

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**APPELLANT’S BRIEF ON
SPECIFIED ISSUES**

v.

Docket No. ARMY 20220195

Private First Class (E-3)

GLEN R. SPITZ,
United States Army,

Appellant

Tried at Fort Riley, Kansas, on 16
December 2021 and 19 April 2022,
before a general court-martial
convened by the Commander,
Headquarters, 1st Infantry Division,
Colonel Steven C. Henricks, military
judge, presiding.

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

On 20 March 2023, this court ordered appellant to submit a brief on the
following issues:

I.

**HOW, IF AT ALL, DO THE PRINCIPLES OF
STATUTORY INTERPRETATION AND
JUDICIAL NOTICE GOVERN WHAT
INFORMATION THIS COURT MAY CONSIDER,
AND HOW MUCH WEIGHT WE GIVE IT, IN
DETERMINING WHETHER THE RECORDS
MAINTAINED IN MILITARY JUSTICE ONLINE
ARE ADMISSIBLE AT SENTENCING UNDER
R.C.M. 1001(b)(2)?**

Statutory interpretation is, simply put, the process by which a court
interprets a statute. *See generally*, Larry M. Eig, Cong. Rsch Serv., 97-589,
Statutory Interpretation: General Principles and Recent Trends (2014) [Statutory

Interpretation]. To interpret a statute, a court always begins “with the language of the statute.” *United States v. McPherson*, 73 M.J. 393, 395 (C.A.A.F. 2014). The first step is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. *Id.* This court’s analysis includes the language of the statute itself, the context of the language, and the greater context of the larger statute to determine whether its language is ambiguous. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). Each word in a statute is given its “ordinary, contemporary, and common meaning.” *United States v. Andrews*, 77 M.J. 393, 400 (C.A.A.F. 2018). The inquiry ceases if the statutory language is unambiguous, and the statutory scheme is coherent and consistent. *McPherson*, 73 M.J. at 395. Only when statutory language is ambiguous do courts use a variety of interpretive models, or canons, to construe a statute. *See* Statutory Interpretation.

Military Rule of Evidence [Mil. R. Evid.] 201, which addresses judicial notice of adjudicative facts, was imported from its civilian federal counterpart and permits a military judge to “judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known universally, locally, or in the area pertinent to the event; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.”

Examples of such facts are the ordinary division of time into years, weeks, months, and days; general facts of history; general facts of science; and “facts . . . so generally known . . . in the area in which the trial is held that they cannot be reasonably be the subject of dispute.” Mil. R. Evid. 201 analysis at A22-4, A22-5 (2016 ed).

Rule for Courts-Martial [R.C.M.] 1001 is not a congressionally enacted statute, but rather a rule promulgated by the President pursuant to his authority under Article 36(a), Uniform Code of Military Justice, 10 USC § 836(a). Nevertheless, traditional rules of statutory interpretation, as outlined in *McPherson*, are the appropriate mode for this court to interpret R.C.M. 1001(b)(2). The rule is promulgated pursuant to a statute, and its interpretation is subject to de novo review. *See United States v. Edwards*, 82 M.J. 239, 243 (C.A.A.F. 2022) (holding interpretation of R.C.M. 1001A is a question of law reviewed de novo). Use of the *McPherson* analysis provides consistency in this court’s interpretative analysis of both statutes and rules. Accordingly, this court should first look to the “ordinary, contemporary, and common meaning” of each word of R.C.M. 1001(b)(2), the context of the language within the rule, and the context of the rule itself.

Judicial notice should not govern whether records maintained in Military Justice Online [MJO] are admissible at sentencing under R.C.M. 1001(b)(2).

Records of nonjudicial punishment [NJP] under Article 15, Uniform Code of Military Justice [UCMJ], are not of such general or universal knowledge that they merit judicial notice. *See* Mil. R. Evid. 201 analysis at A22-4, A22-5 (2016 ed.).

Moreover, this court should not permit judicial notice, which obviates standard requirements of formal proof, to be used as a procedure to dispense with establishing the government’s presentencing case. *United States v. Williams*, 3 M.J. 155, 157 (C.M.A. 1977). Military justice offices are dissimilar to the traditional sources of information that may be judicially noticed. *See United States v. Brown*, 33 M.J. 706, 709 (A.C.M.R. 1991) (finding “treatises [and] scientific journals” to be type of sources “whose accuracy cannot reasonably be questioned” for purposes of M.R.E. 201(b)).

II.

