the right to seek elective union office affected their status as union members. Upon reviewing the record, however, the *Gabauer* court concluded that there was insufficient evidence to warrant sending either of these claims to a jury.

The Second Circuit also has apparently accepted the view that

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66 The allegations of the district committeeman were considered in a companion case, *Huskey v. UAW*, 520 F.2d 1096 (8th Cir. 1975), *cert. denied*, 423 U.S. 1061 (1976). Gabauer and Huskey wrote a letter to the vice-president of the union on April 1, 1969, informing him of their opposition to a strike by their local. After a trusteeship was imposed on their local in June, 1970, they distributed handbills to the membership criticizing the trusteeship. Gabauer and Huskey were summarily removed from office in late June, 1970. After a hearing on August 27th, they were convicted of financial improprieties and barred from seeking elective office. *Id.* at 1087-89.

67 520 F.2d at 1091.

68 520 F.2d at 1093-94. Following the weight of authority, the court held that Gabauer and Huskey did not have a cause of action under § 101(a)(5) by virtue of their summary removal from union office. The court noted, however, that the Second and Third Circuits had held that the summary deprivation of the right to seek elective union office created a cause of action under § 101(a)(5). *See* note 82 and accompanying text *infra*. Finding that there was insufficient evidence to support the allegations of Gabauer and Huskey that the hearing which resulted in the suspension of their eligibility for union office violated the due process provisions of § 101(a)(5), the court declined to decide this question. 520 F.2d at 1093-94.

69 *Id.* at 1092-94. Characterizing the allegations of Gabauer and Huskey as "pure speculation," the court found substantial evidence to support the union's contention that these officials were disciplined for refusing to comply with lawful directives from their superiors and for committing financial improprieties. The court also found that the plaintiffs were afforded due process within the meaning of § 101(a)(5) at the hearing which resulted in the suspension of their candidacy rights. *Id.*
reprisal discharges violate the LMRDA. In *Salzhandler v. Caputo*, the financial secretary of a local union was removed from his elected office and excluded from participation in union affairs for five years after a trial board convicted him of libeling Caputo, the local's president. Finding that section 101(a)(2) protected even libelous statements, the court held that the union could not lawfully subject Salzhandler to disciplinary action for expressing his opinions about the management of the union. Without discussing whether removal from union office constituted discipline within the meaning of section 609, the court enjoined the union from carrying out the sanctions imposed by the trial board.

In *Schonfeld v. Penza*, the Second Circuit directly addressed the question whether the removal of a union official from office could violate the LMRDA. Schonfeld was removed from his elected position as secretary-treasurer of a district council and barred from seeking elective office after a trial board found him guilty of mishandling a jurisdictional dispute with another union. Alleging that he was denied a fair hearing and that the charges had been brought against him solely for the purpose of suppressing opposition and dissent within the union, Schonfeld and several other members of the district council sought a preliminary injunction restraining his removal from office and preventing the holding

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70 316 F.2d 445 (2d Cir. 1963), cert. denied, 375 U.S. 946 (1963).
71 Salzhandler was barred from attending, speaking, and voting at union meetings, and from being a candidate for union office. Id. at 448.
72 Salzhandler had distributed leaflets accusing the local's president of larceny. Id. at 447.
73 The court stated that the LMRDA was designed to protect the rights of union members to discuss freely and to criticize the management of their union. The court also doubted the ability of union tribunals to distinguish between criticism and defamation. Id. at 448-50.
74 316 F.2d at 451. The court simply assumed that Salzhandler's removal from office was a form of discipline:

Freedom of expression would be stifled if those in power could claim that any charges against them were libelous and then proceed to discipline those responsible on a finding that the charges were false. That is precisely what Webman and the Trial Board did here when they punished Salzhandler with a five-year ban of silence and stripped him of his office.

