

LAW REVIEW¹ 12053

May 2012

Military Power of Attorney: A Copy is *Not* Just as Good as an Original

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

5.5—Other Military Service and Family Obligations

Bartholomew v. Blevins, No. 10-6352 (6th Cir. May 17, 2012).

(a) Instruments To Be Given Legal Effect Without Regard to State Law.— A military power of attorney—

(1) is exempt from any requirement of form, substance, formality, or recording that is provided for powers of attorney under the laws of a State; and

(2) shall be given the same legal effect as a power of attorney prepared and executed in accordance with the laws of the State concerned.

¹I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

²BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

(b) Military Power of Attorney.— For purposes of this section, a military power of attorney is any general or special power of attorney that is notarized in accordance with section 1044a of this title or other applicable State or Federal law.

(c) Statement To Be Included.—

(1) Under regulations prescribed by the Secretary concerned, each military power of attorney shall contain a statement that sets forth the provisions of subsection (a).

(2) Paragraph (1) shall not be construed to make inapplicable the provisions of subsection (a) to a military power of attorney that does not include a statement described in that paragraph.

(d) State Defined.— In this section, the term “State” includes the District of Columbia, the Commonwealth of Puerto Rico, and a possession of the United States.³

Congress enacted section 1044b of title 10 as part of the National Defense Authorization Act (NDAA) for Fiscal Year 1994. Public Law No. 103-160, section 547, 107 Stat. 1547 (1993). The House Armed Services Committee (HASC) Report that accompanied the legislation described this section’s purpose as follows:

The past experience of service members and their dependents who executed powers of attorney in advance of recent military operations has shown that some states and territories have refused to honor these powers of attorney because they were not executed in accordance with state or territorial legal requirements. The failure to honor these documents has created substantial hardships for military families.

This section would provide that a power of attorney signed by a person authorized to receive [military] legal assistance and notarized by a person authorized under section 1044a of title 10, United States Code, to perform notarial acts shall be recognized as valid and given full effect by those to whom such a power of attorney is presented.⁴

Latonya Bartholomew is on active duty in the United States Air Force. She executed a military power of attorney (MPOA) designating her husband (Lyndon Bartholomew) as her attorney-in-fact during her overseas deployment. In March 2010, Lyndon presented a *photocopy* of the MPOA to the Fayette County (Kentucky) Clerk’s Office for the purpose of recording an original deed and mortgage in the county’ real property index records. The clerk’s office rejected the copy as inauthentic and refused to record the deed and mortgage. As a result of the inability to record the deed and mortgage, the Bartholomews breached a loan agreement with a lender, resulting in inability to refinance or sell the property.

³Title 10, United States Code, section 1044b (10U.S.C> 1044b).

⁴H.E. Rep. No. 103-200, at 286 (1993).

The Bartholomews sued the clerk in the United States District Court for the Eastern District of Kentucky, seeking a preliminary injunction requiring the clerk to accept a copy of the MPOA in lieu of the original. District Judge Joseph M. Hood declined to grant the injunction, ruling that 10 U.S.C. 1044b did not require the clerk to accept a copy. The Bartholomews filed a petition for a writ of mandamus with the United States Court of Appeals for the Sixth Circuit.⁵ A motions panel of the 6th Circuit denied the Bartholomews' request for a writ of mandamus in January 2011, but the Bartholomews continued their appeal.

With the assistance of a military legal assistance attorney, Latonya Bartholomew prepared and signed a new MPOA original and sent it to her husband. He received it and used it to record the deed in April 2011. The clerk then asked that the appeal be dismissed as moot. In August 2011, a 6th Circuit motions panel denied that motion, because the Bartholomews sought compensatory and punitive damages and injunctive relief.

In our federal appellate system, an appeal from a federal district court is heard by a three-judge panel of the appropriate circuit. On May 17, 2012 the panel decided this case by a 2-1 vote. The majority held that 10 U.S.C. 1044b does not require a government official to accept a *copy* of a military power of attorney. There are two more steps in the federal appellate process, if the Bartholomews choose to pursue them. They can ask the 6th Circuit for rehearing *en banc*. If that request is granted, there will be new briefs and new oral arguments, and all of the active judges of the 6th Circuit (those who have not taken senior status) will hear and decide the case.

If the Bartholomews choose to bypass asking for rehearing *en banc*, or if the 6th Circuit denies the *en banc* request, or if the 6th Circuit grants rehearing *en banc* and then affirms the panel decision, then the Bartholomews can petition the United States Supreme Court for a writ of *certiorari* (discretionary review). If four or more of the nine justices vote for *certiorari*, the case will be heard by the Supreme Court during the term that starts in October 2012. If fewer than four justices vote for *certiorari*, the case then becomes final. We will keep the readers informed of future developments (if there are any) in this important case.

I hope that Congress will amend 10 U.S.C. 1044b to make clear that a copy of an MPOA is just as good as an original. In the meantime, what we can learn from this case is that before deploying the service member should execute multiple signed and notarized *originals* of the MPOA.

If you are at sea or in a place like Afghanistan, either as a mobilized reservist or as a regular, life at home does not stop while you are gone, but you may be out of easy communication for days or weeks at a time, and when you are deployed to the tip of the spear you should be devoting your full time and attention to your military duties. Your spouse or some other trusted person will need a power of attorney to act on your behalf during your absence. I urge you to ensure

⁵The 6th Circuit is the federal appellate court that sits in Cincinnati and hears appeals from district courts in Kentucky, Michigan, Ohio, and Tennessee.

that the person who will be acting in your behalf has multiple original powers of attorney, properly signed and executed and drafted, to facilitate this process.

Preparing powers of attorney, wills, and other important documents is part of the principal day-to-day activity of military legal assistance offices. If you are the commanding officer of a National Guard or Reserve unit that will be mobilizing, please make arrangements for a legal assistance attorney, or possibly a team of legal assistance attorneys, to advise members of your unit and to prepare and execute these important documents, during the weeks leading up to mobilization. I have heard of instances where judge advocates (reserve and active) have been tasked to prepare these documents on card tables on the tarmac of the airport, for service members who are about to board the aircraft to fly to Southwest Asia. I submit that this process works much better when it is not done in such a rushed manner.

UPDATE—JANUARY 2019

This case has been officially published. The citation is *Bartholomew v. Blevins*, 679 F.3d 497 (6th Cir. 2012). The Bartholomews did not apply for rehearing en banc in the 6th Circuit, nor did they apply to the Supreme Court for certiorari (discretionary review). This case became final years ago.

For more information about this case and about military powers of attorney, please see Law Review 19007 and Law Review 19010 (January 2019).

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ROA is almost a century old—it was established on 10/1/1922 by a group of veterans of “The Great War,” as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For almost a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs.

Through these articles, and by other means, including amicus curiae (“friend of the court”) briefs that we file in the Supreme Court and other courts, we educate service members, military spouses, attorneys, judges, employers, DOL investigators, ESGR volunteers, congressional and state legislative staffers, and others about the legal rights of service members and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

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If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

Reserve Organization of America
1 Constitution Ave. NE
Washington, DC 20002

⁶Congress recently established the United States Space Force as the 8th uniformed service.