

Section 1044b of Title 10 Requires Local Governments To Accept and Act upon Military Powers of Attorney

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

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Q: I am a Captain in the Army Reserve and a member of the Reserve Organization of America.³ I have read with great interest several of your “Law Review” articles about the Uniformed

¹ I invite the reader’s attention to www.roa.org/lawcenter. You will find more than 1700 “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 (ROA) initiated this column in 1997. I am the author of more than 1500 of the articles.

² BA 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 42 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.

³ At its September 2018 annual convention, the Reserve Officers Association amended its Constitution to make all service members (E-1 through O-10) eligible for membership and adopted a new “doing business as” (DBA) name: Reserve Organization of America. The full name of the organization is now the Reserve Officers Association DBA the Reserve Organization of America. The point of the name change is to emphasize that our organization represents the interests of all Reserve Component members, from the most junior enlisted personnel to the most senior officers. Our nation has seven Reserve Components. In ascending order of size, they are the Coast Guard Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard, the Army Reserve, and the Army National Guard. The number of service members in these seven components is almost equal to the number of

Services Employment and Reemployment Rights Act (USERRA) and other laws that are especially pertinent to those who serve our country in uniform.

A year ago, I volunteered to return to active duty for a period of three years, and that period may be extended. I am currently serving at a classified location in Southwest Asia. Because of security considerations and the press of my military duties, I am incommunicado, sometimes for weeks at a time.

When I returned to active duty a year ago, I got a military legal assistance attorney to draft for me a military general power of attorney, naming my mother as my “attorney-in-fact” and giving her the authority to make any decision or take any action that I could take or make if I were present. The power of attorney was drafted, signed, executed, and notarized in accordance with sections 1044, 1044a, and 1044b of title 10 of the United States Code. The military legal assistance attorney told me that this power of attorney was valid in any U.S. state, territory, possession, or the District of Columbia.

I own a house and an acre of land in my home town, and the property is currently leased by another family, during my active duty service. Like most counties in the United States, my county imposes a tax on real property (land and buildings). The tax is a percentage of the “assessed value” of the property—supposedly what a buyer would be willing to pay if I were to put the property on the market.

Three months ago, while I was on active duty and deployed overseas, the county tax assessor raised the assessed value of my house and land by 50%. I think that a buyer would not pay the assessed value even before the recent increase. The county tax assessor apparently does not know or has chosen to ignore that my property is only a few feet above sea level and is located only a few feet from a quiet little creek that can become a raging flood after a torrential downpour. Three times in the last 20 years my house has been flooded. I did not know about the flooding issue when I bought the property five years ago, but I became aware of it three years ago when my house flooded in the aftermath of a major hurricane.

The county tax assessor has pointed to three nearby properties that recently sold at high prices, claiming that they are “comparable” to my property. The tax assessor wants to ignore that those houses were at least 200 feet higher in altitude and 300 feet farther from the creek. I think that those houses and properties are not “comparable” at all.

personnel in the Active Components of the armed forces, so Reserve Component personnel make up almost half of our nation’s pool of trained and available military personnel. Our nation is more personnel make up almost half of our nation’s pool of trained and available military personnel. Our nation is more dependent than ever before on the Reserve Components for national defense readiness. Almost a million Reserve Component personnel have been called to the colors since the terrorist attacks of 9/11/2001.

My mother told me about the increased assessment on my property. I asked her to appeal the increase in the assessment, and she did so, using the general power of attorney. The county tax assessor rejected her appeal, without even considering it, because I (as the property owner) did not file the appeal myself, in person.

My mother provided the county tax assessor a copy of your Law Review 19007 and told him that federal law (10 U.S.C. 1044b) requires him to accept the military power of attorney as valid. He said that he is not questioning the “validity” of the power of attorney, but that neither federal law nor state law requires him to accept a power of attorney. He said that the policy of his office, going back for at least five decades under his seven most recent predecessors in the office, has been not to accept a power of attorney under any circumstances. A property owner who does not show up in person to contest an increase in the assessed value of his or her property, for whatever reason, loses the right to appeal and must pay the property tax based on the higher assessment.

It seems to me that accepting the power of attorney as “valid” in an academic sense but refusing to let my mother proceed with the appeal based on the power of attorney makes a mockery of the federal law. What do you think?

Answer, bottom line up front:

While section 1044b of title 10 does not explicitly overrule the common law rule that a person or entity is not required to deal with an attorney-in-fact for a person who is unable or unwilling, for whatever reason, to appear in person, section 1044b can be reasonably read to require that result. Congress does not ordinarily enact statutes that have only an academic effect, rather than a practical effect.

Explanation

Title 10 of the United States Code provides:

- (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.**
- (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.⁴

Section 1044b was enacted as part of the National Defense Authorization Act (NDAA) for Fiscal Year 1994.⁵ The House Armed Services Committee explained the purpose and intended effect of this section 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 and 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.*⁶

It is the failure of governmental officials and others to honor the military power of attorney that causes the severe problems that Congress sought to address by enacting section 1044b. Acknowledging the validity of the military power of attorney but then refusing to act upon it as a matter of policy helps the service member not one iota. Interpreting section 1044b to require a governmental agency to accept the military power of attorney as valid *and to act upon it* is the most reasonable interpretation of section 1044b.

Although section 1044b was enacted more than a quarter century ago, there is still only one published appellate court decision construing it.⁷ In that case, the federal appellate panel held: "Because section 1044b serves a remedial purpose, it 'should be construed broadly to effectuate

⁴ 10 U.S.C. 1044b (emphasis supplied). The citation refers to section 1044b of title 10 of the United States Code. Section 1044b should not be confused with section 1044(b), which is subsection (b) of section 1044. Sections 1044a and 1044b are separate sections that come after section 1044 and before section 1045.