Id. at 451 (emphasis supplied).
75 The court also indicated that Salzhandler was entitled to damages. Id. In *Sands v. Abelli*, 290 F. Supp. 677 (S.D.N.Y. 1968), a district court awarded Salzhandler compensatory damages for the loss of salary caused by his removal from office, damages for mental suffering and humiliation, exemplary damages, and attorney fees. Since his term of office had expired when the decision was rendered, the district court did not reinstate him to office. Furthermore, the district court declined to award him damages for the loss of his opportunity to seek reelection, regarding his prospects for electoral success as too speculative.
76 477 F.2d 899 (2d Cir. 1973).
77 The district council's trial board originally barred Schonfeld from seeking office for five years, but the executive board of the international union modified this part of his penalty, making him eligible to run in the next regular election, which was only three months away. Id. at 901.
78 The trial board found that Schonfeld had bypassed the district council's Agreement Committee in handling the jurisdictional dispute and that he had misrepresented the matter to the council's delegates. Id. at 901 n.1.
The court granted the preliminary injunction, finding that Schonfeld and the other members had stated claims under the LMRDA. Although the court held that the members had no cause of action under section 101(a)(1), it also held that in light of the peculiar history of factionalism in the district council, their allegations stated a cause of action under section 101(a)(2). The Schonfeld court stressed that its decision was limited to situations where the reprisals were part of "a purposeful and deliberate attempt by union officials to suppress dissent within the union." For similar reasons, the court held that Schonfeld had stated a claim under section 101(a)(2). Moreover, acknowledging that the restrictions on his eligibility for union office affected his status as a member, the court concluded that Schonfeld could challenge the fairness of his disciplinary proceeding under section 101(a)(5).

II. REPRISAL DISCHARGES AND UNION DEMOCRACY

Since the statutory language and legislative history of the LMRDA are ambiguous, the courts must examine the fundamental purposes of the legislation to determine whether union officials can be discharged for exercising rights protected under Title I.

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79 Schonfeld alleged that the charges were brought against him in retaliation for his efforts to make the district council more democratic. In a separate action, the members further alleged that the reprisals against Schonfeld constituted a form of intimidation of the membership. Id. at 901-03.

80 Id. at 902-03. The court concluded that this portion of the members’ complaint was governed by Calhoon v. Harvey, 379 U.S. 134 (1964), which held that unreasonable limitations on eligibility for union office violate the provisions of Title IV, not § 101(a)(1). Unlike Title I rights, the provisions of Title IV may be enforced only by the Secretary of Labor. 29 U.S.C. § 482 (1970).

81 477 F.2d at 903-04.


83 Noting that much of the LMRDA was written on the floor of the House and Senate and that the Act contains many calculated ambiguities or political compromises. Professor
gress enacted the LMRDA in order to curb corruption and to promote democracy in labor organizations.\(^8^4\) To encourage the development of internal union democracy, the LMRDA regulates union elections\(^8^5\) and trusteeships\(^8^6\) and guarantees union members certain fundamental rights.\(^8^7\) These provisions reflect the view that union democracy can flourish only where the members control the decisions which affect them and where the rights of individuals and minorities are protected.\(^8^8\) The LMRDA also reflects the belief that government interference in internal union affairs should be minimized to avoid undermining union self-government.\(^8^9\)

### A. Reprisal Discharges as a Threat to Union Democracy

Reprisal discharges may undermine internal union democracy by impairing or chilling the exercise of rights protected under Title I.\(^9^0\) Without the resources and prestige of union office, the effectiveness with which deposed union officials exercise Title I rights, especially the right to free speech, may be impaired.\(^9^1\) Further-

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\(^9^1\) See Wood v. Dennis, 489 F.2d 849, 855 (7th Cir. 1973), cert. denied, 415 U.S. 960 (1974); note 55 and accompanying text supra. In this case the court stated: suppression of freedom of speech is not limited to noninterference with vocalization. Rights of communication cannot be so restricted as to be meaningless . . . Lowry was possessed of an effective voice as an officer. It cannot be said that his freedom of speech as a member is unimpaired when that which made his speech effective is removed for improper disciplinary reasons. So long as their status as union members is not affected, however, deposed officials still
more, where removal from office entails significant hardships, deposed union officials may be discouraged from continuing to exercise their rights. Most importantly, reprisal discharges and threats of such discharges may exert a chilling effect on the exercise of protected rights because they present union officials with a "Hobson's choice," forcing them to choose between their Title I rights and their jobs. When confronted with such a situation, most union officials, in practice, will abstain from exercising their rights in order to keep their positions. In addition to the chilling effect on individual officials who are threatened with dismissal, there is a general chilling effect on the exercise of protected rights by other union officials and ordinary union members.