IS MILITARY JUSTICE ONLINE IDENTIFIED AS A SYSTEM OF RECORD KEEPING IN THE ARMY RECORDS INFORMATION MANAGEMENT SYSTEM? IN WHAT WAY, IF ANY, DOES THE IDENTIFICATION OR LACK OF IDENTIFICATION OF MILITARY JUSTICE ONLINE AS A SYSTEM OF RECORD KEEPING IMPACT THIS COURT’S LEGAL DETERMINATION WHETHER NONJUDICIAL PUNISHMENT RECORDS CAN THEREBY BE PROPERLY “MAINTAINED” IN ACCORDANCE WITH ARMY REGULATION 27-10 IN MILITARY JUSTICE ONLINE FOR PURPOSES OF ADMISSION UNDER R.C.M. 1001?

Military Justice Online is not identified as a system of record keeping in the Army Records Information Management System [ARIMS], nor in AR 25-400-2, nor is it identified as a component of the ARIMS.

Rule for Courts-Martial 1001(b)(2) permits trial counsel, under regulations of the Secretary of the Army, to “obtain and introduce from the personnel records of the accused evidence of . . . punishments under Article 15. “‘Personnel records of the accused’ includes any records made or maintained in accordance with departmental regulations that reflect the past military efficiency, conduct, performance, and history of the accused.” R.C.M. 1001(b)(2).

Personnel records are defined as “a collection of documents maintained as a single entity that pertains to the military career of a particular Soldier.” Army Reg. 600-8-104, Army Military Human Resource Records Management, section II, (April 2014) [AR 600-8-104]. The Army Military Human Resource Record [AMHRR] is the “permanent, historical, and official record of a Soldier’s military service.” *Id.* The AMHRR includes, but is not limited to, the official military personnel file, and has been identified as a Records Management Application for the Army. AR 600-8-104, para. 1-6(a). Records of NJP must be submitted via MJO to the interactive Personnel Electronic Records Management System [iPERMS] for filing in the AMHRR. Army Reg. 27-10, Military Justice, para. 3-

37(a-b), (November 2020) [AR 27-10]; *see also* AMHRR Required Documents (2023), <https://iperms.hrc.army.mil/svc/public-download/ASRBDocuments.pdf>.

The ARIMS is “the official records repository for all Army records.” Army Reg. 25-400-2, Army Records Management Program, para. 5-3, (October 2022) [AR 25-400-2]. The ARIMS is also defined as “the [information technology] system for identifying, arranging, managing, storing (electronic records), retrieving, and applying dispositions to Army record material . . . [and] is accessed via the ARIMS website (<https://www.arims.army.mil>).” AR-25-400-2, Glossary of Terms.

Army Regulation 25-400-2 defines “record,” through reference to the Federal Records Act of 1950, as amended, as including “all recorded information, regardless of form or characteristics, made or received by a Federal agency under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the U.S. Government or because of the informational value of data in them.” *Id.*

Army Regulation 25-400-2 directs all Army records to be stored “in accordance with applicable records management policies and directives” and lists such examples as the Defense Travel System, Defense Civilian Personnel Data

System, and Automated Time Attendance and Production System. AR 25-400-2, para. 5-3(c). Army Regulation 25-400-2 does not list Military Justice Online as a system example.

Military Justice Online is not identified as a system of record keeping in the ARIMS, nor in AR 25-400-2, nor is it identified as a component of the ARIMS. As the ARIMS is the official records repository for all Army records, this court should consider such lack of identification as evidence that MJO does not constitute an official military personnel file for military personnel records. As noted above, MJO is merely the vehicle by which units send materials for filing in the AMHRR, which is a soldier's official record. Military Justice Online itself is not considered a place for filing. That a record of NJP is contained within MJO should not be considered dispositive as to whether that record is part of a soldier's personnel file or official AMHRR.

III.

IS MILITARY JUSTICE ONLINE LISTED AS A LOCATION OF MILITARY JUSTICE FILES IN THE SYSTEM OF RECORDS NOTIFICATION (SORN) UNDER THE REQUIREMENTS OF THE PRIVACY ACT? IF MILITARY JUSTICE ONLINE IS NOT LISTED AS A LOCATION FOR MILITARY JUSTICE FILES, WHAT IMPACT, IF ANY, DOES THAT HAVE ON THIS COURT'S DETERMINATION WHETHER NONJUDICIAL PUNISHMENT RECORDS CAN THEREBY BE PROPERLY "MAINTAINED" IN ACCORDANCE WITH ARMY REGULATION 27-10 IN MILITARY

JUSTICE ONLINE FOR PURPOSES OF ADMISSION UNDER R.C.M. 1001?

Military Justice Online is not identified as a location of military justice files in the SORN under the requirements of the Privacy Act.

