CASE NOTE: *UNITED STATES V. BAUERBACH*: HAS THE ARMY COURT OF CRIMINAL APPEALS PUT "*COLLAZO* RELIEF" BEYOND REVIEW?

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I. Introduction

Ex cathedra, meaning "from the chair," is "a theological term which signifies authoritative teaching,"[2] and is used to describe the Pope's authority to create irreformable dogma for the Catholic Church.[3] Once the Pope exercises this rarely used power, his decision cannot be overturned. The Army Court of Criminal Appeals (Army Court) claims, with some support, a similar power to place their decisions beyond review.[4] According to the Army Court, its decisions are unreviewable when it exercises its sentence appropriateness authority under Article 66(c) of the Uniform Code of Military Justice (UCMJ).[5] In *United States v. Bauerbach*, the Army Court invoked this authority when it granted relief for non-prejudicial post-trial delay, known as "*Collazo* relief."[6] Thus, according to the Army Court, "*Collazo* relief" is beyond review by the Court of Appeals for the Armed Forces (CAAF).

This note examines the *Bauerbach* opinion and its ramifications, focusing on three questions raised by *Bauerbach* and "*Collazo* relief" in general. First, was the Army Court correct when it stated that "*Collazo*

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2. 5 THE CATHOLIC ENCYCLOPEDIA (1913).

3. *Id.* According to Catholicism, when the Pope speaks *ex cathedra* he is doing so through and with divine assistance.

4. *See* United States v. Bauerbach, 55 M.J. 501, 505 (Army Ct. Crim. App. 2001); United States v. Dukes, 5 M.J. 71, 73 (C.M.A. 1978); United States v. Turner, 35 C.M.R. 410, 411 (A.B.R. 1965).

5. Article 66(c) provides:

> In cases referred to it, the Courts of Criminal Appeals . . . . may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved.

UCMJ art. 66(c) (2000).

6. *Bauerbach*, 55 M.J. at 505.

relief" has always been a matter of sentence appropriateness? Second, did the Army Court correctly conclude that *Bauerbach* and "*Collazo* relief" are beyond review? Third, was the Army Court's use of its sentence appropriateness authority to create "*Collazo* relief" consistent with Congress's intent for how the Courts of Criminal Appeal (or "service courts") should use this unique authority?

II. *United States v. Collazo*: The Birth of a New Method of Addressing Undue Post-Trial Delay

Last year, in *United States v. Collazo*,[7] the Army Court of Criminal Appeals took the bold and controversial step of granting sentence relief for a non-prejudicial post-trial delay. Since that 2000 decision, the Army Court has granted "*Collazo* relief" in several memorandum opinions and four published opinions.[8] The court has used these opinions to pressure staff judge advocates (SJA) and chiefs of criminal law to devote greater attention to post-trial processing. In *Collazo*, the court stated that the reason there are so many post-trial errors and records involving excessive delay is because "there are no meaningful sanctions for tardy or sloppy work."[9] The court's creation of "*Collazo* relief" was obviously an effort to provide a meaningful sanction.

One problem with *Collazo*, however, was the court's failure to state clearly its legal authority to reduce a sentence for post-trial delay absent prejudicial error. The caselaw regarding undue post-trial delay seemed to

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7. 53 M.J. 721 (Army Ct. Crim. App. 2000).

8. *See Bauerbach*, 55 M.J. 501 (Army Ct. Crim. App. 2001); United States v. Nicholson, 55 M.J. 551 (Army Ct. Crim. App. 2001); United States v. Marlow, No. 9800727 (Army Ct. Crim. App. Aug. 31, 2000) (unpublished); United States v. Bass, No. 9801511 (Army Ct. Crim. App. Aug. 3, 2001) (unpublished); United States v. Holland, No. 9901168 (Army Ct. Crim. App. Aug. 1, 2001) (unpublished); United States v. Stevens, No. 9900666 (Army Ct. Crim. App. Aug. 1, 2001) (unpublished); United States v. Delvalle, No. 9800126 (Army Ct. Crim. App. July 16, 2001); United States v. Brown, No. 9900216 (Army Ct. Crim. App. Jul. 13, 2001) (unpublished); United States v. Pershay, No. 9800729 (Army Ct. Crim. App. Jun. 12, 2001) (unpublished); United States v. Bradford, No. 9900366 (Army Ct. Crim. App. May 16, 2001) (unpublished); United States v. Hansen, No. 20000532 (Army Ct. Crim. App. May 10, 2001) (unpublished); United States v. Acostas-Rondon, No. 9900458 (Army Ct. Crim. App. Apr. 30, 2001) (unpublished); United States v. Sharp, No. 9701883 (Army Ct. Crim. App. Apr. 16, 2001) (unpublished); United States v. Hernandez, No. 9900776 (Army Ct. Crim. App. Feb. 21, 2001) (unpublished); United States v. Fussell, No. 9801022 (Army Ct. Crim. App. Oct. 20, 2000) (unpublished).

9. *Collazo*, 53 M.J. at 725 n.4.

require prejudice before a court could grant relief.[10] In *United States v. Bauerbach*, [11] the Army Court removed any confusion regarding its legal authority to grant "*Collazo* relief." The court devoted almost the entire opinion to explaining that its authority to grant "*Collazo* relief" came from the court's Article 66(c) sentence appropriateness power.

In *Bauerbach*, the appellant pled guilty to one specification of wrongful use of marijuana and was sentenced to three months confinement, forfeiture of all pay and allowances, and a bad-conduct discharge.[12] The only issue raised by appellate defense counsel was whether Private Bauerbach was entitled to "*Collazo* relief," as it took 288 days to process the 385-page record of trial and complete the post-trial process. Appellate defense counsel did not allege any prejudice from the post-trial delay, only that the post-trial process took too long.[13]

The government argued that the Army Court was not permitted to grant relief from non-prejudicial post-trial delay, because to do so would violate Article 59(a), UCMJ.[14] The court disagreed, stating the government's argument "suggests a misunderstanding of the court's responsibility and authority to determine sentence appropriateness under Article 66(c), UCMJ."[15] The court went on to discuss the origins of Article 66, the interplay between Articles 59 and 66, and its holding in *Collazo*. The gist of this discussion was that when the Army Court grants "*Collazo* relief," it does so under its sentence appropriateness authority.

The significance of this holding is considerable. For the first time, the Army Court expressly declared that its Article 66 sentence appropriateness authority may be used to grant "*Collazo* relief." If the court was properly exercising this authority, its decision, and "*Collazo* relief" in general, may be beyond review.[16] Finally, *Bauerbach* and all the "*Collazo* relief"

10. *See, e.g.*, United States v. Bell, 46 M.J. 351 (1997); United States v. Hudson, 46 M.J. 226 (1997); United States v. Banks, 7 M.J. 92 (C.M.A. 1979).