Any impairment or chilling of the exercise of Title I rights by union officers or employees is harmful to union democracy. Although union officials comprise only a small segment of the total membership, they play a crucial role in the promotion of union democracy. Besides being more knowledgeable about union affairs than most other members, union officers and employees usually have an almost complete monopoly over the formal means of enjoy the same Title I rights as other members. Moreover, it is questionable whether the LMRDA guarantees union officials the right to enhanced effectiveness in the exercise of Title I rights. Indeed, § 401 (c) and (g) is designed to prevent union officials from utilizing the advantages of incumbency during election campaigns. Also, union officials commit a fiduciary violation if they use the resources and prestige of union office to support activities which do not benefit the union, such as personal reelection campaigns. 29 U.S.C. § 501 (1970).

In addition to losing the salary and the prestige of union office, deposed union officials may suffer significant psychological trauma, particularly if they are ostracized by their fellow members. See generally Sands v. Abelli, 290 F. Supp. 677 (S.D.N.Y. 1968); Lipset, The Political Process in Trade Unions, A Theoretical Statement, in LABOR AND TRADE UNIONISM: AN INTERDISCIPLINARY READER 216, 221-25 (W. Galenson & S. Lipset eds. 1960).


The general chilling effect is most apparent when the reprisals are part of a deliberate campaign by the incumbent administration to silence opposition. See Schonfeld v. Penza, 477 F.2d 899 (2d Cir. 1973). Even where the disciplinary action is merely an isolated event, however, other officers and members are reminded of their vulnerability and are pressured into conforming with the prevailing norms of conduct. Nevertheless, it is doubtful that the courts will entertain a suit based on this general chilling effect, since deposed union officials do not have standing to litigate the Title I rights of other members. See Grove v. Glass Bottle Blowers Ass'n, 329 F. Supp. 337, 338 (W.D.Pa. 1971).
communication within their unions and the opportunities for learning political and organizational skills.\textsuperscript{96} Furthermore, since rank and file members often look to union officials for guidance because of the responsibility and the prestige of their positions, union officials have a greater responsibility to assert their Title I rights vigorously.\textsuperscript{97}

B. Reprisal Discharges as an Integral Part of Union Democracy

Despite their potentially harmful impact on the exercise of Title I rights, reprisal discharges of union officials may actually contribute to union democracy. Elected union officers must be able to discharge subordinate officials without cause in order to implement programs and policies which have been mandated by the union membership.\textsuperscript{98} Even in the absence of direct insubordination, the friction resulting when elected officers and their subordinates espouse opposing positions may impede the efficient implementation of the leadership's programs.\textsuperscript{99} Thus, unless elected officers are permitted to discharge their subordinates, entrenched union bureaucracies which are unresponsive to the membership may develop, and union elections will be rendered less meaningful.\textsuperscript{100} Furthermore, the ability of elected union officers to dispense appointive positions as a form of patronage helps promote vigorous union democracy. Patronage hiring practices may stimulate interest and participation by the membership in internal union politics, particularly on the local level.\textsuperscript{101} Also, they may assist insurgent


\textsuperscript{98} See Wambles v. International Bhd. of Teamsters, 488 F.2d 888, 889-90 (5th Cir. 1974) (per curiam). Despite imperfections in the electoral processes of some unions, see, e.g., Wirtz v. Hotel, Motel & Club Employees Union, 391 U.S. 492 (1968), in view of the democratic safeguards established by the LMRDA, courts are justified in presuming that elected officers receive a mandate from the membership to carry out certain programs.

\textsuperscript{99} Although subordinate officials who opposed the union leadership may become reconciled to the views of their superiors and continue to perform their duties properly, they may lack the dedication and enthusiasm of persons who are completely loyal to the elected officials. See generally Wambles v. International Bhd. of Teamsters, 488 F.2d 888, 889-90 (5th Cir. 1974) (per curiam).

\textsuperscript{100} Id. Indeed, subordinate officials might attempt to insulate themselves from accountability to the leadership by characterizing their actions as political opposition. Id. at 890. It has been argued that subordinate officials owe their loyalty to the union as an institution, and indirectly to the membership, rather than to individual leaders. See Note, supra note 5, at 594-96. This argument merely begs the question, however, since it does not determine who decides what the interests of the members are.

movements by enabling them to establish the political base needed
to successfully challenge incumbent union administrations.102

Finally, judicially imposed limitations on the power of elected
union officers to discharge their subordinates involve increased
government interference in internal union affairs, thereby weaken­
ing union self-government.103 By preventing the dismissal of cer­
tain union officials, the courts will directly affect the internal oper­
ations of unions. Moreover, whatever restrictions are imposed on
reprisal discharges, the courts will have to closely scrutinize inter­
nal union affairs in order to implement these limitations.104 Most
importantly, where union constitutions and bylaws permit reprisal
discharges, the courts will, in effect, be substituting their judgment
about such discharges for the views of union members.105