The Privacy Act of 1974, as amended, 5 U.S.C. § 552(a), establishes guidelines for the collection and use by the federal government of personal information. (Pub. L. 93–579, 88 Stat. 1896, enacted December 31, 1974, 5 U.S.C. § 552a) [Privacy Act]; *see also* <https://www.govinfo.gov/content/pkg/USCODE-2018-title5/pdf/USCODE-2018-title5-partI-chap5-subchapII-sec552a.pdf>.

The Privacy Act requires each federal agency to publish a system of records notice [SORN] that lists its system of records. *See* System of Records Notices (SORNS), <https://dpcl.d.defense.gov/Privacy/SORNS/>. Military Justice Online is not enumerated as a system location of military justice files in the Military Justice Files SORN under the Privacy Act. *See* A0027-10a DAJA, Military Justice Files (October 2014), <https://dpcl.d.defense.gov/Privacy/SORNSIndex/DOD-wide-SORN-Article-View/Article/569941/a0027-10a-daja/>.

The Military Justice Files SORN lists the Department of the Army, Office of The Judge Advocate General, as the primary system location, and “Staff Judge Advocate Offices [sic], at major Army commands, field operating agencies, Brigade Judge Advocate Offices [sic], installations and activities Army-wide,” as secondary locations. *Id.*

The Military Justice Files SORN also lists “Nonjudicial punishment (Article 15) actions” as a category of records in the Military Justice Files system and also lists provisions required for safeguarding and storing of applicable information. *Id.*

This court should give weight to the Privacy Act’s failure to list MJO as a system location of military justice files. The general purpose of the Privacy Act is to govern the collection, maintenance, use, and dissemination of information about individuals that is maintained in systems of records by federal agencies.

<https://www.justice.gov/opcl/privacy-act-1974>.

Of note, the Privacy Act authorizes certain “need to know” disclosures for intra-agency disclosures. *See* Office of Management and Budget 1975 Guidelines, 40 Fed. Reg. 28,948. 28,950-01, 28,954 (1975),

https://www.justice.gov/d9/pages/attachments/2021/02/24/omb_1975_guidelines_0.pdf.

“[T]he term ‘agency’ means any Executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the [federal] Government (including the Executive Office of the President), or any independent regulatory agency.” 5 U.S.C. § 552a(a)(1) (incorporating 5 U.S.C. § 552(f)(1) (2018), which in turn incorporates 5 U.S.C. § 551(1) (2018)).

The Privacy Act has not been incorporated into the R.C.M., nor into AR 27-10. The term “agency,” under the Privacy Act, does not encompass disclosure for

the purposes of admission at courts-martial, nor for the purposes of authentication, foundation, and hearsay under evidentiary rules applicable at courts-martial.

IV.

WHAT, IF ANY, IS THE LEGAL SIGNIFICANCE OF ARMY REGULATION 27-10, PARA. 3-44(b) AND 5-37(a) STATING THAT A RECORD OF NONJUDICIAL PUNISHMENT MAY BE ADMITTED AT COURTS-MARTIAL FROM ANY FILE IN WHICH IT IS PROPERLY “MAINTAINED” BY REGULATION WHILE PARAGRAPH 14-1(a) IDENTIFIES MILITARY JUSTICE ONLINE AS A TOOL FOR “MANAGING” VARIOUS ADVERSE ADMINISTRATIVE DOCUMENTS, INCLUDING NONJUDICIAL PUNISHMENT? AND WHAT SIGNIFICANCE, IF ANY, SHOULD WE PLACE ON THE FACT THAT PARAGRAPH 5-37 IS TITLED SENTENCING?

Army Regulation 27-10 precludes use of documents from MJO for sentencing. Military Justice Online is a *tool* for managing nonjudicial punishments; it is not a record.

Army Regulation 27-10, paragraph 3-44(b) states, “[a] record of NJP or a duplicate as defined in [Mil. R. Evid.] 1001(e), not otherwise inadmissible, may be admitted at courts-martial or administrative proceedings from any file in which it is properly maintained by regulation. A record of NJP, otherwise properly filed, will not be inadmissible merely because the wrong copy was maintained in a file.”

Army Regulation 27-10, paragraph 5-37, discusses various aspects of sentencing. Paragraph 5-37(a) states, “[f]or purposes of [R.C.M.] 1001(b)(2) and (d), trial counsel and defense counsel may, at the counsel’s discretion, introduce to the court-martial copies of any personnel records that reflect the past conduct and performance of the accused, made or maintained according to departmental regulations.” Under this subsection, “personnel records” includes records of nonjudicial punishment “from any *file* in which the record is properly maintained by regulation.” AR 27-10, para. 5-37(a)(4) (emphasis added).

