Apparent Unlawful Command Influence: An Unworkable Test for an Untenable Doctrine

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Unlawful command influence is a "malignancy that eats away at the fairness of [the] military justice system."

—United States v. Gleason[1]

INTRODUCTION

The appearance of fairness in the judicial system is of the utmost importance. In particular, the public must trust that defendants in a criminal prosecution are being treated fairly at all stages of the trial and appellate process. If the public does not believe in the independence of the judiciary, our system of checks and balances erodes, and the concomitant branches of government—especially the Executive

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1. United States v. Gleason, 39 M.J. 776, 782 (A.C.M.R. 1994), *rev'd on other grounds* 43 M.J. 69 (C.A.A.F. 1995).

Branch—will not enforce judgements made by the federal courts.[2] The appearance of fairness to defendants is of particular importance in the military justice system, where the threat of unlawful command influence (UCI) looms large.

The hierarchical structure of the military creates an environment where UCI can easily thrive. In the military, the inculcated obedience to orders from superior officers has the danger of impacting how those involved in the court-martial process conduct themselves.[3] Specifically, courts, scholars, and policymakers have always been concerned with individuals involved in the military prosecutorial process–from the convening authority to the servicemembers on the panel–"[making] decisions in a case … based on fealty to their [superior officers] instead of on the facts and law."[4] For example, during and after World War II, there were a significant number of courts-martial in which the commander's influence resulted in draconian enforcement of the Articles of War (the precursor to the Uniform Code of Military Justice (UCMJ)).[5] In fact, the War Department's Vanderbilt Report, produced in 1946, concluded "that in many instances the commanding officer who selected the members of the courts made a deliberate attempt to influence their decisions."[6] This conduct not only undermined the rights of defendants, but negatively impacted the public's perception of the military justice system and its ability to conduct itself fairly.

In response to the tendency of military commanders to manipulate criminal prosecutions of servicemembers, Congress created the military's Article I appellate court system in 1950 to provide civilian oversight of the military justice system and protect against UCI.[7] Congress' creation of the Court of Military Appeals (now the Court of Appeals for the Armed Forces) was specifically intended to "erect a further bulwark against impermissible command influence."[8] Additionally, Congress explicitly prohibited unlawful command influence in

2. *See* THE FEDERALIST NO. 78, at 402 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) (explaining that the courts "have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments").

3. *See* Rachel E. VanLandingham, *Military Due Process: Less Military* & More Process, 94 TUL. L. REV. 1, 7 (2019) ("Th[e] inculcated obedience to orders is a dangerous dynamic in relation to a criminal justice system owned and operated by those giving orders.").

4. *Id.* at 4; *see also* Stephen I. Vladeck, *Unlawful Command Influence and the President's Quasi-Personal Capacity*, 96 TEX. L. REV. ONLINE 35, 36 (2018) ("UCI is such a central issue to the military justice system because of those courts' unique structure—in which virtually all of the key players in a criminal trial, from the lawyers to the witnesses to the members of the jury to the judge, are uniformed servicemembers who could have both legal and professional reasons not to act against the wishes of those above them in the chain of command."); LISA M. SCHENCK, MODERN MILITARY JUSTICE: CASES AND MATERIALS 55 (3d ed. 2019) ("It is not difficult to imagine that, without constant vigilance, subordinate participants in the military justice system could be influenced by their superiors, resulting in unfairness to the accused.").

5. *See* Michael Scott Bryant, *American Military Justice from the Revolution to the UCMJ: The Hard Journey from Command Authority to Due Process*, 4 CREIGHTON INT'L & COMP. L. J. 1, 2 (2013) (describing "abuses within the U.S. military justice system during World War II," including "harsh sentences disproportionate to the offense, and despotic control of the proceedings by the commander").

6. ADVISORY COMM. ON MIL. JUST., REPORT OF WAR DEPARTMENT 6–7 (1946).

7. *See* VanLandingham, *supra* note 3, at 7.

8. United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986).

Article 37 of the UCMJ.[9] Since the creation of the Article I military court system and Article 37, UCMJ, military appellate courts have extended the prohibition on UCI "far beyond its statutory origins."[10] In particular, apparent UCI—a court-created doctrine that the UCMJ does not contemplate—is the most prevalent example of military courts expanding Article 37 beyond its statutory origins.[11] Furthermore, the U.S. Court of Appeals for the Armed Forces' (C.A.A.F.) current formulation of the doctrine under *Boyce*[12] is the most egregious example of C.A.A.F. disregarding Congress' intent, the express provisions of Article 37, and the UCMJ more broadly.

This Article argues that apparent UCI, as currently formulated by C.A.A.F., is not only intractable, but also in direct violation of both Articles 37 and 59 of the UCMJ. Part I discusses the development of apparent UCI and how the doctrine is applied today. Part II examines why the current test for apparent UCI is unworkable and argues that the doctrine itself is also unsupported by the UCMJ, thus exceeding C.A.A.F.'s authority as an Article I court. Finally, recognizing that apparent UCI remedies a harm that needs to be addressed—namely, protecting the public's perception of fairness in the military justice system—Part III offers proposals that C.A.A.F. and Congress could adopt to protect the appearance of fairness in the military justice system.

I. APPARENT UCI: ORIGINS & APPLICATION

A. The Origins of Apparent UCI

Apparent UCI is a doctrine created entirely by military courts. "There is absolutely no reference to apparent UCI in Article 37, UCMJ."[13] In fact, the concept of apparent UCI did not appear in an opinion from the Court of Military Appeals until 1954 in *United States v. Knudson*, and even then, it appeared only in a concurring opinion.[14] A majority of the Court of Military Appeals did not support the

9. Uniform Code of Military Justice (UCMJ) art. 37, 10 U.S.C. § 837 (1958).

10. VanLandingham, *supra* note 3, at 7.

11. *See* United States v. Barry, 78 M.J. 70, 85 (C.A.A.F. 2018) (Ryan, J., dissenting) (explaining that apparent UCI is a judicially-created doctrine). While the distinction between actual and apparent UCI is not the focus of this Article, it is helpful to briefly highlight one of the primary differences between actual and apparent UCI. Actual UCI concerns "whether an accused receives a fair trial; [apparent UCI] examines whether the service members and public at large *believe* the accused received a fair trial." Capt. Teresa K. Hollingsworth, USAF, *Unlawful Command Influence*, 39 A.F. L. REV. 261, 264 (1995) (citing United States v. Cruz, 20 M.J. 873, 880 (A.C.M.R. 1985) (en banc), *rev'd on other grounds*, 25 M.J. 326 (C.M.A. 1987). Additionally, whereas actual UCI requires a commander to act intentionally, the current test for apparent UCI does not require an intentional act. *See* United States v. Simpson, 58 M. J. 368, 374 (C.A.A.F. 2003). However, the lack of an intentionality requirement directly contradicts Article 37 of the UCMJ. *See infra* Part II.B.