11. 55 M.J. 501 (Army Ct. Crim. App. 2001).

12. *Id.* at 502. Although Private Bauerbach pled guilty to one specification of wrongful use of a controlled substance on multiple occasions, the government also went forward on a wrongful distribution charge. Private Bauerbach was found not guilty of the distribution charge. *Id.*

13. *Id.*

14. UCMJ art. 59(a) (2000). "A finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." *Id.*

15. *Bauerbach*, 55 M.J. at 502.

16. *See supra* note 4 and accompanying text.

cases represent an aggressive use of sentence appropriateness authority to resolve undue post-trial delay, an issue traditionally addressed as legal error.

III. Has "*Collazo* Relief" Always Been a Matter of Sentence Appropriateness?

The first section of this note addresses whether the Army Court was correct when it stated in *Bauerbach* that "*Collazo* relief" has always been a matter of sentence appropriateness. This statement's potential significance has already been discussed, but not its accuracy. Despite the Army Court's conclusion to the contrary, it is unlikely the *Collazo* court had conclusively resolved that sentence appropriateness was its basis for granting relief. Three observations about the Court's opinion in *Collazo*, as well as subsequent Army Court opinions, support this proposition. First, the *Collazo* opinion lacks any discussion clearly identifying it as a case where the Army Court was exercising its sentence appropriateness authority. Second, based on an examination of the *Collazo* record, it is unlikely the court would have concluded that Collazo received an unjust sentence, despite the government's undue post-trial processing delay. Third, in two later memorandum opinions, the Army Court dealt with sentence appropriateness and "*Collazo* relief" separately.[17] In one case, the court even stated, "We disagree that the appellant's sentence was inappropriately severe, but find that the post-trial processing of this case warrants some relief."[18]

A. The *Collazo* Court's Failure to Discuss Sentence Appropriateness

The Army Court, like all service courts, derives its authority to act from UCMJ Article 66(c). In accordance with Article 66(c), the Army Court "may affirm only such findings of guilt and the sentence or such part or amount of the sentence as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Based on this lan-

17. United States v. Hansen, No. 20000532 (Army Ct. Crim. App. May 10, 2001) (unpublished); United States v. Sharp, No. 9701883 (Army Ct. Crim. App. Apr. 16, 2001).

18. *Hansen*, No. 20000532.

guage, the Army Court can affect sentences through one of three powers. The court described these powers in *Bauerbach* as follows:

> The three components of our Article 66(c), UCMJ, authority are commonly referred to as legal sufficiency ("correct in law"), factual sufficiency ("correct in . . . fact"), and sentence appropriateness ("may affirm only . . . such part or amount of the sentence, as it . . . determines, on the basis of the entire record, should be approved").[19]

In *Collazo*, the court granted relief for undue post-trial delay by exercising its "broad power to moot claims of prejudice by 'affirming only such findings of guilt and the sentence or such part or amount of the sentence as it finds correct in law and fact and determines, on the basis of the entire record, should be approved.'"[20] Thus, the *Collazo* court refused to state which of three components of Article 66(c) it was exercising. Additionally, in the five memorandum opinions following *Collazo*, the court did not state which of the three components of Article 66(c) it was exercising when granting "*Collazo* relief".

In addition to the court's failure to state expressly that it was exercising sentence appropriateness authority, the court failed to discuss or apply the standard of review for granting sentence appropriateness relief. The case law regarding sentence appropriateness consistently describes the service courts' authority as the power to ensure that justice is done and that the accused receives a just punishment.[21] In *United States v. Healy*, the Court of Military Appeals (CMA) stated, "Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves."[22] The court must make its sentence appropriateness determination on the basis of the entire record.[23] Although the *Collazo* court discussed the dictates of "fundamental fairness" regarding the government's diligence in the post-trial process,[24] the

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19. *Bauerbach*, 55 M.J. at 504.

20. 53 M.J. 721, 727 (Army Ct. Crim. App. 2000) (quoting United States v. Wheelus, 49 M.J. 283, 288 (1988) (quoting Article 66(c), UCMJ)).

21. *See, e.g.*, United States v. Parker, 36 M.J. 269, 271 (C.M.A. 1993); United States v. Claxton, 32 M.J. 159, 162 (C.M.A. 1991); United States v. Lanford, 20 C.M.R. 87, 94 (C.M.A. 1955); United States v. Cavallaro, 14 C.M.R. 71, 74 (C.M.A. 1954).

22. 26 M.J. 394, 395 (C.M.A. 1988).

23. UCMJ art. 66(c) (2000).

24. *Collazo*, 53 M.J. at 727.

court never concluded—based on the entire record—that Private Collazo did not get the punishment he deserved.

A seminal case describing factors to consider when making sentence appropriateness determinations is *United States v. Cavallaro*.[25] In *Cavallaro*, the CMA found the Navy Board of Review was confused about the scope of its sentence appropriateness authority and responsibility.[26] The CMA returned the case to the Board of Review because the Board had affirmed the accused's sentence, and also recommended that The Judge Advocate General exercise clemency. The CMA concluded there was at least an appearance that "boards of review do not understand fully the factors they may consider in determining the appropriateness of [a] sentence."[27] The CMA went on to state,

> When reconsidering the sentence, the board of review should consider the appropriateness of the sentence in light of the entire record before it, giving due consideration to the factors set forth in paragraph 76a and other parts of the *Manual* and any other factors in the record which tend to establish a fair and just sentence.[28]

The CMA referred to paragraph 76a of the *1951 Manual for Courts-Martial*, which described the matters a panel or judge were required to consider when sentencing a convicted soldier. These factors included: aggravation evidence, character of the soldier's service, extenuation evidence, prior convictions, and the needs of good order and discipline.[29]

In *Collazo*, the Army Court did not discuss these factors, other than the needs of good order and discipline. This one discussion was extremely brief, and was limited to the effect of undue post-trial delay on "the confidence of both soldiers and the public in the fairness of military justice."[30] The court did not address other seemingly important factors in determining

25. 14 C.M.R. 71 (C.M.A. 1954).
26. *Id.* at 74.
27. *Id.*
28. *Id.* at 75.
29. MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 76a (1951).
30. United States v. Collazo, 53 M.J. 721, 726 (Army Ct. Crim. App. 2000).

a just sentence, like the nature and seriousness of Private Collazo's crimes or extenuation and mitigation evidence presented during sentencing.