III. A SUGGESTED APPROACH

A. The Cause of Action

In deciding whether reprisal discharges violate the LMRDA, the
courts have considered several factors which are not particularly
helpful in resolving the issue. There is little justification for inquir­
ing whether the authority to discharge the union official was
explicitly granted or merely implied in the union constitution.106

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102 Successful insurgent movements often develop from a particular region, department,
or council in the union where the dissident group controls a certain amount of patronage and
is securely entrenched. See generally J. BARBASH, supra note 5, at 67, 96-99. For example,
the insurgent movement led by Walter Reuther in the UAW succeeded, in part, because it
developed from the powerful General Motors Department of the union. See E. CORMIER &

103 See note 89 and accompanying text supra.

104 At a minimum, the courts will have to ascertain the motivations behind the discharges.
Furthermore, if they attempt to distinguish between insubordination and political opposi­
tion, official and personal activities, or policymaking and nonpolicymaking officials, the
courts also will have to make determinations concerning the scope of union officials' duties
and the institutional interests of unions.

105 Judicial limitations on reprisal discharges will most conflict with the views of union
members where the dismissals result from a vote by the entire union membership. See, e.g.,
Sheridan v. United Bhd. of Carpenters Local 626, 306 F.2d 152 (3d Cir. 1962).

106 In analyzing reprisal discharges, several courts have noted that authority for the
discharges was expressly granted in the union constitution. See Wambles v. International
Bhd. of Teamsters, 488 F.2d 888, 889 (5th Cir. 1974) (per curiam); DeCampli v. Greeley, 293
(1970), provides, however, that provisions of union constitutions which are inconsistent
with the provisions of Title I are invalid. Therefore, if reprisal discharges violate Title I, the
presence of provisions in union constitutions authorizing such dismissals should be immate­
rial. Moreover, since unions may discipline their members for offenses not proscribed by
would be anomalous to require that they have specific constitutional provisions in order to
remove union officials from office. Finally, this distinction has little practical significance,
since unions can amend their constitutions to provide elected officers with the authority to
discharge subordinate officials.
Similarly, examining whether the deposed official was discharged for actions committed in an official or personal capacity, or whether the deposed official was discharged for intra-union political activities or for insubordination, is not very meaningful. To advance the fundamental purposes of the LMRDA, the courts should instead consider two crucial factors: the position occupied by the deposed official and the process by which the official was removed.

Reprisal discharges of elected officers are clearly inconsistent with union democracy. In addition to thwarting the electoral process, the dismissal of elected officers also chills the exercise of Title I rights by members who, due to their ability to marshal political support, play an especially important role in the promotion of vigorous union democracy. Since all elected officers receive a mandate from the membership, their dismissals cannot be rationalized as necessary to facilitate the implementation of programs and policies which have been mandated by the membership. Moreover, reprisal discharges of elected officers do not provide a mechanism for distributing patronage, since the positions must ultimately be filled by election. While judicial limitations on reprisal discharges of elected officers will increase government interference in internal union affairs, this consideration is not sufficient to justify such dismissals.

Reprisal discharges of appointed officials, on the other hand, are more compatible with union democracy than reprisal discharges of elected officers. Although the dismissal of appointed officials may produce a chilling effect on their exercise of Title I rights, this poses less of a threat to union democracy than a chilling effect on