12. United States v. Boyce, 76 M.J. 242 (C.A.A.F. 2017).

13. Col. John Loran Kiel, Jr., *"So You're Telling Me There's a Chance": Why Congress Should Seize the Opportunity to Reform Article 37 (UCI) of the UCMJ*, 227 MIL. L. REV. 1, 19 (2019).

14. United States v. Knudson, 16 C.M.A. 161, 172 (1954) (Brosman, J., concurring in the result) ("I am fortified in my belief that *the appearance of* unlawful 'command influence' is vivid enough here to require reversal.") (emphasis added).

doctrine of apparent UCI until ten years later in *United States v. Johnson*.[15] In that case, the members of the court-martial (i.e., the jury) were issued a pamphlet by the staff legal officer of the convening authority before the court-martial commenced.[16] The pamphlet's purpose was to educate the members as to "the nature and importance of a court-martial and their individual responsibilities."[17] However, the pamphlet also contained objectionable instructions. For example, the pamphlet instructed the members to refer to paragraph seventy-six of the Manual for Courts-Martial (MCM) for "factors 'which may be considered in determining an appropriate sentence'" even though the Court of Military Appeals had previously held that the instructions in paragraph seventy-six of the MCM "ought to be discarded."[18] The court explained, when it reversed the conviction of the accused, that the "*apparent* existence of 'command control,' . . . is as much to be condemned as its actual existence."[19]

Despite recognizing the existence of apparent UCI in *Johnson*, the court stopped short of identifying a particular test that should be used to determine when a commander has committed apparent UCI. However, the court did establish that the appearance of UCI creates a rebuttable presumption of prejudice to the accused.[20] The court opined that if the members of the court-martial "completely disregarded the improper matter, there is no reason to conclude that the accused was *deprived of a fair trial*."[21] Thus, the presumption of prejudice is rebutted. The court in *Johnson,* however, did not believe that the presumption of prejudice was rebutted and overturned the defendant's conviction precisely because the accused was prejudiced as to his sentence.[22] In short, although *Johnson* did not create an articulable test for apparent UCI, it did establish that prejudice to the accused is a necessary component in overturning a conviction on the grounds of apparent UCI.[23]

It was not until 1994 that the foundation for modern apparent UCI jurisprudence was established in *United States v. Mitchell*, and, as in *Knudson*, it was established in a concurring opinion.[24] The *Mitchell* concurrence, quoting the concurrence from the lower court, stated that apparent UCI could be established when "'an

15. United States v. Johnson, 14 C.M.A. 548, 551 (1964).
16. *Id.* at 550.
17. *Id.* (description of the pamphlet's purpose in the words of the court).
18. *Id.* at 550 n.1 (quoting United States v. Mamaluy, 10 C.M.A. 102, 107 (1959)).
19. *Id.* at 551 (emphasis added).
20. *Id.*
21. *Id.* (emphasis added).
22. *Id.* at 552.
23. *See, e.g.*, United States v. Allen, 33 M.J. 209, 212 (C.M.A. 1991), *overruled by* United States v. Dinger, 77 M.J. 447 (C.A.A.F. 2018) ("There must be more than an appearance of evil to justify action by an appellate court in a particular case."); United States v. Reynolds, 40 M.J. 198, 203 (C.M.A. 1994) (Wiss, J., concurring in part and in the result) ("[C]ommand influence, however condemnable, does not prompt judicial action in response where an appellate court is convinced beyond a reasonable doubt that the proceedings are free from prejudicial influence."). *But cf.* United States v. Hilow, 32 M.J. 439, 444 (C.M.A. 1991) (Cox, J., dissenting in part) (questioning if "some evils are so enormous that they must be punished, notwithstanding that they do not affect the accused).
24. United States v. Mitchell, 39 M.J. 131, 147–53 (C.M.A. 1994) (Wiss, J., concurring in part, dissenting in part, and concurring in the result).

objective, disinterested observer fully informed of the facts would entertain a significant doubt that justice was being done' and would perceive an appearance of command influence."[25] Four years later, C.A.A.F. adopted substantially similar language in its majority opinion in *United State v. Calhoun*, thus establishing the "objective, disinterested observer" standard as the formal test for apparent UCI.[26]

Although *Calhoun* finally established an objective test for determining whether a court-martial was tainted by the appearance of UCI, it did not overrule the requirement from *Johnson* that prejudice to the accused is still needed. For example, in *United States v. Salyer*, after determining that an objective, disinterested observer, with knowledge of all the facts, could reasonably conclude that there was at least an appearance of UCI, the court stated that it would then "test for prejudice."[27] By going out of its way to mention a test for prejudice—followed by an analysis regarding whether or not there was prejudice—the *Salyer* Court explicitly recognized that prejudice to the accused was an additional, but necessary, step in concluding that there was apparent UCI.

B. C.A.A.F.'s Approach to Apparent UCI: The *Boyce* Standard

In 2017, C.A.A.F. overruled over sixty years of its own precedent in *United States v. Boyce*, holding that apparent UCI could be established despite the fact that the accused was not prejudiced in any way.[28] In that case, C.A.A.F. overturned Airman Rodney Boyce's conviction of rape and assault consummated by a battery.[29] The convening authority, Lieutenant General (Lt. Gen.) Craig Franklin, referred Boyce's case to a general court-martial shortly after being told that the Secretary of the Air Force had lost confidence in him and that he must either voluntarily retire or be removed from his command.[30] Lt. Gen. Franklin previously set aside the findings and sentence in an unrelated sexual assault case and refused to refer another sexual assault case to a general court-martial.[31] Both of these decisions received a maelstrom of negative attention from the media and Congress.[32] Boyce's apparent UCI claim rested on the assumption that the Secretary lost confidence in Lt. Gen. Franklin because of his decisions in the prior

25. *Id.* at 151 (quoting United States v. Mitchell, 37 M.J. 903, 930–31 (N.M.C.M.R.) (Reed, J., concurring)).