It could be argued that it was unnecessary for the *Collazo* court to state it was exercising sentence appropriateness authority because to do so would articulate the obvious. The *Collazo* court found that appellant suffered no actual prejudice, and still granted relief. Since Article 59(a) prevents military courts from granting relief for non-prejudicial legal errors, the court must have been exercising its sentence appropriateness authority. It could also be argued that the only reason the *Bauerbach* court stated that "*Collazo* relief" was a matter of sentence appropriateness was because the government's position in *Bauerbach* indicated the government did not understand what should have been obvious.

If the government's position in *Bauerbach* "suggests a misunderstanding"[31] of "*Collazo* relief" and the service courts' Article 66(c) authority, as the Army Court stated in *Bauerbach*, they were not alone. The Coast Guard Court of Criminal Appeals,[32] the Navy-Marine Corps Court of Criminal Appeals,[33] and even panels of the Army Court apparently "misunderstood" that "*Collazo* relief" was based on sentence appropriateness rather than legal error.[34] One viable explanation for these misunderstandings: the Army Court erred in *Bauerbach* by concluding that "*Collazo* relief" has always been based on sentence appropriateness.

On its face, *United States v. Collazo* does not appear to be a sentence appropriateness case. The Army Court neither stated it was exercising sentence appropriateness authority when granting relief, nor did it discuss or apply the standard of review for granting sentence appropriateness. In *United States v. Bauerbach*, the court referred to no less than twenty cases dealing directly with the court's sentence appropriateness authority.[35] The *Collazo* court, by contrast, only referred to one case that tangentially addressed the court's sentence appropriateness authority.[36] If the court

31. United States v. Bauerbach, 55 M.J. 501, 502 (Army Ct. Crim. App. 2001).

32. *See* United States v. Tardiff, 54 M.J. 827, 830 (C.G. Ct. Crim. App. 2001).

33. *See* United States v. Green, No. 9900256, 2001 CCA Lexis 9 (N-M. Ct. Crim. App. Jan. 16, 2001).

34. *See* United States v. Hansen, No. 20000532 (Army Ct. Crim. App. May 10, 2001) (unpublished); United States v. Sharp, No. 9701883 (Army Ct. Crim. App. Apr. 16, 2001).

35. *Bauerbach*, 55 M.J. at 503-06.

36. 53 M.J. 721, 727 (Army Ct. Crim. App. 2000).

intended to grant sentence appropriateness relief in *Collazo*, it could have done so in clear, unambiguous terms, as it did in *Bauerbach*.

B. Private Collazo's Sentence Was Not Rendered Unjust by the Undue Post-Trial Delay

The Army Court's failure in *Collazo* to state it was granting relief based on sentence appropriateness could have been because it did not believe Private Collazo received an unjust punishment. It is impossible to know exactly what the members of any court were thinking beyond that which is written in its opinion. This is also true of the Army Court in *Collazo*. It is possible, however, to examine those factors the court was required to consider when granting sentence appropriateness relief and discuss whether, under that standard, Private Collazo received an unjust punishment.

Service courts are required to base their sentence appropriateness determination on the entire record. The entire record "encompass[es] the transcript, the documentary exhibits, and all the allied papers as well as any appellate brief."[37] When examining the record, the court should consider a variety of factors. These factors include "the nature and seriousness of the offense,"[38] matters presented during sentencing under Rule for Courts-Martial (RCM) 1001,[39] the accused's "acceptance or lack of acceptance of responsibility for his offense[s],"[40] and any other factors the court deems relevant to whether the accused received a just punishment. Applying these considerations to Private Collazo's sentence, it seems unlikely that the court would have concluded Collazo received an unjust punishment.

Private Collazo was convicted, contrary to his pleas, of raping Ms. P. and having carnal knowledge of Ms. B, the fifteen year-old step-daughter of a soldier stationed at Fort Drum.[41] The government called no witnesses in sentencing, relying instead on the victims' testimony from the findings phase of trial. The defense called four sentencing witnesses and presented one stipulation of expected testimony. The defense witnesses and the stip-

37. *Id.*

38. United States v. Snelling, 14 M.J. 267, 268 (C.M.A. 1982); *see also* United States v. Sharp, No. 9701883 (Army Ct. Crim. App. Apr. 16, 2001) (unpublished).

39. *See* United States v. Cavallaro, 14 C.M.R. 71, 75 (C.M.A. 1954).

40. United States v. Aurich, 31 M.J. 95, 97 (C.M.A. 1990).

41. United States v. Collazo, No. 9701562, 474 (Headquarters, Fort Drum Sept. 25, 1997) (Record of Trial).

ulation of expected testimony were from Private Collazo's chain of command, who all stated Collazo was an excellent duty performer with good rehabilitative potential.[42] The accused did not make a sworn or unsworn statement, but instead had both his defense counsel make statements on his behalf. Although the statements made by Collazo's attorneys communicated his regret for any pain he may have caused the two victims of his crimes, the statements fell short of either a full acceptance of guilt or a full apology.[43] Private Collazo's Enlisted Record Brief was unremarkable, containing one Army Achievement Medal.[44]

The post-trial process in Collazo's case took one year and five days, with twenty of those days owing to a defense delay.[45] The record of trial was 519 pages long, and it took the government about ten months to authenticate it. In addition to this delay, there were errors in the post-trial process. The government failed to let Collazo's defense counsel review the record of trial before authentication, provide Collazo or his defense counsel with an authenticated record of trial for the preparation of RCM 1105/1106 matters, and provide the accused and defense counsel with a copy of the convening authority's action in a timely manner.[46] Despite the delay in Private Collazo's case and the technical errors in the post-trial process, his appellate defense counsel alleged no harm from these errors, other than a delay in having his matters considered by the Army Court.[47]

The Army Court found that the government's lack of due diligence in the post-trial process was fundamentally unfair, but found no harm arising from the delay. The Army Court also found no merit to Private Collazo's other allegations of error.[48] Thus, if the court was correct in *Bauerbach*, which asserted that "*Collazo* relief" has always been an exercise of sentence appropriateness authority, then the *Collazo* court would have concluded that the unspecified harm to Private Collazo's post-trial processing rights rendered his sentence unjust or unfair. Given Private Collazo's crimes, sentence, and the lack of any actual harm due to the government's

42. *Id.* at 477-96.

43. *Id.* at 487.

44. *Id.* (Prosecution Exhibit 1).

45. *Id.* (Chronology Sheet).

46. United States v. Collazo, 53 M.J. 721, 726-27 (Army Ct. Crim. App. 2000).

47. *Id.*

48. *Id.* Due to the length of Private Collazo's term of confinement, he missed no parole opportunity because of the government's delay. *See* U.S. DEP'T OF ARMY, REG. 15-130, CLEMENCY AND PAROLE BOARDS para. 3-1(e) (23 Oct. 1998).

post-trial processing delay, it is unlikely the Army Court would have concluded Private Collazo's relief was for sentence appropriateness.

