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The New York Times interviews Kastenberg on the history of the military charge: misbehavior before the enemy

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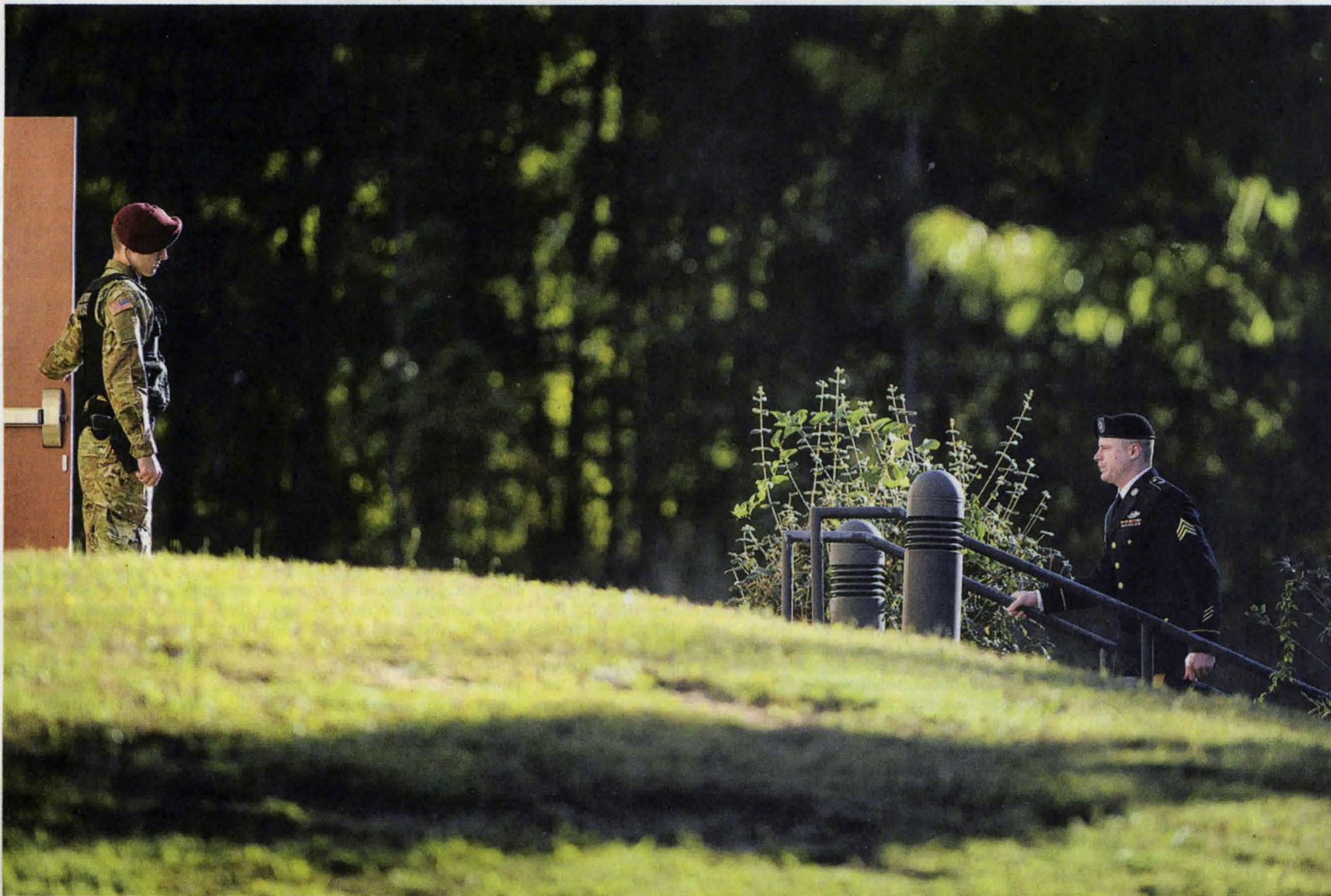


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ANDREW CRAFT/THE FAYETTEVILLE OBSERVER, VIA ASSOCIATED PRESS

Sgt. Bowe Bergdahl arrives for his sentencing hearing Wednesday. He faces life in prison on a rarely used charge that he endangered others when he deserted his post.

Sentencing Hearing Begins With Wounded Navy SEAL

By RICHARD A. OPPEL Jr.

FORT BRAGG, N.C. — The sentencing hearing for Sgt. Bowe Bergdahl, who walked away from his post in Afghanistan in 2009, began on Wednesday with an ex-Navy SEAL's assertion that he knew the military operation to find the missing soldier would be dangerous.

"Somebody's going to get killed or hurt trying to get that kid," Jimmy Hatch recalled telling another member of his task force before setting off on a mission to find Sergeant Bergdahl. Mr. Hatch was shot in the leg during the rescue effort and had surgery 18 times.