26. United States v. Calhoun, 49 M.J. 485, 488 (C.A.A.F. 1998) (Apparent UCI is not established "unless an objective, disinterested observer, with knowledge of all the facts, could reasonably conclude that there was at least an appearance of unlawful command influence . . .").

27. United States v. Salyer, 72 M.J. 415, 427 (C.A.A.F. 2013).

28. *See* United States v. Boyce, 76 M.J. 242, 248 (C.A.A.F. 2017). Although the 2020 revisions to the UCMJ likely supersede the *Boyce* standard, C.A.A.F. has not yet explicitly overruled it. As such, any reference to "the *Boyce* Standard" in this Article is referring to the standard as elucidated by the *Boyce* majority and not to the alternative standard put forth by Judge Ryan in her *Boyce* dissent. That said, as noted *infra* note 71, in the absence of guidance from C.A.A.F., lower military courts have held that the *Boyce* standard is no longer good law as a result of the 2019 UCMJ revisions.

29. *Id.* at 244.

30. *Id.* at 245–46.

31. *Id.* at 244–45.

32. *Id.* at 245.

sexual assault cases and that he felt compelled to refer Boyce's case to a general court-martial for fear of the repercussions if he did not do so.[33]

Judge Ohlson, writing for the majority, established a two-pronged test to evaluate claims of apparent UCI.[34] The first prong requires the appellant to show facts, which if true, would constitute UCI.[35] If the first prong is met, the appellant must then show that the UCI placed "'an intolerable strain' on the public's perception of the military justice system because an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding."[36] Judge Ohlson then established an analytical framework for courts to use in applying the two-pronged test.[37]

Finally, Judge Ohlson's opinion explicitly overruled the long-established requirement that the accused be prejudiced to succeed on a claim of apparent UCI.[38] Judge Ohlson explained that the prejudice involved in claims of apparent UCI "is the damage to the public's perception of the fairness of the military justice system as a whole. . . ."[39] While Judge Ohlson went out of his way to reconcile the *implicit tension* between this conclusion and C.A.A.F.'s holding in *United States v. Biagase*, which required that UCI have a "logical connection to the court-martial," [40] he made no attempt to reconcile the *explicit tension* between holding that no prejudice to the accused is required and Article 59(a)'s requirement that prejudice to the accused *is* required for C.A.A.F. to set aside the findings and sentence of a court-martial.[41]

Recognizing that the majority's holding contained some logical inconsistencies, Judge Stucky and Judge Ryan each dissented in *Boyce*.[42] Judge Stucky argued that the majority's test for apparent UCI "makes little sense" because "it is difficult to understand how an objective, disinterested, *fully informed observer*, knowing that there is no actual unlawful command influence, 'would harbor a

33. *Id.* at 246.

34. *Id.* at 249.

35. *Id.*

36. *Id.* (quoting United States v. Wiesen, 56 M.J. 172, 175 (C.A.A.F. 2011)). The second prong of the *Boyce* standard modifies the "objective observer" standard established in *Calhoun* by explicitly requiring consideration of the public's perception of fairness and requiring "significant doubt about the fairness of the proceeding" as opposed to only requiring a reasonable conclusion that apparent UCI was present. *Id.*

37. Judge Ohlson's framework is not directly relevant to the arguments advanced in this Article so, for the sake of brevity, it will not be discussed in detail. For further understanding of the analytical framework courts use to apply the two-pronged test, see *id.* at 249–50; *see also* Lt. Col. John L. Kiel, Jr., *They Came in Like a Wrecking Ball: Recent Trends at C.A.A.F. in Dealing with Apparent UCI*, 2018 ARMY LAW. 18, 20 (2018).

38. *Boyce*, 76 M.J. at 248 ("[N]o . . . showing [of prejudice to the accused] is required for a meritorious claim of an appearance of unlawful command influence.).

39. *Id.* at 249.

40. United States v. Biagase, 50 M.J. 143, 150 (C.A.A.F. 1999).

41. *Boyce*, 76 M.J. at 248–49, 249 n.6. Judge Ohlson reconciles the tension between his holding and *Biagase* by explaining that a logical connection to a court-martial "is not the same as a conclusion that there was prejudice to the individual accused. Rather, 'logical connection' is merely a germaneness requirement. *Id.*

42. *Id.* at 253–56.

significant doubt about the fairness of the proceeding.'"[43] Put simply, if an omniscient observer knew that there was no actual UCI, then the observer would have no reason to doubt the fairness of the proceeding, making any claim of apparent UCI impossible to prove (at least under the test as the majority articulated it).

While Judge Ryan agreed with Judge Stucky's reasoning, she spent most of her dissent arguing that C.A.A.F. does not have the authority to reverse the findings or sentence of a court-martial absent prejudice to the accused rather than criticizing the "omniscient and objective observer" standard. Judge Ryan argued that "[w]ithout prejudice to the substantial rights *of the accused* from an error . . . Article 59(a), UCMJ, prohibits [C.A.A.F.] from affording relief."[44] Judge Ryan relied on the text of Article 59(a) in drawing this conclusion.[45] She thus afforded deference to "Congress' . . . good reason[s] to tether appellate relief to Article 59(a)'s requirement of prejudice to the accused,"[46] and recognized that C.A.A.F. does not have the authority to circumvent the UCMJ even if there was "monkey business aplenty" in Boyce's case.[47]

United States v. Barry was decided one year after *Boyce* and is integral to understanding C.A.A.F.'s current approach to apparent UCI under *Boyce* (although it was an *actual*, not *apparent*, UCI case). [48] While the facts and holding of *Barry* are not directly pertinent to understanding the *Boyce* standard, Judge Ryan's *Barry* dissent provides a relevant interpretation of Article 37(a) of the UCMJ. As her dissent noted, Article 37(a)—as it existed at the time *Barry* was decided—stated in part that "[n]o person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial . . . ."[49] In her dissent, Judge Ryan argued that the UCMJ requires a commander to act intentionally to commit UCI, reasoning that not only does the word "attempt" denote an intentional act, but that both "coerce" and "influence" also

43. *Id*. at 253–54 (Stucky, J., dissenting) (quoting *id*. at 248–49 (majority opinion)).

