UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	
Petitioner	)	**Misc. Dkt. No 2013-15**
	)	
v.	)	
	)	**ORDER**
Colonel (O-6)	)	
DONALD R. ELLER, JR.,	)	
USAF,	)	**Panel No. 2**
Respondent	)	
	)	
Airman (E-2)	)	
CHANCE J. MCGRATH,	)	
USAF	)	
Real Party in Interest	)	

On 8 January 2013, the court-martial in the case of the *United States v. Airman First Class Chance J. McGrath* convened at Joint Base San Antonio, Texas. The accused is charged with one specification of wrongful sexual contact and two specifications of indecent acts in violation of Article 120, UCMJ, 10 U.S.C. § 920, and one specification of forcible sodomy in violation of Article 125, UCMJ, 10 U.S.C. § 925, and one specification of assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928. On 16 May 2013, following the completion of voir dire, the military judge granted a defense challenge for cause excusing a panel member. The Government filed a petition for a writ of mandamus requesting this Court order the military judge to reverse his decision.

Colonel (Col) Susan Hall was thoroughly questioned during voir dire concerning her knowledge of comments made by the President regarding sexual assault in the military[1], as well as her personal views on whether verbal consent was required as a prerequisite to consensual sexual interaction. Applying the liberal grant mandate, the military judge granted the defense challenge for cause, finding that Col Hall had exhibited an implied bias in part due to her comments regarding the specificity of

[1] The record of individual voir dire provided to this Court stops at the conclusion of the military judge's questioning of Col Hall on page 120 of the transcript. Page 121 picks up over three and a half hours later with the military judge asking both sides about challenges for cause—and after the other members presumably have been individually voir dired. As the record containing the other members' responses to individual questions about their awareness of the President's comments about sexual assault in the military was not provided to us, we are unable to conduct a meaningful analysis of if, or why, Col Hall was the only member the defense challenged for cause on the basis of such awareness. Given the military judge's other rationale for granting the defense challenge, however, we find the lack of this information to be inapposite to our ultimate conclusion.

permission that might be required in order for her to find that sexual activity between two people was consensual.

Rule for Courts-Martial 912(f)(1)(N) requires an excusal for cause where it appears an individual should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality. *United States v. Bagstad*, 68 M.J. 460 (C.A.A.F. 2010). Having reviewed the petitioner's writ and materials provided therewith, as well as the real party in interest's reply, we are convinced that the military judge's decision was based on his determination that Col Hall had exhibited an implied bias against the accused and not whether the President's comments concerning sexual assault amounted to unlawful command influence.[2] This decision was warranted by the facts and was a proper exercise of the military judge's judicial responsibility. *United States v. Townsend*, 65 M.J. 460 (C.A.A.F. 2008) (military judges should apply a liberal grant mandate in ruling on challenges for cause asserted by an accused); *United States v. Reynolds*, 23 M.J. 292, 294 (C.M.A. 1987) ("We again take the opportunity to encourage liberality in ruling on challenges for cause. Failure to heed this exhortation only results in the creation of needless appellate issues."); *United States v. Martinez*, 67 M.J. 59 (C.A.A.F. 2008) (in close cases, military judges are enjoined to liberally grant challenges for cause).

We need not decide whether the Government may secure, via a petition for mandamus, an interlocutory appellate review of a trial court's order that does not fall within those matters specifically contemplated by Article 62, UCMJ, 10 U.S.C. § 862, because assuming arguendo that such review were proper, the petitioner would not prevail. "To justify reversal of a discretionary decision by mandamus, the judicial decision must amount to more than even gross error; it must amount to a judicial usurpation of power." *United States v. Labella*, 15 M.J. 228, 229 (C.M.A. 1983) (internal quotation marks and citations omitted); *Will v. United States*, 389 U.S. 90, 104 (1967) (mandamus is not used to control decisions of the trial court but merely to confine that court to the sphere of its discretionary power). The military judge acted within his wide latitude of authority in granting the defense challenge for cause, and his decision to do so did not constitute error. As we have held the military judge's decision to grant the challenge of Col Hall for cause was not error, such decision would not—by clear implication—meet the standard required for us to issue the writ the Government seeks.

Accordingly, it is by this Court, this 21st day of June 2013,

ORDERED:

[2] At the time the military judge excused Col Hall, he had not ruled on the defense's motion to dismiss for selective prosecution and unlawful command influence.

The Government's Petition for Extraordinary Relief in ten Nature of a Writ of Mandamus is hereby **DENIED**.

FOR THE COURT

LAQUITTA J. SMITH
Appellate Paralegal Specialist