C. Army Court's Pre-*Bauerbach* Analysis of "*Collazo* relief" and Sentence Appropriateness Relief

Perhaps the strongest evidence that "*Collazo* relief" was not originally based on sentence appropriateness appears in the Army Court's memorandum opinions following *Collazo*. Although memorandum opinions are not binding precedent, they carry some weight of authority, especially with the court that wrote the opinion.[49] Memorandum opinions also reveal how a court analyzes a particular issue, because its analysis should not be affected by the decision to publish the opinion.[50] In two memorandum opinions written after *Collazo* but before *Bauerbach*, the Army Court addressed "*Collazo* relief" and sentence appropriateness relief separately. These opinions, *United States v. Sharp*[51] and *United States v. Hansen*,[52] shed considerable light on two Army Court panels' view of "*Collazo* relief" in relation to sentence appropriateness.

In *Sharp*, the accused was convicted, contrary to his pleas, of possession with the intent to distribute and distribution of cocaine. Sharp was sentenced to a dishonorable discharge, total forfeiture of all pay and allowances, reduction to Private E1, and confinement for twenty years.[53] Appellate defense counsel raised several errors, including claims that "the dilatory post-trial processing of appellant's court-martial warrants relief, and . . . [the appellant's] sentence was inappropriately severe."[54] The Army Court addressed these two allegations of error separately.[55] Regarding the slow post-trial processing, the court concluded the government failed to proceed with due diligence when it took 399 days to authenticate

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49. *See, e.g.*, David S. Tatel, *Some Thoughts on Unpublished Decisions*, 64 GEO. WASH. L. REV. 815 (1996).

50. Although memorandum opinions are generally less extensive regarding the court's legal analysis, the analytic framework the court applies should generally be the same.

51. No. 9701883 (Army Ct. Crim. App. Apr. 16, 2001) (unpublished).

52. No. 20000532 (Army Ct. Crim. App. May 10, 2001) (unpublished).

53. *Sharp*, No 9701883, at 2.

54. *Id.*

55. *Id.* at 5.

the appellant's record of trial. Based on this failure, the court reduced the accused's confinement by six months.[56]

The *Sharp* court then addressed sentence appropriateness. It discussed the following: the accused's age, marital status, number of children, educational level, general testing score, rank, number of prior convictions and Article 15s, awards and commendations, the offenses of which he was guilty, the effect of his offenses on unit readiness, the maximum sentence authorized, the evidence presented by defense during sentencing, and the accused's apology at the conclusion of his unsworn statement.[57] After considering these factors, the court reduced Sharp's punishment "by five years because his approved sentence was inappropriately severe."[58] The court added the relief it granted under *Collazo* to the relief it granted due to the inappropriately severe punishment.[59] In the end, the court approved fourteen and a half years of confinement.

In *United States v. Hansen*, the trial court convicted the accused of multiple specifications of willfully damaging property.[60] He was sentenced to a bad-conduct discharge, reduction to E1, a fine of $1,000, and confinement for six months. On appeal, the Army Court addressed allegations of undue post-trial delay and an inappropriately severe sentence. As in *Sharp*, the court dealt with the allegations separately. More significant, however, the *Hansen* court found the accused's sentence was not inappropriately severe, but granted "*Collazo* relief" anyway. The court wrote, "We disagree that the appellant's sentence was inappropriately severe, but find that the post-trial processing of this case warrants some relief."[61]

In light of *Hansen* and *Sharp*, it is difficult to conclude that "*Collazo* relief" has always been a matter of sentence appropriateness, as *Bauerbach* maintained. Both opinions dealt with "*Collazo* relief" and sentence appropriateness relief separately. In *Sharp*, the court gave a distinct quantum of relief for each issue and then added them together. In *Hansen*, the court did not find the sentence inappropriately severe, yet still granted "*Collazo* relief." If the *Hansen* court had truly determined that "*Collazo* relief" was a matter of sentence appropriateness, it would have likely discussed post-trial delays and errors within its sentence appropriateness analysis, and

56. *Id.*
57. *Id.* at 5-6.
58. *Id.*
59. *Id.* at 7.
60. No. 20000532, 1 (Army Ct. Crim. App. May 10, 2001) (unpublished).
61. *Id.*

granted relief only where the court found the sentence was inappropriately severe.

IV. Practical Effects of *Bauerbach*

Based on the *Collazo* record of trial, the language of the *Collazo* opinion, and the Army Court's subsequent memorandum opinions, it is unlikely that "*Collazo* relief" has always been a matter of sentence appropriateness. That being said, the *Bauerbach* court concluded otherwise. Until the Army Court changes its stand on "*Collazo* relief," or a higher court overrules it, practitioners must address "*Collazo* relief" issues.

Both defense counsel and government counsel must look for "*Collazo* relief" issues and respond appropriately. Government counsel opposing "*Collazo* relief" should emphasize the government's efforts to proceed with due diligence in post-trial processing. The government should highlight those portions of the record of trial that demonstrate the accused received a just punishment (such as severity of the accused's crime or a lack of remorse). Conversely, defense counsel should focus on post-trial delay issues and the accused's punishment in general. Thus, defense counsel should address not only the time it took the government to complete the record and any defense requests made to expedite the process, but also any other matters indicating the accused's sentence was inappropriately severe (such as a guilty plea or an excellent service record).

A defense claim for "*Collazo* relief" based on *Bauerbach* is not an allegation of legal error; however, there are two reasons why SJAs should address this claim in an addendum to their post-trial recommendation. First, the Army Court has repeatedly stated it expects these claims to be addressed in an addendum.[62] Second, most defense counsel do not simply ask for "*Collazo* relief," but also allege prejudice as a result of undue delay in post-trial processing.

Once prejudice is alleged, SJAs must address it in an addendum. The SJA's addendum is ideal for addressing claims for "*Collazo* relief," whether the SJA recommends granting or denying relief. If the SJA recommends granting some relief, that can be reflected in the addendum with

62. *See, e.g.*, United States v. Bass, No. 9801511, 2 (Army Ct. Crim. App. Aug. 3, 2001) (unpublished); United States v. Brown, No. 9900216, 3 (Army Ct. Crim. App. Jul. 13, 2001) (unpublished).

a concur/nonconcur line for the convening authority to initial. This approach leaves no doubt that any relief granted responds to a *Collazo* issue and is not a matter of clemency. If the SJA recommends disapproving a claim for "*Collazo* relief," the addendum can be used to account for the government's due diligence in post-trial processing. Staff judge advocates should be mindful that the Army Court applies a totality of the circumstance test for determining due diligence. Thus, SJAs must account for circumstances contributing to a lengthy post-trial process, and the steps taken to reduce processing time.[63]

V. Are *Bauerbach* and "*Collazo* Relief" Beyond Review?

This note next considers the Army Court's assertion that *Bauerbach*, and "*Collazo* relief" in general, are beyond review. The court claims that "any relief . . . we grant an appellant exercising our factual sufficiency or sentence appropriateness authority is final."[64] This statement has enormous implications. If the Army Court is correct, then theoretically a service court could grant any relief it chose for any error. So long as the service court stated it was exercising its sentence appropriateness authority, the CAAF could not review the grant of relief. Although readers may reflexively disagree with the Army Court, the issue is more complicated than it first appears.