44. *Id*. at 254 (Ryan, J., dissenting). Prejudice is defined as "'a reasonable probability that but for the error, the outcome of the proceeding would have been different.'" United States v. Lopez, 76 M.J. 151, 154 (C.A.A.F. 2017) (quoting Molina-Martinez v. United States, 136 S. Ct. 1338, 1343 (2016)). *But see* VanLandingham, *supra* note 3, at 62 ("The [UCMJ] does not define what types of errors materially prejudice the accused's substantial rights; indeed, there is room for such material prejudice to substantial rights to mean something other than reasonable doubt that the outcome would be different . . .").

45. *See Boyce*, 76 M.J. at 254 (Ryan, J., dissenting) ("'A finding or sentence of a 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*.'" (quoting UCMJ art. 59(a), 10 U.S.C. § 859(a) (2012)) (emphasis added)).

46. *Id*. at 256.

47. *Id*.

48. United States v. Barry, 78 M.J. 70 (C.A.A.F. 2018).

49. Note that Article 37(a) was amended in 2019. The relevant text of Article 37 as amended in 2019 states: "No person subject to this chapter may attempt to coerce or, by any unauthorized means, *attempt to* influence the action of a court-martial . . ." 10 U.S.C. § 837(a)(3) (2019) (emphasis added). The only difference between this portion of Article 37 and the version of Article 37 as interpreted in *Barry* is the insertion of "attempt to" before "influence the action." *Compare id. with* 10 U.S.C. § 837(a) (2018). This confirms that an intentional act is required as to both coercing and influencing a court-martial as Judge Ryan argued in her *Barry* dissent. *See Barry*, 78 M.J. at 82 (Ryan, J., dissenting). Congress was clearly responding to the points Judge Ryan made regarding the ambiguity that resulted from Article 37 before it was revised. *See infra* notes 54–57 and accompanying text.

"suggest intentional action."[50] As such, Judge Ryan argued, the UCMJ requires that a commander act intentionally in order to commit UCI.[51] Judge Ryan acknowledged that *Boyce* did not require intentionality to show apparent UCI; however, she had dissented *in Boyce* and did not appear to endorse that portion of *Boyce* in her *Barry* dissent.[52]

Notwithstanding Judge Ryan's powerful arguments from her *Boyce* and *Barry* dissents, her approach has yet to be adopted by C.A.A.F. As a result, the *Boyce* standard—which permits relief without prejudice to the substantial rights of the accused—is still C.A.A.F's current approach in apparent UCI cases. Furthermore, *Barry* makes clear that the *Boyce* standard can still be applied even if a commander creates the appearance of UCI through an unintentional action.

II. THE *BOYCE* STANDARD AND APPARENT UCI ARE UNSUPPORTED BY THE UCMJ

While Judge Stucky's *Boyce* dissent makes an extremely compelling argument for why the majority's test for apparent UCI is intractable, this Section will focus primarily on the reasoning from Judge Ryan's *Boyce* dissent; namely, that C.A.A.F. does not possess the authority to set aside a finding or sentence unless that error "materially prejudices the substantial rights of the accused."[53] Additionally, this Section will argue that while Judge Ryan's logic was sound at the time she wrote her dissent, Congress' revision to Article 37, UCMJ in the National Defense Authorization Act for Fiscal Year 2020[54] (NDAA) establishes conclusively that without prejudice to the accused, C.A.A.F. has no authority to set aside a finding or sentence. Finally, this Section will explain that, consistent with Judge Ryan's *Barry* dissent, the intentionality requirement of Article 37 must result in the conclusion that C.A.A.F. has no authority to reverse the findings or sentence of a court-martial on the grounds of apparent UCI *even if* the rights of the accused have been materially prejudiced.[55]

A. The Boyce *Standard is Unworkable Because Article 37 Requires Prejudice to the Accused in UCI Cases*

It is well established that courts should not interpret statutes in a vacuum and that there is a presumption that the meaning of a particular provision should be read in the context of the statute as a whole, even if the current case only invokes a particular section of the statute.[56] In other words, a particular section of a statute

50. *See Barry*, 78 M.J. at 81–84 (Ryan, J., dissenting).

51. *See id*. at 85.

52. *Id*.

53. *See* United States v. Boyce, 76 M.J. 242, 254 (C.A.A.F. 2017) (Ryan, J., dissenting) (emphasis omitted) (quoting 10 U.S.C. § 859(a) (2012)).

54. National Defense Authorization Act for Fiscal Year 2020 (NDAA 2019), Pub. L. No. 116-92, 133 Stat. 1198.

55. *But see infra* note 88 (arguing that C.A.A.F.'s authority to reverse the findings and sentence of a court-martial in cases of apparent UCI lies in the Due Process Clause of the Fifth Amendment).

56. *See* Corley v. United States, 556 U.S. 303, 314 (2009) (explaining that "a statute should be construed [to give effect] to all its provisions, so that no part will be inoperative or superfluous, void or insignificant" (quoting Hibbs v. Winn, 542 U.S. 88, 101 (2004)).

shall not be divorced from the rest of the act. Judge Ryan made precisely this point in her *Boyce* dissent when she argued that Article 59(a) prevented C.A.A.F. from granting relief absent prejudice to the accused.[57] Notwithstanding the fact that Article 37 was silent as to whether prejudice was required in cases of UCI, C.A.A.F. should not only have considered its longstanding precedent requiring prejudice to the accused, but more importantly, it should have adhered to one of the most basic tenets of statutory interpretation and looked to all of the requirements imposed by the UCMJ before holding that prejudice to the accused is not required in apparent UCI cases.