Military Justice Online “is the single tool in the Regular Army for creating, processing, and managing administrative reprimands, administrative separations, NJP, and courts-martial. The MJO application is also the primary tool for generating data and conducting analysis related to the execution of administrative actions and the practice of military justice.” AR 27-10, para. 14-1.

Black’s Law Dictionary defines “maintain” as “to continue in possession of” and “to care for (property) for the purposes of operational productivity;” it defines “file” as a noun to mean “a . . . complete and official record of a case” and as a verb “to record or deposit something in an organized retention system . . . for . . . future reference.” *Black’s Law Dictionary* (9th ed. 2009).

Merriam-Webster defines “manage” as “to exercise executive, administrative, and supervisory direction of.” Merriam-Webster, <https://www.merriam-webster.com/dictionary/manage> (last visited Mar. 29, 2023). Merriam-Webster defines “tool” as “a . . . device that aids in accomplishing a task” and “something (such as an instrument or apparatus) used in performing an operation or necessary in the practice of a vocation or profession.” Merriam-Webster, <https://www.merriam-webster.com/dictionary/tool> (last visited Mar. 29, 2023).

As a preliminary matter, the plain language of AR 27-10 precludes use of documents from MJO for sentencing. Military Justice Online is the primary *tool* for managing nonjudicial punishments. A tool is not a file, and a responsibility for managing a document imposes no obligation to maintain that document. Specifically, AR 27-10 directs records of nonjudicial punishment to be filed in local nonjudicial punishment files, or in a soldier’s AMHRR, depending upon rank and filing determination. AR 27-10, para. 3-37(b)(1-2).

Guidance for removal of records of nonjudicial punishment from military records also highlights that MJO is not a file. AR 27-10, Table 3-2. Army Regulation 27-10, Table 3-2 outlines from where, and to where, a Soldier’s NJP file is placed when removal is approved. Depending on the outcome, such file might be moved from the performance portion to the restricted portion of the

AMHRR, with the unit file removed. Similarly, the NJP file might be removed from “the Soldier’s record.” This guidance does not direct deletion from MJO because MJO is not a file, much less a personnel file, from which records of NJP may be obtained for sentencing.

Appendix M to AR 27-10 is also instructive. That document is used “to establish and maintain effective internal controls, assess areas of risk, identify and correct weaknesses in those controls, and keep their superiors informed.” *See* Army Reg. 11-2, Managers’ Internal Control Program, para. 2-1(a) (Mar 2012). In reviewing the management of imposition of NJP, in part to determine deficiencies in records retention and determine any corrective action needed, military justice managers must determine whether records of NJP were “recorded properly in either the Soldier’s local file or the AMHRR” and whether the record was otherwise “distributed properly.” AR 27-10, Appendix M, para. M-4. Managers are not required to determine any recording or filing in MJO because MJO is not a file.

To ensure proper filing, legal offices must use MJO to transmit original records of nonjudicial punishment and all allied documents to U.S. Army Human Resources Command. AR 27-10, para. 14-4. This guidance does not say that MJO must be used to store those records and documents. Moreover, AR 27-10, paragraph 3-37(b)(2) provides guidance for situations in which MJO is not

available, directing legal offices to upload that information via the web. The approval to transmit documents for filing in the AMHRR without using MJO would indicate that MJO is not a file, but a tool whose availability is not always guaranteed. MJO is a vehicle; when that vehicle is unavailable, another may be used.

Army Regulation 27-10, paragraph 5-37 is titled “Sentencing.” The significance of this section is to further elaborate upon R.C.M. 1001(b)(2)’s use of the phrase “personnel records.” The R.C.M. uses generic descriptors of what constitutes “personnel records.” Conversely, paragraph 5-37 provides enumerated examples of such records that, under R.C.M. 1001(b)(2) “reflect the past military efficiency, conduct, performance, and history of the accused.” Of note, paragraph 5-37(c), “Authenticating government files,” permits staff judge advocates to name authorizing officials who “may access and download Soldiers’ AMHRRs from government databases for use at courts-martial or nonjudicial and administrative proceedings” to authenticate government files. This provision suggests that MJO is insufficient from which to obtain nonjudicial punishments and provides the proper means by which military justice personnel can obtain a copy of records of nonjudicial punishment from a personnel file for admission under R.C.M. 1001.

V.