The Army Court highlights a unique aspect of the military appellate system. Specifically, the military's initial appellate courts have broader statutory jurisdiction then the next level of appellate review. Because this

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63. The Army Court has specifically mentioned four potentially acceptable reasons for a lengthy post-trial process: "excessive delay in submission of R.C.M. 1105 matters, post-trial absence or mental illness of the accused, exceptionally heavy military justice post-trial workload, or unavoidable delays as a result of operational deployments." *Bass*, No. 9801511, at 2. Although the court has rejected a lack of court reporters as an excuse for lengthy post-trial processing, this should still be mentioned in the SJA's addendum. United States v. Bauerbach, 55 M.J. 501, 507 (Army Ct. Crim. App. 2001). Also, the addendum should mention defense delays caused by the defense, like the time required for errata and the time required for the military judge to authenticate the record. Efforts that the criminal law office made to complete the record as quickly as possible should also be accounted for. Finally, efforts to send the record to another jurisdiction for typing or use of a civilian contract court reporter should also be mentioned.

64. *Bauerbach*, 55 M.J. at 505.

unique aspect of the military appellate system is critical to understanding the Army Court's position in *Bauerbach*, it bears some explaining.

The U.S. military justice system contains two levels of appellate review, the Courts of Criminal Appeal[65] and the CAAF.[66] There are four Courts of Criminal Appeal, one for each service, and one CAAF. Any service member found guilty at court-martial and sentenced to either a punitive discharge or to one or more years of confinement will have his record reviewed by a Court of Criminal Appeal.[67] Article 66, UCMJ, created this court and defined the scope of its authority, while Article 67 did the same for the CAAF. Article 66(c) requires the Courts of Criminal Appeal to review the entire record of trial in any case falling within their jurisdiction. After reviewing the record, the court "may only affirm such findings of guilty and sentence or such part or amount of sentence, as it finds correct in law and fact and determines . . . should be approved."[68] Thus, as mentioned earlier, the Courts of Criminal Appeal can overturn or alter a finding or sentence based on legal error, factual insufficiency, or an inappropriate sentence. The CAAF's jurisdiction, however, is not so broad.

According to UCMJ Article 67, the CAAF

> may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Courts of Criminal Appeal . . . . The Court of Appeals for the Armed Forces shall take action only with respect to matters of law.[69]

The plain language of Articles 66 and 67 seems to support the Army Court's assertion that its grant of "*Collazo* relief" is beyond review. Article 66 gives the Army Court the power to reduce a sentence based on sentence appropriateness, factual insufficiency, and legal error. Article 67 permits the CAAF to review only those cases affirmed or overturned by the service courts for legal error. Arguably, therefore, the CAAF has no jurisdiction over cases where the service courts have overturned a finding or sentence for factual sufficiency or sentence appropriateness. Although the plain

65. *See* UCMJ art. 66 (2000).
66. *See id.* art. 67.
67. *Id.* art. 66(b)(1).
68. *Id.* art. 66(c).
69. *Id.* art. 67(c).

language of Articles 66 and 67 seems to support the Army Court's position, the cases make it clear the analysis is not so cut and dry.

In *Bauerbach*, the Army Court cited five cases to support its conclusion that "any relief we grant an appellant exercising our factual sufficiency or sentence appropriateness authority is final."[70] Each case supports, in varying degrees, the broad authority of the service courts, and limits the CAAF's jurisdiction to legal errors. One of the cases, however, notes a significant exception to the general rule that the CAAF will not disturb a service court's exercise of one of its unique authorities.

In *United States v. Christopher*, the CMA stated that, although it did not have the authority to review a service court's factual determinations, "a board of review may not defeat review in this court by labeling as questions of fact those matters which are questions of law, or mixed holdings of law and fact."[71] Thus, the CAAF may exercise review despite a service court's assertion that it was exercising one of its unique authorities under Article 66(c). This is especially significant with regard to "*Collazo* relief" in general, and the *Bauerbach* case in particular.

This note previously argued that "*Collazo* relief" is not based on sentence appropriateness.[72] In addition to the matters discussed earlier, *Bauerbach* (and "*Collazo* relief" in general) are vulnerable to allegations that the Army Court has labeled "*Collazo* relief" as an exercise of sentence appropriateness authority rather than legal error to avoid CAAF review. The language of *Collazo* and its progeny has all the earmarks of a legal error analysis.

In *Collazo*, the Army Court established a standard that the government must meet: due diligence in post-trial processing.[73] The court stated it would measure whether the government met its burden given the totality of the circumstances.[74] In *Collazo* and the cases that followed, the court granted relief for violations of the post-trial due diligence standard without regard to other factors that might be relevant to sentence appropriateness.

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70. United States v. Bauerbach, 55 M.J. 501, 505 (Army Ct. Crim. App 2001).
71. 32 C.M.R. 231, 236 (C.M.A. 1962).
72. *See supra* notes 49-66 and accompanying text.
73. United States v. Collazo, 53 M.J. 721, 727 (Army Ct. Crim. App. 2000).
74. *Id.*

This manner of granting relief is based more on legal error than on sentence appropriateness.

To date, the Army Court has decided fifteen cases where it concluded the government did not proceed with due diligence in post-trial processing.[75] The court granted relief in each case. No case discussed any matters occurring before the post-trial process began. One of the cases, *United States v. Marlow*,[76] is particularly significant.