The court's holding in *Boyce*—that in cases of apparent UCI, the prejudice involved is the damage to the public's perception to the fairness of the military justice system—is a halfhearted attempt at invoking a prejudice requirement that completely disregards Article 59(a)'s requirement that prejudice be *to the accused*. If Congress had wanted to allow military courts to decide what type of prejudice was sufficient to overturn a case on UCI grounds, it would have either made that explicitly clear in the UCMJ or it would not have limited the type of prejudice that constitutes reversal in Article 59(a).[58]

Even if C.A.A.F. could somehow circumvent the well-established canons of statutory interpretation and only look at Article 37 when deciding apparent UCI cases, the *Boyce* standard is made even more unworkable under the NDAA's revision to Article 37.[59] The revision to Article 37 imports substantially similar language from Article 59(a) into Article 37, stating that "[n]o finding or sentence of a court-martial may be held incorrect on the ground of a violation of this Section unless the violation materially prejudices the substantial rights *of the accused*."[60] Congress' decision to amend Article 37 appears to have been motivated in part by C.A.A.F.'s decisions in *Boyce* and *Barry* (as well as Judge Ryan's dissents in both cases). In fact, the Department of Defense (DOD) initiated the proposal that Congress ultimately adopted specifically to reintroduce prejudice to the accused as a requirement in apparent UCI cases.[61]

While testifying at a congressional hearing on the DOD's proposal, the Judge Advocate General of the Army, General Charles Pede, stated that consistent with Judge Ryan's dissents in *Boyce* and *Barry*,[62] "this proposal, if enacted, would re-

57. *Boyce*, 76 M.J. at 254 (Ryan, J., dissenting).

58. *See* Conn. Nat'l. Bank v. Germain, 503 U.S. 249, 253–54 (1992) (opining that "in interpreting a statute a court . . . presume[s] that a legislature says in a statute what it means and means in a statute what it says there").

59. For further discussion of the NDAA's revisions to the UCMJ and the implications of those changes, see Rachel E. VanLandingham, *Ordering Injustice: Congress, Command Corruption of Courts-Martial, and the Constitution*, 49 HOFSTRA L. REV. 211, 232–38 (2020) which was the first article to discuss the NDAA.

60. UCMJ art. 37(a)(3), 10 U.S.C. § 837(a)(3) (2019) (emphasis added).

61. *See Examining the Role of the Commander in Sexual Assault Prosecutions: Hearing Before the Subcomm. On Mil. Pers. Of the H. Comm. On Armed Servs.,* 116th Cong. 166 (2019) (statement of Gen. Charles Pede, U.S. Army J. Advoc. Gen.) [hereinafter *Examining the Role of the Commander*].

62. *Id.* Although General Pede only refers to *Barry*, the larger context of his statement indicates that the proposal is also consistent with Judge Ryan's dissent in *Boyce* since her dissent in that case discussed

institute the harmless-error doctrine analysis into the apparent unlawful command influence doctrine."[63] While the DOD's and Congress' intent in revising Article 37 are not dispositive in determining the meaning of the article, the explicit language of the statutory provision informed by this intent should be sufficient for C.A.A.F. to understand that it must reverse course on the *Boyce* standard since it is not now, nor has it ever been, sanctioned by the UCMJ.[64]

B. Apparent UCI Is an Untenable Doctrine Because of Article 37's Intentionality Requirement

Not only is the *Boyce* standard's absence of a prejudice requirement unsupported by the UCMJ, apparent UCI is itself impermissible even if C.A.A.F. finds prejudice to the accused. As an Article I court, C.A.A.F. derives its authority from Congress, as enacted through the UCMJ.[65] As such, C.A.A.F. does not have the authority to wield its power beyond the text of the UCMJ. Thus, one must look to the specific provisions of the UCMJ to determine whether or not C.A.A.F. can reverse the findings or sentence of a court-martial based on apparent UCI.

C.A.A.F. has held that apparent UCI, unlike actual UCI, does not require a commander to act intentionally, but has been unable to point to any provision of the UCMJ to substantiate this claim.[66] This is because apparent UCI is a doctrine entirely made up by C.A.A.F.'s predecessor, the C.M.A., and finds no support in

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the fact that prejudice to the accused is required in apparent UCI cases. *See Boyce*, 76 M.J. at 254 (Ryan, J., dissenting).

63. *Examining the Role of the Commander*, *supra* note 61, at 166.

64. In the absence of guidance from C.A.A.F. on whether it will continue to apply the *Boyce* standard, the JAG Corps of each service branch are proceeding as if the *Boyce* standard is no longer good law and teaching JAG officers that they should proceed as if prejudice to the accused is necessary in apparent UCI cases. *See, e.g.*, Lt. Col. Rebecca L. Farrell, *Article 37, Command Influence FY20 NDAA Changes*, JUDGE ADVOC. GEN.'S LEGAL CTR. & SCH., 16 (2020) ((quoting *Boyce*, 76 M.J. at 248), https://perma.cc/4RRX-7BLQ ("Relief [is] *no longer available* based on 'the damage to the public's perception of the fairness of the military justice system as a whole and not the prejudice to the individual accused.'")). Furthermore, it seems that the courts of appeals for the service branches are adopting a prejudice standard in their analysis of apparent UCI. *See, e.g.*, United States v. Batson, No. ACM 39637, 2021 WL 634951, at *24 (A.F. Ct. Crim. App. Feb. 18 2021) (explaining that "there is no evidence that the actions underlying the claimed influence was prejudicial to Appellant" when it held that there was no apparent UCI); United States v. Gattis, 81 M.J. 748, 757 (N.M. Ct. Crim. App. 2022) (holding that even if Gattis had not waived his apparent UCI claim that it would still fail because he was not prejudiced). Note, however, that lower courts are proceeding cautiously when it comes to explicitly overruling the *Boyce* standard. Consider, for example, the holding in *Gattis*. Although the court held that it was "statutorily barred from holding the findings or sentence of [Gattis' court-martial] to be incorrect on the grounds of apparent UCI," the court then analyzed the apparent UCI claim under the *Boyce* standard and reached the same conclusion. *See Gattis*, 81 M.J. at 757–58. If it was settled that *Boyce* is no longer good law, then the *Gattis* court would have had no reason to hedge its holding and apply the *Boyce* standard. The *Gattis* court's application of *Boyce* illustrates that there is still uncertainty as to the future of the *Boyce* standard since C.A.A.F. has yet to hold that the revised Article 37 supersedes *Boyce*.