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107 See Sheridan v. United Bhd. of Carpenters Local 626, 306 F.2d 152, 165 (3d Cir. 1962) (McLaughlin, J., dissenting). This distinction is artificial because the prestige of union office or employment attaches to all activities of union officials. 306 F.2d at 157-58.
108 See Sewell v. Grand Lodge, Int'l Ass'n of Machinists, 445 F.2d 545, 550-52 (5th Cir. 1971), cert. denied, 404 U.S. 1024 (1972). Since union officials are often called upon to advocate the programs and policies that the leadership seeks to implement, it is not always possible to distinguish clearly between insubordination and political opposition. See Note, supra note 5, at 570-71, 593-97. It might be possible to distinguish between officials who are discharged for exercising rights protected under § 101(a)(2) rather than rights protected by § 101(a)(4) on the ground that the former are more important to the realization of a vigorous democracy. Since most actions involve § 101(a)(2), however, this distinction would be of limited utility.
109 Cf. Retail Clerks Local 648 v. Retail Clerks Int'l Ass'n, 299 F. Supp. 1012, 1021 (D.D.C. 1969) (members holding responsible offices in labor organizations can best marshal the political support needed to challenge incumbent administrations). See also notes 96 and 97 and accompanying text supra.
110 See notes 98-100 and accompanying text supra. There is less danger that elected officers will form an entrenched bureaucracy, since they must always stand for reelection.
111 See notes 101 and 102 and accompanying text supra.
112 See notes 103-105 and accompanying text supra.
the exercise of protected rights by elected officers. Furthermore, reprisal discharges of appointed officials may be necessary to prevent the development of entrenched union bureaucracies which would obstruct the implementation of policies and programs mandated by the membership. Reprisal discharges of appointed officials may also be justified on the ground that they are an integral part of the patronage system in unions. Finally, any judicial limitations on the dismissal of appointed officials will conflict with the ideal of union self-government.

Regardless of the position occupied by the deposed official, reprisal discharges which result from a vote by the entire membership are consistent with union democracy. Where a single officer orders the dismissal, there is always a potential danger that the discharge is motivated by personal or political animosity rather than concern for the welfare of the union. This potential danger also exists where the dismissal is ordered by a trial board. Although trial boards may follow quasi-judicial procedures which give their decisions an aura of legitimacy, they may be controlled

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113 Appointed officials play a more important role in promoting union democracy than do ordinary members. See notes 96 and 97 and accompanying text supra. Nevertheless, appointed officials usually do not command the same respect among union members as elected officers and, therefore, have a lesser obligation to assert their rights vigorously. See notes 97 and 109 and accompanying text supra.

114 See notes 99 and 100 and accompanying text supra. Appointed officials will often be in a position to obstruct the implementation of policies and programs ordered by the union leadership. Moreover, since appointed officials never have to stand for election, they need not be responsive to the interests of the membership.

115 See notes 7, 101, and 102 and accompanying text supra.

116 See notes 103-105 and accompanying text supra. Analogizing to the Supreme Court’s decision in Elrod v. Burns, 427 U.S. 347 (1976), see note 38 supra, it can be argued that reprisal discharges for nonconfidential, nonpolicymaking union employees should be prohibited by the LMRDA. The Burns decision was based in part on the premise that nonconfidential, nonpolicymaking government employees would seldom be in a position to thwart the goals of their superiors, 427 U.S. at 367. In contrast, many nonconfidential, nonpolicymaking union employees, such as staff representatives, play crucial roles in implementing union policies and will often be in positions to obstruct the programs of elected officers whom they oppose. See Joseph, The Role of the Field Staff Representative, 12 INDUS. & LAB. REL. REV. 353, 355, 364 (1959). See generally Wambles v. International Bhd. of Teamsters, 488 F.2d 888, 889-90 (5th Cir. 1974) (per curiam). A stronger argument can be made that reprisal discharges of ministerial union employees should violate the LMRDA. Employees who perform ministerial tasks, such as clerical or maintenance personnel, will rarely be able to interfere with the implementation of policies mandated by the membership. To apply this distinction, however, the courts would have to consider the precise status of the deposed officials in every case. Since few ministerial employees are members of the unions for whom they work, see Note, supra note 5, at 569 n.28, this judicial intrusion into internal union affairs would undermine union democracy more than it would promote it.

by a single, dominant union officer. Where the decision to remove a union official is made by a vote of the entire membership, however, even if the membership acts from improper motives, the discharge reflects a democratic consensus. The conflicting decisions of the Courts of Appeal can generally be reconciled if they are analyzed in terms of these two factors. With the exception of King, all of the decisions finding that reprisal discharges violate the LMRDA have involved the dismissal of elected union officers. On the other hand, the decisions finding that reprisal discharges are not prohibited by the LMRDA have involved either the dismissal of appointed officials or the removal of an elected officer by a vote of the entire membership.