In *Marlow*, the convening authority approved a punishment less severe than the adjudged sentence and the Army Court still granted "*Collazo* relief."[77] Marlow pled guilty and was convicted of multiple larcenies, attempted larceny, forgery, and absence without leave. He was sentenced to thirty months of confinement, a bad-conduct discharge, and forfeiture of all pay and allowances.[78] In accordance with a pretrial agreement, the convening authority only approved eighteen months of Marlow's confinement. It took the government 335 days to complete the post-trial process for the 168-page record of trial. After examining Marlow's claim of prejudicial post-trial delay, the Army Court concluded he had not established prejudice.[79] Despite Marlow's failure to establish prejudice, the court held he was entitled to relief due to the government's failure to proceed with due diligence in the post-trial process. The court reduced Marlow's confinement from eighteen to fifteen months.[80]

As in many "*Collazo* relief" cases, the Army Court's application of sentence relief in *Marlow* appears disconnected from the central question of sentence appropriateness; that is, whether the accused got the punishment he deserved. In *Marlow*, the court first determined the government had failed to proceed with due diligence in the post-trial process, and although the accused was not prejudiced, he deserved some relief.[81] Next, the court established a quantum of relief to award the accused based on the

75. *See supra* note 8.
76. No. 9800727 (Army Ct. Crim. App. Aug. 31, 2000) (unpublished).
77. *Id.* at 4.
78. *Id.* at 1.
79. *Id.* at 3.
80. *Id.*
81. *Id.* at 4.

government's error. Finally, the court subtracted that quantum from the approved sentence.[82]

This method would be appropriate if the Army Court was granting relief for a legal error, like illegal pretrial confinement; however, if the court is granting sentence appropriateness relief, the analysis starts from the wrong point. In determining sentence appropriateness, the court should begin with the sentence itself. It must determine whether the accused got the punishment he deserved based on the entire record. Thus, the court should begin with the accused's sentence, look at the entire record, and then determine whether the accused received a fair punishment. As part of that analysis, the court must consider the government's undue delay in post-trial processing, along with everything else in the record of trial.

The adjudged sentence in *Marlow* was particularly relevant, as the military judge sentenced Marlow to thirty months of confinement.[83] Presumably the judge's sentence should have been the baseline for the Army Court's sentence appropriateness analysis. Because Marlow had entered into an advantageous pretrial agreement, only eighteen of the thirty months of confinement could be approved. This pretrial agreement, however, should not alter the court's sentence appropriateness analysis. Thus, if the relief was based on sentence appropriateness, the Army Court would have to conclude that Marlow was sentenced to twice the confinement he deserved.

The *Bauerbach* assertion that the Army Court's exercise of sentence appropriateness authority is beyond review by the CAAF has support in the UCMJ and case law, but *Bauerbach* overstates that support. The CAAF can, and has, gone beyond the service court's characterization of its own actions. *Bauerbach* and "*Collazo* relief" are particularly vulnerable to such an examination. Specifically, the Army Court's application of "*Collazo* relief" in *Hansen*, *Sharp*, and *Marlow* may cause the CAAF to disagree with the Army Court's assertion that "*Collazo* relief" is an exercise of sentence appropriateness.

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82. *Id.*

83. *Id.* at 1.

VI. *Bauerbach*, "*Collazo* Relief," and Congressional Intent

Finally, this note examines whether the Army Court's creation of "*Collazo* relief" is consistent with Congress's intent for how service courts should exercise their unique Article 66(c) sentence appropriateness authority. Although the "*Collazo* relief" debate may begin with undue delay in the post-trial process, it clearly ends on a question of statutory interpretation.

The Army Court, through *Bauerbach*, has identified "*Collazo* relief" as a form of sentence appropriateness relief. Arguably, the Army Court has been granting relief for non-prejudicial legal error and calling it an exercise of sentence appropriateness authority. By doing so, the court avoids not only the requirement to find material prejudice, but also the potential consequence of finding prejudicial post-trial delay.[84] If this characterization is correct, does this mean the court has been acting outside its statutory authority?

The answer to this question is not an easy one, given the court's broad power to approve only those sentences it believes "should be approved."[85] Article 66(c) is worded broadly and has been interpreted broadly by the CAAF, which wrote, "A clearer *carte blanche* to do justice would be difficult to express."[86] Certainly an argument can be made, based on Article 66(c), that service courts can disapprove any sentence for whatever reason the court finds appropriate. Despite this argument, it is difficult to believe that Congress intentionally created a statutory trapdoor where service courts could sidestep Article 59(a) requirements[87] by using their sentence appropriateness authority. When faced with two reasonable and contradic-

84. If a military appellate court finds that an accused was prejudiced by an undue delay in the post-trial process, the appellate court should be required to dismiss the findings and sentence. *See* United States v. Clevidence, 14 M.J. 17 (C.M.A. 1982); United States v. Banks, 7 M.J. 92 (C.M.A. 1979); Dunlap v. Convening Authority, 48 C.M.R. 751 (C.M.A. 1974).

85. UCMJ art. 66(c) (2000).

86. United States v. Claxton, 32 M.J. 159, 162 (C.M.A. 1991).

87. *See supra* note 14.

tory interpretations of a statute, it is appropriate to refer to its legislative history.[88]

Although examining a statute's legislative history to divine congressional intent can be difficult, the UCMJ facilitates this with "one of the best and most informative . . . legislative histor[ies] anywhere."[89] Unfortunately, even with the UCMJ's extensive legislative history, there is no "smoking gun" regarding what, if any, restrictions Congress intended to place on the service courts' sentence appropriateness authority. The UCMJ's legislative history, however, does contain "circumstantial evidence" on the issue. Congress's discussion of why it was granting service courts sentence appropriateness authority provides this evidence. Presumably, determining the intended use of sentence appropriateness will also show how it was not intended to be used.

In 1948, work began on the creation of a uniform criminal code for the U.S. armed forces.[90] Secretary of Defense James Forrestal began the process by appointing a committee to draft the uniform code and asked Harvard Law Professor Edmund A. Morgan to chair the committee. Professor Morgan and his committee were tasked with creating a justice system that could provide the "proper accommodation between the meting out of justice and the performance of military operations—which involves not only fighting, but also the winning of wars."[91]

As Professor Morgan and his committee drafted the UCMJ, the committee constantly struck a balance between a commander's role in the discipline of his unit and "prevent[ing] courts martial from being an instrumentality and agency to express the will of the commander."[92] Pursuing that balance, Professor Morgan's committee retained aspects of the Articles of War that placed the commander at the center of the military justice system. Commanders still preferred charges, selected panel members, and retained clemency authority over an accused. While retaining the commander's role in military justice, the committee also created new safe-

88. Steven Breyer, *On the Use of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992).

89. Brigadier General (Retired) John S. Cooke, *Introduction: Fiftieth Anniversary of the Uniform Code of Military Justice Symposium Edition*, 165 MIL. L. REV. 1 (2000).

90. *Id.* at 8.

91. *Hearings on H.R. 2498 Before the Subcomm. of the House Armed Services Comm. on the Uniform Code of Military Justice*, 81st Cong., 1st Sess. 597 (1949) [hereinafter *Hearings on H.R. 2498*].