65. *See* UCMJ art. 67, 10 U.S.C. § 867 (2018).

66. *See* United States v. Simpson, 58 M.J. 368, 374 (C.A.A.F. 2003) (determining that actual UCI requires intent whereas apparent UCI does not); *see also* United States v. Boyce, 76 M.J. 242, 251 (C.A.A.F. 2018) (explaining that intent is not required to demonstrate apparent UCI without citing to any provision in the UCMJ to support this claim).

the text of the UCMJ.[67] Article 37 unequivocally requires that a commander's impermissible interference with a court-martial be intentional as evidenced through the need for an "attempt" to be made at coercion or influence.[68] If there was any doubt as to Article 37's intentionality requirement prior to 2019, recent revisions to Article 37 make clear that a commander must act intentionally as to both coercion attempts *and* attempts to influence a court-martial.[69]

Even if the substantial rights of the accused were prejudiced, as required by Article 37(c), C.A.A.F. would still not have the authority to reverse the findings or sentence of the accused based on the unintentional, yet impermissible, interference of a commander into a court-martial. Article 37(c) requires that a violation of "this section" (meaning Article 37) be committed for C.A.A.F. to reverse the findings or sentence of a court-martial.[70] Since Article 37(a)(3) unequivocally requires an intentional act, it is not possible for there to be a violation under Article 37(c) absent an intentional act by someone subject to Article 37. As such, apparent UCI is inconsistent with the express provisions of the UCMJ, and C.A.A.F. has no authority to reverse the findings or sentence of a court-martial on the basis of apparent UCI.

One may choose to look to the purpose of C.A.A.F.—namely, its purpose to "erect a further bulwark against impermissible command influence"[71]—to conclude that, notwithstanding the text of Article 37, C.A.A.F. has the authority to create and enforce apparent UCI of its own accord. However, the purpose for which C.A.A.F. was created has no significance when it comes to determining the power it has to reverse the findings and sentence of a court-martial. Instead, the text of the statute—which explicitly requires an intentional act—necessarily supersedes C.A.A.F.'s abstract purpose. Even if one could find a textually demonstrable reason for C.A.A.F. to enforce apparent UCI, that reason still could not directly contradict other portions of the UCMJ.[72] Thus, even when one considers C.A.A.F.'s explicit purpose to protect the fairness of the military justice system, it would still be unable to outmaneuver Article 37's intentionality requirement.

Since an intentional act that impermissibly interferes with a court-martial in such a way as to prejudice the accused is already covered by actual UCI, and there is no textually-demonstrable reason to conclude that even with prejudice,

67. *See supra* note 14 and accompanying text.

68. *See supra* notes 52–54 and accompanying text.

69. This is because Congress recognized the potential ambiguity created when the words "attempt to" only preceded the word "coerce" and not the word "influence" which it rectified in the 2019 revision to Article 37. *See* UCMJ art. 37(a)(3), 10 U.S.C. § 837(a)(3) (2019).

70. UCMJ art. 37(c), 10 U.S.C. § 837(c) (2019).

71. United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986).

72. *Cf.* K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 324 n.2 (1988) (Scalia, J., with whom Rehnquist, C.J., Blackmun, J., and O'Connor, J., joined, concurring in part and dissenting in part) (opining that "it is a venerable principle that a law will not be interpreted to produce absurd results"). Interpreting the UCMJ in such a way that allows C.A.A.F. to find apparent UCI without an intentional act by the commander while Article 37 explicitly requires an intentional act would produce an absurd result.

C.A.A.F. could reverse the findings and sentence of a court-martial in the absence of an intentional act, it becomes clear that apparent UCI is an untenable doctrine even if enforcing it would serve the worthy goal of ensuring the appearance of fairness in the military justice system.

III. ADDRESSING DAMAGE TO THE PERCEPTION OF FAIRNESS: HOW TO PROTECT APPEARANCES WITHOUT APPARENT UCI

It cannot be denied—and it has long been held by C.A.A.F.—that "the mere appearance of unlawful command influence may be 'as devastating to the military justice system as the actual manipulation of any given trial.'"[73] However, this observation still does not endow C.A.A.F. with the power to craft a remedy outside the bounds of the UCMJ simply because the lack of such a remedy would be damaging to the military justice system. That said, addressing unintentional acts by commanders that either prejudice the substantial rights of the accused or damage the public's perception of the fairness of the military justice system are of paramount importance. This Section begins by discussing how C.A.A.F., under the UCMJ as it currently stands, can protect the appearance of fairness in the military justice system in cases where unintentional, yet impermissible, conduct does not prejudice the rights of the accused but may damage the appearance of fairness of the military justice system. Next, this Section suggests how Congress could amend the UCMJ to provide a remedy for defendants who have been prejudiced by unintentional, yet impermissible, conduct of commanders. This Article concludes by recommending that C.A.A.F. abandon the classification of actual and apparent UCI in favor of an intent-based standard. UCI should be classified as either intentional or unintentional with both categories requiring prejudice to the accused in order to merit reversal.[74]

A. Well-Reasoned, Objective Opinions and the Appellate Process Will Protect Appearances When the Accused Was Not Prejudiced

C.A.A.F. currently has the power to dispel any claims that the court-martial process was unfair in any particular case (or that the accused was prejudiced) via the long-established practice of writing opinions explaining the court's decision. Even if the unintentional acts of a commander appear on their face as UCI such that the public may lose faith in the fairness of the military justice system, "[t]he appellate review process in and of itself should restore public confidence [in the military justice system]. By publishing the truth about the case, [the court will] dispel[] any appearance of unlawful command influence that may have existed."[75]

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73. United States v. Ashby, 68 M.J. 108, 128 (C.A.A.F. 2009) (quoting United States v. Ayers, 54 M. J. 85, 94–95 (C.A.A.F. 2000) (quoting United States v. Allen, 33 M.J. 209, 212 (C.M.A. 1991))).

74. Of course, this new classification would only be possible if Congress adopts the UCMJ revisions recommended *infra* Part III.B.

75. Hollingsworth, *supra* note 11, at 265 (citing United States v. Cruz, 20 M.J. 873, 891 (A.C.M.R. 1985) (en banc), *rev'd on other grounds*, United States v. Cruz, 25 M.J. 326 (C.M.A. 1987)).