⁵ Section 547, Public Law 103-160, 107 Stat. 1547 (1993).

⁶ H.R. Rep. No. 103-200, at page 286 (1993) (emphasis supplied).

⁷ *Bartholomew v. Blevins*, 679 F.3d 497 (6th Cir. 2012). This is a decision of the United States Court of Appeals for the Sixth Circuit, the federal appellate court that sits in Cincinnati and hears appeals from district courts in Kentucky, Michigan, Ohio, and Tennessee. The citation means that you can find this decision in Volume 679 of *Federal Reporter Third Series*, starting on page 497.

its purposes.”⁸ More than 75 years ago, the Supreme Court held: “The Soldiers’ and Sailors’ Civil Relief Act⁹ is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation.”¹⁰ Just three years later, the Supreme Court held that a similar liberal construction is required of the Veterans’ Reemployment Rights Act (VRRA), which was enacted in 1940: “This legislation [the VRRA] is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need.”¹¹ Like the veterans’ reemployment statute and the civil relief statute for service members, section 1044b must be liberally construed to make the protection of service members effectual and not merely academic.

Section 1044b is one of several statutes that Congress has enacted with the overarching purpose of protecting the rights of service members while they serve, so that they can devote their full attention to their military service, especially when deployed to a combat zone.¹² This is a safety issue, for the individual service member and for his or her colleagues in arms. If I am in the foxhole next to Josephine Smith, I should not have to worry that she is not paying full attention to her sector of the perimeter because she cannot put out of her mind her intense worry about family, employment, and business issues back home.

The *Bartholomew* case involves interesting and instructive facts. Latonya Bartholomew was on active duty in the Air Force, serving overseas. In accordance with section 1044b of title 10, she executed a military general power of attorney designating her husband (Lyndon Bartholomew) as her attorney-in-fact and giving him the authority to make any decision or take any action that she would be able to do if present. In March 2010, Lyndon sought to use a *photocopy* of the power of attorney to record an original deed and mortgage in the real property index records of Fayette County, Kentucky. The county clerk refused to accept the photocopy of the power of attorney.

The Bartholomews sued the county clerk in the United States District Court for the Eastern District of Kentucky, seeking an injunction requiring the county clerk to accept and act upon the photocopied power of attorney. District Judge Joseph M. Hood, in an unpublished decision, declined to issue the injunction, holding that section 1044b did not require the clerk to accept a copy.

With the assistance of a military legal assistance attorney, Latonya signed a new military general power of attorney and sent it to her husband. In April 2011, he used the new, original power of

⁸ 679 F.3d at 500, citing *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) and *In re Carter*, 553 F.3d 979, 985 (6th Cir. 2009). The *Tcherepnin* case is a decision of the United States Supreme Court, and it can be found in Volume 389 of *United States Reports*, starting on page 332. The specific language cited can be found on page 336.

⁹ In 2003, Congress and President George W. Bush enacted the Servicemembers Civil Relief Act (SCRA) as a long-overdue rewrite and update of the Soldiers’ and Sailors’ Civil Relief Act, which was originally enacted in 1917, shortly after our country entered World War I.

¹⁰ *Boone v. Lightner*, 319 U.S. 561, 575 (1943).

¹¹ *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

¹² Please see Law Review 135 (April 2005).

attorney to record the deed and mortgage, but this was too late to avoid a substantial financial penalty.

The Bartholomews appealed to the United States Court of Appeals for the Sixth Circuit, and (as in all appellate cases in our federal court system) the case was assigned to a three-judge panel. In a 2-1 decision, the panel held that the *photocopy* of the military power of attorney was not just as good as the original and that section 1044b did not require the county clerk to accept a photocopy.¹³

The 6th Circuit majority decision accepted that the county clerk was required to accept *and act on* a properly signed and notarized military power of attorney.¹⁴ If all the county clerk was required to do was to “accept” that the Bartholomew military power of attorney was “valid” in an academic sense but was not required to act on it, the District Court and the Court of Appeals could have disposed of this case very quickly and easily.

Q: I would prefer not to burden my mother with this problem while I am deployed. Can I wait until I return home to bring a legal action challenging the tax assessor’s increase in the assessed value of my home and property? Is there a statute of limitations for bringing such an action, and is that limited period running while I am on active duty and deployed overseas?

A: The deadline for you to bring your legal action is tolled (stops running) during the entire time that you are on active duty, even when you are serving within the United States. The Servicemembers Civil Relief Act (SCRA) provides:

Tolling of statutes of limitation during military service. The period of a servicemember's military service may not be included in computing any period limited by law, regulation, or order for the bringing of any action or proceeding in a court, or in any board, bureau, commission, department, or other agency of a State (or political subdivision of a State) or the United States by or against the servicemember or the servicemember's heirs, executors, administrators, or assigns.¹⁵

The statute of limitations can be tolled for many years, in the case of a career active duty service member.¹⁶

¹³ Because of the *Bartholomew* precedent, I strongly suggest that when you visit a military legal assistance attorney you should obtain at least ten *signed and notarized originals* of the power of attorney.

¹⁴ *Bartholomew*, 679 F.3d at 500.

¹⁵ 50 U.S.C. 3936(a).

¹⁶ See *Conroy v. Aniskoff*, 507 U.S. 511 (1993). I discuss that case in detail in Law Review 09008 (February 2009).