92. *Id.* at 606.

guards to prevent a commander's will from eclipsing the goal of fair and impartial justice. Some of these safeguards were requiring convening authorities to get advice from their SJA before preferring charges or taking action, giving Boards of Review (the 1949 equivalent to today's service courts) greater authority, and creating a civilian Court of Criminal Appeals.[93] For this note's purposes, expanding the boards' authority was the most significant new safeguard.

Boards of Review were not an innovation of the UCMJ; they had existed since the creation of Article of War 50.5 in 1920.[94] The Army and Air Force's Boards of Review underwent significant modification under the Elston Act in 1948, which authorized Boards of Review "to weigh evidence, judge the credibility of witnesses and determine controverted questions of fact."[95] The UCMJ took the modifications created in the Elston Act and built upon them. In addition to deciding questions of law and factual sufficiency, the Boards of Review under the UCMJ were given the authority to approve only those sentences they determine should be approved. The creation of this sentence appropriateness authority was "[t]he single greatest change brought about in the powers and duties of the boards of review by the Uniform Code of Military Justice."[96]

Although the UCMJ's legislative history is extensive, surprisingly few sections specifically state why Boards of Review were granted sentence appropriateness authority. Beyond the language of Article 66(c) itself, only the Commentary sections of the House and Senate reports represent the collective intent of Congress. The Commentary on Article 66(c) is the same in both reports, and it states: "The Boards may set aside, on the basis of the entire record, any part of a sentence, either because it is illegal or because it is inappropriate. It is contemplated that this power will be exercised to establish uniformity of sentences throughout the armed forces."[97] Although sentence uniformity can be a goal in itself, in the context of the UCMJ, sentence uniformity was directed at curing two ills of

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93. *Id.*

94. Roger M. Currier & Irvin M. Kent, *The Boards of Review of the Armed Forces*, 6 VAND. L. REV. 241 (1952-1953).

95. *Id.* at 242.

96. *Id.*

97. SUBCOMM. OF THE HOUSE ARMED SERVICES COMM., REPORT ON H.R. 2498, 81st Cong., 1st Sess. 31-32 (1949); SUBCOMM. OF THE SENATE ARMED SERVICES COMM., REPORT ON S. 857 AND H.R. 2498, 81st Cong., 1st Sess. 28 (1949).

the military justice system: command influence in sentencing and excessive sentences.

As stated, striking a balance between discipline and justice occupied a majority of the House and Senate hearings on the UCMJ. Congress heard from several witnesses and read reports discussing the concern that "[t]oo often the [courts-martial] have been told by commanders they were expected to bring in verdicts of guilty, and impose specific sentences."[98] Witnesses like Mr. Arthur E. Farmer, Chairman of the Committee on Military Law, War Veterans Bar Association, testified that it was not unique for him to have heard commanding officers state, "Gentlemen, when you pass sentence on the accused, you will give him the maximum sentence. Clemency is my function."[99] Mr. Farmer went on to testify that the command influence did not have to be as overt as the above statement. It could be as subtle as a commander expressing his concern at a staff meeting that a particular crime should be treated as a serious offense.[100]

Professor Morgan testified that Boards of Review would be sufficiently separate from any general court-martial convening authority so as to remove any hint of command control.[101] Removed from command influence and armed with the power to reduce sentences, "the board of review would take care of any excessive sentence."[102]

A concern that military sentences were generally too severe provided another motivation for Congress to seek sentence uniformity through Article 66(c).[103] Several witnesses, most notably Professor Morgan, testified about their experiences or cited statistics regarding clemency boards that

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98. *Hearings on H.R. 2498*, *supra* note 92, at 640 (statement by Mr. Richard H. Wels, Chairman, Special Committee on Military Justice of the New York County Lawyers' Association); *see also id.* at 46 (statement of the Honorable Gerald R. Ford, Member of Congress From the Fifth District of the State of Michigan).

99. *Hearings on S. 857 and H.R. 2498 Before the Subcomm. of the Senate Armed Services Comm.*, 81st Cong., 1st Sess. 87 (1949) [hereinafter *Hearings on S. 857*] (statement of Mr. Arthur E. Farmer, Chairman, Committee on Military Law, War Veterans Bar Association).

100. *Id.*

101. *Hearings on H.R. 2498*, *supra* note 92, at 608 (statement of Professor Edmund A. Morgan).

102. *Hearings on S. 857*, *supra* note 100, at 46 (statement of Professor Edmund G. Morgan).

103. *Hearings on H.R. 2498*, *supra* note 92, at 840 (statement of Professor Arthur John Keeffe, Cornell Law School); *Hearings on S. 857*, *supra* note 100, at 46, 311 (statements of Professor Edmund G. Morgan).

were held after World War I.[104] Mr. George A. Spiegelberg, Chairman of the Special Committee on Military Justice of the American Bar Association, stated, with the support of Senator Morse, "There is something . . . wrong with the system which results in a clemency board . . . reducing or remitting over 27,000 sentences."[105] Twice during the Senate hearings, Professor Morgan referred to his own experience sitting on a clemency board after World War I where the board "remitted 18,000 [years] in 6 weeks."[106]

Some of the witnesses that testified against making substantial changes to the military justice system actually may have encouraged Congress to pass measures like Article 66(c). Members of the House Subcommittee were concerned when witnesses like Colonel William A. Roberts of the U.S. Air Force Reserve testified:

> The real difference [between the military and civilian justice systems] is the object and amount of punishment. The object of civilian criminal court generally is to reform and rehabilitate the offenders. The object of military law . . . is to act as a deterrent so that when the first man steps out of line and gets a hard sentence it will deter others.[107]

Testimony like Colonel Roberts' supported the concern of many in Congress that sentencing in the military was too focused on discipline at the expense of justice.

Congress was fairly clear on why it granted Boards of Review sentence appropriateness authority. It intended that service courts exercise this authority to "establish sentence uniformity throughout the services."[108] As previously discussed, the purposes of sentence uniformity were to reduce command influence over the sentencing process and avoid unduly harsh sentences. If this was the motivation behind the Article 66(c)

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104. *Hearings on S. 857*, *supra* note 100, at 46, 311 (statements of Professor Edmund G. Morgan).

105. *Id.* at 80 (statement of Mr. George A. Spiegelberg, Chairman, American Bar Association Special Committee on Military Justice).

106. *Id.* at 46, 311 (statements of Professor Edmund G. Morgan).

107. *Hearings on H.R. 2498*, *supra* note 92, at 780 (statement of Colonel William A. Roberts, U.S. Air Force Reserve, representing the AMVETS).

108. *Id.* at 840 (1949) (statement of Professor Arthur John Keeffe, Cornell Law School).

sentence appropriateness authority, however, creation of "*Collazo* relief" would not fulfill these purposes.