C.A.A.F. has recently used this logic, at least implicitly, to justify holding that there was no apparent UCI in the accused's court-martial process. In *United States v. Bergdahl*, C.A.A.F. held that there was no apparent UCI when Senator John McCain and President Donald Trump made comments that could have influenced the actions of those involved with the court-martial.[76] Senator McCain told a reporter that if Bergdahl was not punished, the Senate Armed Services Committee would "have to have a hearing . . . ."[77] Meanwhile, President Trump incorporated statements he had made about Bergdahl while he was a candidate for president at a Rose Garden ceremony while he was President.[78] The incorporated statements of then-candidate Trump included *inter alia* claims that Bergdahl was a "dirty, rotten, no-good traitor" and that five or six people died while searching for Bergdahl when he deserted his post.[79]

After chronicling the statements made by both President Trump and Senator McCain, the court explained with particularity why those actions did not prejudice Bergdahl with respect to his sentence.[80] The court then concluded that it was "clear beyond a reasonable doubt that the comments made by President Trump and Senator McCain—regardless of how 'troubling,' 'disturbing,' 'disappointing,' 'inaccurate,' 'inappropriate,' and 'ill-advised' they were—did not place an intolerable strain upon the public's perception of the military justice system . . . ."[81]

Although the court in *Bergdahl* invoked the *Boyce* standard by centering its holding around the public's perception of the military justice system rather than holding that there was no apparent UCI because the accused was not prejudiced, the holding could be reframed to be consistent with this Section's proposal. In that case, C.A.A.F. explained in great detail the many reasons why Bergdahl was not prejudiced notwithstanding the unintentional interference of President Trump and Senator McCain; interference that would, on its face, appear to influence the outcome of the court-martial.[82] For example, the court explained *inter alia* that

76. United States v. Bergdahl, 80 M.J. 230, 239 (C.A.A.F. 2020).

77. *Id.* at 236. Note that the reason Senator McCain was capable of committing UCI (whether it be actual or apparent) was because at the time he made his statement, he was a retired member of the Navy and not because of his membership on the Senate Armed Services Committee. *See id.* at 234.

78. *Id.* at 238. Note that President Trump was capable of committing UCI by virtue of his position as Commander-in-Chief under Article 22(a)(1) of the UCMJ and R.C.M. 104(a)(1). *See id.* at 235. The only reason the statements he made as a candidate were relevant was because he incorporated them by reference during his speech in the Rose Garden, thus ratifying them under the auspices of his authority as President of the United States. *See id.* at 238.

79. According to C.A.A.F.'s majority opinion, the record did not support the claim that five or six people died while searching for Bergdahl. *See id.* at 237. The record only supported the fact that "a number of military members were injured—some seriously—while searching for [Bergdahl.]" *Id.*

80. *Id.* at 239–44.

81. *Id.* at 244 (cleaned up).

82. It is important to note here exactly what I mean by an unintentional action or interference by a commander into a court-martial. I do not mean unintentional only in the sense that the action was reckless or negligent (i.e., accidental), although an accidental act could fall under the ambit of unintentional UCI if it prejudiced the substantial rights of the accused. Here, unintentional also encompasses voluntary (or intentional) actions that were not intended to influence a court-martial. Thus,

Bergdahl chose to plead guilty, and that when he was given the opportunity to withdraw his guilty plea after raising the issue of apparent UCI, he declined to do so. [83]

Because Bergdahl was not prejudiced—and because C.A.A.F. clearly explained all the reasons why in its opinion—it is not possible that the public's perception of the fairness of the military justice system could be threatened. This sort of reasoned analysis explaining the unintentional, yet impermissible, acts of those capable of committing UCI and how they did not prejudice the substantial rights of the accused is exactly how C.A.A.F. should proceed in future cases of claimed apparent UCI when the accused was not prejudiced. By explaining with particularity why the accused was not prejudiced, C.A.A.F. can demonstrate why the fairness of the military justice system was not impacted *even if* that may have been the appearance ostensibly.[84]

B. Explicitly Recognizing Apparent (or Unintentional) UCI in the UCMJ Will Protect Appearances—and the Rights of the Accused—When the Accused Was Prejudiced

While C.A.A.F.'s current ability to write well-reasoned, objective opinions—and the appellate review process more broadly—should address the concern of eroding the public's perception of fairness in the military justice system when the appearance of UCI does not prejudice the accused, it would not satisfactorily address apparent (or unintentional) UCI that does prejudice the accused, which certainly would erode the public's faith in the military justice system. For a solution to this problem, one must look to Congress for an appropriate remedy; without an amendment to the UCMJ, C.A.A.F. will *never* have the authority to reverse the findings or sentence of a court-martial on the grounds of apparent (or unintentional) UCI even if there was prejudice to the accused.[85]

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if the purpose of the action—regardless of whether it is accidental or voluntary—was not to influence a court-martial, then it should be considered unintentional. For example, the statements made by both President Trump and Senator McCain were obviously not accidental; they fully intended to speak publicly about Bergdahl. Their intent, however, was not to coerce the members of the court-martial or alter its outcome and should thus be considered unintentional when conducting a UCI analysis. The unintentional conduct of President Trump and Senator McCain is thus distinguishable from the intentional conduct of a commander who discourages witnesses from testifying on behalf of the accused. In such a case, not only are the commander's actions voluntary, but their express purpose is to influence the outcome of the court-martial.

83. *See Berghdal*, 80 M.J. at 242.

84. Of course, there will always be hard calls to make at the margins, but that is the duty of the court; it must examine the law and the record and make difficult decisions regarding whether the particular circumstances of any given case resulted in actual prejudice to the accused. Anything less would be a dereliction of the court's duty and an impermissible extension of its mandate as an Article I court.