WHAT IMPACT, IF ANY, DOES ARMY REGULATION, PARA. 3-37(h) REQUIRING A UNIT PARALEGAL TO “MAINTAIN” A COPY OF NONJUDICIAL PUNISHMENT IN MILITARY JUSTICE ONLINE FOR A PERIOD OF TWO YEARS HAVE ON THIS COURT’S LEGAL DETERMINATION WHETHER RECORDS PULLED FROM MILITARY JUSTICE ONLINE ARE RECORDS THAT HAVE BEEN “MAINTAINED” IN ACCORDANCE WITH REGULATION FOR PURPOSES OF ADMISSION UNDER R.C.M. 1001? HOW DOES THE LANGUAGE OF ARMY REGULATION 27-10, PARA. 3-37(h), IF AT ALL, COMPORT WITH THE LANGUAGE IN PARAGRAPH 14-1(a) IDENTIFYING MILITARY JUSTICE ONLINE AS A TOOL FOR “MANAGING” VARIOUS ADVERSE ADMINISTRATIVE DOCUMENTS, INCLUDING NONJUDICIAL PUNISHMENT?

The requirement to “maintain” a copy of NJP in MJO does not transform that copy into permissible sentencing evidence under R.C.M. 1001.

Regardless of how records of nonjudicial punishment are transmitted, units must also maintain a copy of records of NJP in the “unit NJP files” directed for filing in the restricted portion of the AMHRR. AR 27-10, para. 3-37(c)(2). A paralegal specialist must also maintain records of NJP along with all allied documents in MJO for a period of two years. AR 27-10, para. 3-37(h). However, a unit’s *file* is distinct from a paralegal specialist’s *copy*; in other words, the paralegal specialist’s copy does not per se constitute the unit file. Army

Regulation 27-10, paragraph 3-37(a-c) directs filing, and documents to be sent for filing, to the AMHRR, iPERMS, and unit NJP files. The regulation does not list MJO as a location for filing, or a location to which records be sent for filing. Any requirement under AR 27-10, paragraph 3-37(h) to maintain a records of NJP in MJO does not convert the paralegal specialist's copy in MJO into a personnel record or file. *See United States v. Frasur*, ARMY 20210420, 2022 CCA LEXIS 401 (Army Ct. Crim. App. 8 Jul. 2022) ([mem. op.](#)).

VI.

DOES THE FACT THAT ARMY REGULATOIN 27-10 STATES THAT MILITARY JUSTICE ONLINE IS A TOOL FOR “MANAGING” ADVERSE ADMINISTRATIVE INFORMATION IMPACT THIS COURT’S LEGAL DETERMINATION WHETHER RECORDS PULLED FROM MILITARY JUSTICE ONLINE ARE RECORDS THAT HAVE BEEN “MAINTAINED” IN ACCORDANCE WITH REGULATION FOR PURPOSES OF ADMISSION UNDER R.C.M. 1001?

As discussed above, presentencing evidence of records of NJP must originate from any “file in which it is properly maintained by regulation.” AR 27-10, para. 3-44(b). If the record is not from a file, the inquiry ends. If the record does come from a file, the proponent of the evidence must still prove that the file is maintained in accordance with regulation. Military Justice Online is defined as both a “tool” and an “application.” Neither of those terms connotes a file.

In addition, the terms “manage” and “maintain” are not synonymous.

“Manage” carries with it no requirement to be in possession. One might exercise authority over, or direction of, an object without having to physically retain it; such responsibility could be delegated. The first definition of “maintain” does incorporate actual possession. The second, however, has no such requirement, as one can care for something “for the purposes of operational productivity” without possessing the object.

This is a distinction with a difference that impacts this court’s determination of the underlying issues. Military Justice Online allows practitioners to manage a process; it is the “primary tool for generating data and conducting analysis.” This data and analysis facilitate management of military justice and documentation through Military Justice Reports. AR 27-10, para. 14-2; AR 27-10, Appendix M, M-4(d). These functions, however, carry no corollary imposition to maintain, and MJO’s regulatory definition does not suggest it is a file.

Conclusion

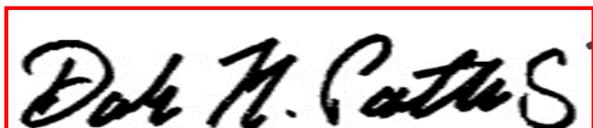
Wherefore appellant respectfully requests this court grant appropriate relief.



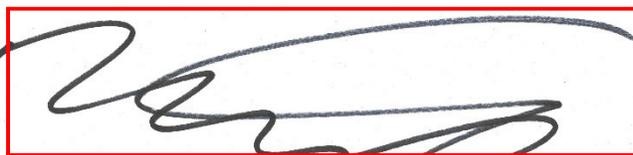
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army Court and Government Appellate Division on April 3, 2023.

A handwritten signature in cursive script, reading "Melinda J. Johnson", is enclosed within a red rectangular border.

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