Some have said that using legislative history to support a statutory interpretation is a bit like "looking over a crowd and picking out your friends."[109] In an effort to avoid such criticism, it should be noted that sections of the UCMJ's legislative history inure to the favor of those arguing that Congress intended no restriction on the Boards of Review in their exercise of sentence appropriateness authority. The testimony of the Judge Advocates General for the Army and Navy and Congress's lack of a response to their concerns offered the strongest evidence on this point. Both opposed granting Boards of Review sentence appropriateness authority because the boards' powers would be too sweeping.[110] Despite this opposition, premised on the Judge Advocates Generals' concern that Boards of Review would invade the province of commanders, Congress passed Article 66(c) with the sentence appropriateness provision intact. Thus, Congress arguably intended the Boards of Review to have sweeping unrestricted power since they were unmoved by the Judge Advocates Generals' concern.

Although this argument has some validity, it is not consistent with the legislative history. After the Judge Advocates General testified before the Senate, their concerns were discussed briefly.

> "Senator Kefauver. The next controversial subject is the board of review and Courts of Military Appeals.
> Professor Morgan. Yes.
> Senator Kefauver. The board of review.
> Professor Morgan. The first thing I understand on that, Senator, is that they [the Judge Advocates General] do not want the board of review to handle sentences, is that right?
> Mr. Galusha. That is right.
> Senator Kefauver. That is right.
> Professor Morgan. That is one of the places where there has been the tremendous criticism of the Army, Navy, and Air Force . . . . I was in the First World War, as a matter of fact, and I happened to sit for 6 weeks as chairman of the clemency committee,

109. Breyer, *supra* note 89, at 846 (quoting Judge Leventhal).

110. *Hearings on S. 857*, *supra* note 100, at 258, 262 (statement of Major General Thomas A. Green, Judge Advocate General of the Army), 287 (statement of Rear Admiral George L. Russell, Judge Advocate General of the Navy).

> and I know we remitted 18,000 years in 6 weeks. The sentences are just fantastic at times.
> Senator Saltonstall. Mr Chairman, I do not want to make hasty decisions, but if you feel the same way, I would say very clearly that I believe they should have the right to reduce sentences.
> Senator Kefauver. I think undoubtedly it should be there.[111]

This discussion does not support a conclusion that Congress intended Boards of Review to exercise their sentence appropriateness authority without restriction. Rather, it highlights that Congress was primarily concerned with the harshness of court-martial sentences, and intended Boards of Review to take sentences that were unduly harsh and make them fair.

VII. Conclusion

In an effort to correct the growing problem of undue post-trial delay within the Army's military justice practice, the Army Court of Criminal Appeals took a bold step. The court broke from the traditional method of addressing post-trial delay and created a new method, "*Collazo* relief." This new method forces SJAs and chiefs of criminal law to scrutinize the post-trial process in their jurisdictions.[112]

The legal authority for this new method of addressing undue post-trial delay was unclear in *Collazo*. The Army Court sought to clarify its authority to grant "*Collazo* relief" in *Bauerbach*. The *Bauerbach* court claimed that "*Collazo* relief" was, and had always been, based on sentence appropriateness authority. The *Collazo* opinion and the Army Court's subsequent memorandum opinions before *Bauerbach*, however, do not support this conclusion.

In *Bauerbach*, the Army Court claimed that, when it exercises sentence appropriateness authority to the benefit of an accused, its decision is final. If true, the court's opinion in *Bauerbach*, and all "*Collazo* relief" cases, would be beyond review. It is unclear whether the CAAF would agree with the Army Court, even if the Army Court properly exercised its sentence appropriateness authority. Clearly, however, the Army Court cannot place its decisions beyond review simply by labeling them as an

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111. *Id.* at 311.

112. This new method also increased interest within the Army in fielding voice recognition software for court reporting.

exercise of the court's sentence appropriateness authority. The court's opinions in *Bauerbach* and all "*Collazo* relief" cases are vulnerable to claims that the court has mislabeled its action, trying to do through sentence appropriateness authority what it could not do through legal error analysis.

Finally, the Army Court's creation of "*Collazo* relief" raises the question of whether Congress intended service courts to use their sentence appropriateness authority to resolve non-prejudicial legal errors. Congress's intent, described in the House and Senate reports and committee hearings on the UCMJ, was to have sentence appropriateness authority used to create sentence uniformity and remove command influence and excessive sentencing from the military. "*Collazo* relief" achieves none of these objectives.

The Army Court's new method of addressing post-trial delay lies in the no-man's land of statutory authority. "*Collazo* relief" is based on neither legal error nor a true sentence appropriateness analysis. "*Collazo* relief", like the *Dunlap*[113] rule before it, is born of frustration with what the court perceives as "tardy or sloppy work."[114] In an effort to stem this tide, the court transformed its sentence appropriateness shield into a stick, which it now wields against errant jurisdictions. This approach grants relief because the government was inefficient, not because the accused received an unjust punishment.

It should be recognized that the Army Court's creation and use of "*Collazo* relief" is not limited to post-trial issues. The court has effectively stated that, although an accused has suffered no legal harm from the government's error, he may nonetheless be entitled to relief. He is entitled because he has a right to a speedy post-trial process, and fundamental fairness dictates that the government proceed with due diligence in the post-trial process.

This same analysis can apply to trial or pretrial errors. For example, the court could determine the government violated an accused's Fifth Amendment or Article 31 rights, but there was no prejudicial effect. If there was no prejudicial effect, then no relief under a legal error analysis is permitted.[115] It could be argued, however, that consistent with the Army

113. Dunlap v. Convening Authority, 48 C.M.R. 751 (C.M.A. 1974) (imposing a strict, ninety day post-trial processing standard).

114. United States v. Collazo, 53 M.J. 721, 725 n.4 (Army Ct. Crim. App. 2000).

Court's analysis in *Bauerbach*, fundamental fairness dictates that the government protect soldiers' Fifth Amendment or Article 31 rights. Thus, when the government violates these rights, the court can provide relief in the form of a sentence reduction.

The legislative history of the UCMJ repeatedly makes reference to the struggle between the needs of discipline and the needs of justice. To ensure that discipline did not eclipse justice within the military, UCMJ Article 66(c) granted service courts sentence appropriateness authority. The intent of this authority was to ensure that convicted soldiers receive a just and fair punishment. Although much has changed in the military justice system since 1951,[116] the purpose and function of Article 66(c) has not. "*Collazo* relief," or interpretations like it, do not serve those purposes or functions.

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115. UCMJ art. 59(a) (2000).

116. Since 1951, the UCMJ has had two major revisions, in 1969 and 1984. *The Manual for Courts-Martial* has undergone four major revisions, in 1969, 1984, 1995, and 1998.