85. Some scholars have proposed alternative approaches that would purportedly allow C.A.A.F. to reverse the findings and sentence of the accused's court-martial notwithstanding the requirements of Article 37. For example, Professor Rachel VanLandingham has argued that the "apparent unlawful command influence doctrine, in helping ensure military justice proceedings are both based, and perceived to be based, on independent decision-making free from command desires," is required under the Due Process Clause of the Fifth Amendment. VanLandingham *supra* note 59, at 214; *see also* United States v. Boyce, 76 M.J. 242, 249 n.8 (C.A.A.F. 2017) (opining that "in the military justice system both

One way Congress could permit C.A.A.F. to craft a remedy for unintentional UCI would be to revise Article 37(a)(3) and remove its intentionality requirement.[86] The revised Article 37(a)(3) could read:

> No person subject to this chapter may *engage in any conduct that could* coerce or, by any unauthorized means, *engage in any conduct that could* influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority or preliminary hearing officer with respect to such acts taken pursuant to this chapter as prescribed by the President *such that the conduct, if proven, would materially prejudice the substantial rights of the accused*.

This revision to Article 37 would allow C.A.A.F. to craft an appropriate remedy based on the specifics of the case. Most relevant to this discussion, C.A.A.F. could consider whether or not the commander's actions were intentional when crafting a remedy since the revised Article 37 only requires that the conduct *could* coerce or influence the process and does not specifically require an intentional act. Additionally, this revision specifically requires that the conduct, if proven, prejudice the accused, thus strengthening even further the 2019 revisions to Article 37.[87] Under the revised Article 37, C.A.A.F. could choose to: (1) reverse the findings and sentence and dismiss the charges with prejudice; (2) dismiss the case without prejudice and order a rehearing to allow "the charges and specifications to proceed through channels untainted by the previous conduct;"[88] or (3)

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the right to a trial that is fair, and the right to a trial that is objectively seen to be fair, have constitutional dimensions sounding in due process."). Thus, VanLandingham argues, attempts to eliminate apparent UCI should "be thrown, by a courageous high military appellate court, into the dustbin where all unconstitutional legislative attempts should molder after meeting rigorous judicial analysis." VanLandingham *supra* note 59, at 214. That said, critics of apparent UCI, some of them judges on C.A.A.F., have thus far been unwilling to accept the due process justifications for apparent UCI. Rather than offering further commentary on the purported constitutional underpinnings of apparent UCI, the remainder of this Article offers a legislative fix that will legitimize apparent (or unintentional) UCI when there is prejudice to the accused that would be palatable to the aforementioned critics of apparent UCI.

86. This statement is made with full understanding that there is likely little appetite in Congress to remove the intentionality requirement of Article 37 considering Congress recently strengthened the intentionality requirement in the 2019 revisions to Article 37. Nonetheless, this solution is still preferable to the current situation where there is no UCMJ sanctioned remedy for apparent (or unintentional) UCI.

87. This Article does not explore whether it would be prudent to remove Article 37(c) as a result of my proposed revision since the prejudice standard would be imported into Article 37(a)(3); however, Article 37(c) would likely no longer be necessary as a result of the revision. With that being said, the creation of Article 37(c) was never necessary in the first place given the prejudice requirement is clearly established in Article 59(a). As such, it would not be harmful to leave it in place even if this proposal were to be adopted just to make it clear to C.A.A.F. that prejudice is a necessary component in UCI cases.

88. Lt. Col. Mark L. Johnson, *Confronting the Mortal Enemy of Military Justice: New Developments in Unlawful Command Influence*, 2007 ARMY LAW. 67, 75 (2007) (citing United States v. Lewis (*Lewis II*), 63 M.J. 405, 417 (C.A.A.F. 2006)).

craft another remedy that best fits the case at hand. This Section does not advocate for any one remedy over another. Rather, it merely suggests that Congress amend the UCMJ to recognize unintentional UCI so that C.A.A.F. can achieve its mandate of protecting the public's perception of fairness in the military justice system when the substantial rights of the accused have been prejudiced by a commander's unintentional, yet impermissible, interference with the court-martial process.[89]

CONCLUSION

C.A.A.F. has acted outside its authority as an Article I court under the UCMJ since its decision in *Johnson*, which granted relief on the grounds of apparent UCI for the first time.[90] Since then, C.A.A.F. has only strayed further from the statutory text of the UCMJ and the origins of Article 37's prohibition on *actual* (or intentional) UCI. In *Boyce*, C.A.A.F. overruled its longstanding prejudice requirement which at the very least only granted relief when the accused was harmed in some way by the unintentional actions of a convening authority.[91] With the 2019 revisions to Article 37, informed by Judge Ryan's dissents in *Boyce* and *Barry*, it is clear that apparent UCI in its current form, and as a doctrine, is untenable despite C.A.A.F.'s good intentions in expanding the doctrine over time. Congress should amend Article 37 to provide C.A.A.F. the necessary authority to address instances of unintentional UCI. C.A.A.F., consistent with both Article 37(c) and Article 59(a), must also start deciding UCI cases based on whether the accused was prejudiced. As a result, C.A.A.F. should abandon its classification of UCI cases as either actual or apparent and begin to classify them according to an intent-based standard.

The actual versus apparent dichotomy perpetuates the false notion that C.A.A.F. can grant relief even if the accused was not *actually* prejudiced. C.A.A.F. should begin to classify UCI cases as either intentional or unintentional to better reflect the court's authority to grant relief only if the accused is prejudiced. Intentional UCI will take the place of traditional actual UCI cases where a commander intentionally interferes with a court-martial resulting in prejudice to the accused. Unintentional UCI will refer to instances where a commander's unintentional actions, for one reason or another, result in prejudice to the accused such that the accused should be afforded relief. The UCMJ provides no room for a doctrine that affords relief when the accused was not prejudiced and C.A.A.F.'s doctrines—and its labels for them—ought to reflect that. If these changes are made, C.A.A.F. can achieve its purpose of ensuring the military justice system is fair without exceeding its statutory authority.

89. Although this Article does not explore the notion that the commander should be punished for his or her conduct as opposed, or in addition, to providing the accused a remedy under Article 98, UCMJ, this course of action would likely ensure commanders are more cautious about what they say or do regarding a court-martial and further bolster the public's confidence in the military justice system. For an interesting discussion on Article 98 and the reticence to charging commanders under this provision, see Hollingsworth, *supra* note 11, at 273–76.

90. *See* United States v. Johnson, 14 C.M.A. 548, 551 (1964).

91. *See* United States v. Boyce, 76 M.J. 242, 248 (C.A.A.F. 2017).