B. Procedure

If the protections of Title I and section 609 extend to some union officials, the courts must decide what standard should be used in determining whether discharges are actually retaliatory and how the burden of proof should be allocated. There are several standards which could be used in determining whether dismissals of union officials constitute unlawful reprisals. One approach would find that discharges of union officials violate the LMRDA whenever they are motivated "in any substantial degree" by the exercise of Title I rights. Under this test, even if there were

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119 See Sheridan v. United Bhd. of Carpenters Local 626, 306 F.2d 152 (3d Cir. 1962); Russo v. Local 676, United Ass'n of Plumbing & Pipelining Indus., 372 F. Supp. 1265, 1268 (D. Conn. 1974). Although a membership vote would not legitimize reprisals directed at union members, it does not necessarily follow that a membership vote cannot legitimize the retaliatory dismissal of a union official. Membership rights derive from the LMRDA, and are therefore "inalienable." In contrast, the privilege of holding office derives from the membership, who can withdraw their consent at any time. This distinction is recognized in § 401(h), 29 U.S.C. § 481(h) (1970), which gives union members the right to recall their officials.
120 See notes 52-82 and accompanying text supra. Although King involved the dismissal of appointed grand lodge representatives, the decision of the Ninth Circuit may have been influenced by the fact that they were removed from office by the unilateral decision of a political opponent. See notes 40-51 and accompanying text supra. But see note 109 supra.
121 See notes 24-39 and accompanying text supra.
122 See notes 14-23 and accompanying text supra.
123 As used in this article, the term "burden of proof" means the "production burden" rather than the "persuasion burden." See generally C. McCORMICK, EVIDENCE § 336 (2d ed. 1972).
124 Once a violation of Title I or § 609 is established, aggrieved officials should be entitled to the panoply of remedies normally available under these sections, including injunctions, compensatory damages, and attorney's fees. See Hall v. Cole, 412 U.S. 1 (1973); Simmons v. Avisco, Local 713, Textile Workers, 350 F.2d 1012, 1018-19 (4th Cir. 1965); McCraw v. Plumbers, 341 F.2d 705, 710 (6th Cir. 1965); 29 U.S.C. § 412 (1970).
125 See Retail Clerks Local 648 v. Retail Clerks Int'l Ass'n, 299 F. Supp. 1012, 1020 (D.D.C. 1969); Note, supra note 5, at 609.
justifiable grounds for discharge, such as incompetence or malfeasance, a union official would still be entitled to relief so long as one reason for his discharge was the exercise of protected rights. 126 Another approach would find that dismissals of union officials violate the LMRDA only when they would not have been discharged "but for" the exercise of Title I rights. 127 This standard would accord greater weight to the legitimate institutional interests of unions by denying relief to deposed officials whenever there was a justifiable ground for the discharge. 128 A third approach would balance the various motivations behind dismissals of union officials, finding a violation of the LMRDA whenever the predominant motivation was the exercise of Title I rights.

Since plaintiffs generally have the burden of proof in actions arising under Title I and section 609, deposed union officials should be required to demonstrate that their dismissals were retaliatory. When the circumstances strongly suggest that a union official was discharged for exercising Title I rights, such as a dismissal occurring shortly after a union election, 129 it may be appropriate to shift the burden to the union by establishing a rebuttable presumption that the discharge was unlawful. 130 In addition to recognizing the likelihood that the dismissal constitutes a reprisal for the exercise of Title I rights, the establishment of such a presumption would reflect the fact that the union usually has better access to the relevant information. 131

IV. CONCLUSION

The federal courts are divided over whether reprisal discharges of union officials violate the provisions of the LMRDA. The statutory language, legislative history, and fundamental purposes of the LMRDA lend support to both positions. In deciding whether

127 See generally Leslie, supra note 10, at 1326.
128 In applying a "but for" standard, the courts would have to scrutinize the institutional justifications offered by unions in order to ensure that they were not fabricated for the purpose of avoiding liability.
129 Where there is a history of factionalism in the union, see Schonfeld v. Penza, 477 F.2d 899 (2d Cir. 1973), it may also be proper to shift the burden of proof to the union.
130 See Retail Clerks Local 648 v. Retail Clerks Int'l Ass'n, 299 F. Supp. 1012, 1019 (D.D.C. 1969); Note, supra note 5, at 608.
131 See generally C. McCORMICK, EVIDENCE § 343 (2d ed. 1972).
reprisal discharges violate the LMRDA, the courts should focus on two factors: the position occupied by the deposed official and the process by which the official was removed from office. The courts should adopt the positions that elected officers cannot be removed from office for exercising protected rights, except by vote of the membership, but appointed officials may be discharged for any reason. The courts will then have to resolve the problems of formulating procedures for implementing this principle.

—Alan V. Reuther