The defense declined to cross-examine Mr. Hatch.

In other developments, the judge, Col. Jeffery R. Nance, said he was not yet ready to rule on the defense's argument that recent comments by President Trump had made a fair hearing impossible. The defense has argued that the president seemed to endorse previous assertions, made when he was a candidate, that Sergeant Bergdahl was a traitor and deserved execution. As commander in chief, he is the superior officer of all the military officials responsible for disciplining Sergeant Bergdahl.

Sergeant Bergdahl, who was captured by the Taliban and held captive for five years, has pleaded guilty and faces up to life in prison. Colonel Nance will determine his sentence after a hearing that is expected to last into next week.

Mr. Hatch's testimony was intended to support a charge Sergeant Bergdahl's actions had endangered other troops. The charge, formally known as "misbehavior before the enemy," is rarely used today but has a colorful history.

What is misbehavior before the enemy?

The charge is so broadly written it could seemingly cover most war-zone misconduct, including cowardice, failing to do the utmost to destroy the enemy, and failing to do everything possible to assist and relieve allied troops.

In Sergeant Bergdahl's case, it means that he endangered his comrades by leaving and that he "wrongfully caused search and recovery operations." No troops were killed searching for Sergeant Bergdahl, the investigating officer concluded, but the judge later found that some were wounded, clearing the way for Mr. Hatch to testify.

Experts say the misbehavior charge dates back to ancient

Greece and Rome, and has always been about maintaining ranks when it counts the most — in the presence of the enemy.

"It goes back to the idea that you have the lives of your own comrades in your hands when you are fighting together in the field of combat, and that's why it's so serious if you let them down," said Bruce Houlder, the top prosecutor in the British armed forces from 2008 to 2013.

How has it been used in the United States?

The first notable use of the charge in the United States followed the War of 1812, when the commander of Fort Detroit was prosecuted for surrendering without a fight, said Joshua Kastenber, a former Air Force judge.

The commander received a death sentence, later commuted by President James Madison. The case helped launch the political career of the prosecutor, Martin Van Buren, who became president.

During the Civil War, the charge was often lodged against officers who got drunk and put their troops at risk.

There were also hundreds of cases during World War I, some for nothing more than saying things considered pro-German,

Mr. Kastenber said. One sergeant was dishonorably discharged and sentenced to a year in prison for telling troops that President Woodrow Wilson was worse than the Kaiser.

Why is it so rarely used today?

After World War II came the introduction of the Uniform Code of Military Justice, which offered a road map to charging soldiers with offenses that were easier to prove, like those related to unauthorized absences.

The misbehavior charge can carry a death sentence, but Sergeant Bergdahl faces a maximum punishment of life in prison. If recent misbehavior cases are any guide, that would be uncharacteristically severe.

There are only a handful, but in one of the most serious, in 2014, an Army staff sergeant left his squad as it was defending during a Taliban attack.

He grabbed a calendar with sexually suggestive pictures, kicked two junior soldiers out of a tent, went inside, and emerged 15 minutes later, bragging that he had gotten his "combat Jack," meaning that he had masturbated, court documents say.

The attack lasted hours and left one soldier wounded, but the staff sergeant was not sentenced to serve any time.

He received a bad-conduct discharge — one notch above a dishonorable discharge — and was demoted to private.

In another case, a Marine refused to leave on a mission off base, saying he feared death. He was sentenced to one year in jail. A third service member, this one in the Air Force, used hashish, violated a no-contact order and engaged in sexual activity while on post. He served five months in jail. Both received bad-conduct discharges.

What does that mean for Sergeant Bergdahl?

The first of the three cases, the Army case, was cited in some back-and-forth over whether Sergeant Bergdahl was unfairly hit with two charges, desertion and misbehavior, for one act, leaving his post.

In the earlier Army case, the staff sergeant was also given two charges: leaving his appointed place of duty and misbehavior.

But the defense has argued that unlike Sergeant Bergdahl, the staff sergeant actually committed two separate offenses: abandoning his post during a firefight, and going inside the tent to engage "in an act that did not conform to the standard of behavior required by a soldier engaging the enemy in combat."

CDC Panel Is Endorsing New Vaccine For Shingles

A panel of experts at the Centers for Disease Control and Prevention has endorsed a new vaccine for shingles, a common and often painful condition that can lead to long-term nerve pain.

The panel, which met in a public hearing on Wednesday, recommended the vaccine for people aged 50 and older. The vaccine is called Shingrix and is made by GlaxoSmithKline.

Shingles is caused by the same virus that causes chickenpox. Most people who have had chickenpox as children will develop shingles at some point in their lives. The pain of shingles can be severe and last for weeks or months.

The CDC panel's recommendation is based on evidence that Shingrix is more effective than the current vaccine, Zostavax. Shingrix is also safer and has fewer side effects.

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