

The Salt Lake Tribune

National security should be above Utah politics

By David R.Irvine

June 17, 2010

In Utah, two Republican candidates for the open U.S. Senate seat held by Bob Bennett are outdoing each other with tough-on-terror campaign rhetoric. Tim Bridgewater and Mike Lee have both resisted federal criminal trials for suspected terrorists, instead joining a congressional chorus calling for trial of the Guantanamo prisoners by military commissions.

This is part of a broader Republican attack on President Obama's pledge to close the prison, which has also involved efforts by Republicans to cut off any funding necessary to close the facility or move the prisoners. While Bridgewater and Lee are aiming their tough talk at the Republican tea-party base, a far larger audience is paying closer attention, and these stakes are more crucial than a Senate seat.

U.S. combat deaths in Afghanistan alone just surpassed 1,000. One unmistakable lesson from our eight years there is that jihadists multiply themselves faster than we can generate new combat battalions (and at much less expense).

There are two non-biodegradable, iconic images of an American "war on Islam" now on computer screens throughout the Muslim world: the orange jumpsuits of Guantanamo prisoners and the hooded, shrouded, prisoner on the box at Abu Ghraib. These photos are on worldwide display as shorthand symbols of American torture, indefinite detention without trials, and prisoner abuse. They are the most powerful recruiting tools at Osama bin Laden's disposal. Messrs. Bridgewater and Lee, and too many members of Congress who ought to know better, seem content to allow al-Qaida the continued benefit of those powerful jihadist recruiting posters.

"It's too dangerous to bring 180 prisoners from Guantanamo to our shores, and they don't deserve a trial in federal court," the argument goes. "They should be tried before military commissions," and, presumably, a quick conviction will be followed by a bullet to the head.

We should think that scenario through, very carefully, before embracing it. In the past eight years, a grand total of three Guantanamo prisoners have been tried before military commissions. Two pleaded guilty, were sentenced to time served, and were soon released to their countries of origin. One refused to participate and received a life sentence.

The military commission process was set up to allow the use of coerced evidence and other shortcuts to conviction, in violation of the Geneva Conventions and our Constitution, and now stands before the world as a badly-damaged brand, much like British Petroleum, only worse.

In that same period of time, there have been 214 terrorist trials in our federal courts, and 195 of these convicted felons are presently serving very long sentences in U.S. maximum security prisons. There have been no escapes, and most people are not aware that these types are even in their neighborhood. That's a 91 percent conviction rate, and in no case has a federal judge allowed a defendant to convert a trial to a bully pulpit. Most important, these are settled cases; they are not the focus of continuing appeals and controversy spawned by a flawed process. The world accepts these verdicts as the products of a fair system of justice.

Nations, even in the Arab world, are willing to cooperate with U.S. attorneys seeking foreign evidence of terrorist activity. Not so easy with military commissions. In many countries, military commissions are associated with junta justice and predetermined outcomes. Cooperation with the U.S. under those circumstances becomes a national political liability.

Perhaps Bridgewater and Lee are conflating military commissions with courts-martial. They are not the same, and while military lawyers are highly experienced with courts-martial and the Uniform Code of Military Justice, neither our judge advocates or military judges have any experience with military commissions, and so it's a process that necessarily is invented on the fly. Hardly reassuring.

Commissions are particularly problematic for the Guantanamo prisoners because of the unique problems of evidence associated with widespread confessions under torture.

Federal prosecutors would be likely to charge material support of terrorism and conspiracy to commit terrorism as catch-all charges which might allow an easier procedural way of avoiding tainted evidence and still produce convictions. In fact, those crimes are likely not triable via military commission because they are not recognized within the law of war.

Guantanamo is a continuing threat to the nation's security. Every day the prison exists, it stands as a real threat to our troops in harm's way. It's not just an Obama thing; George W. Bush and John McCain, two years ago, spoke out for closing it. Keeping it open is killing Americans, every day.

Jihadists who kill innocents want to be portrayed as warriors. Military commissions or courts-martial elevate them to a status they do not deserve. The shoe and underwear bombers of the age are not warriors. They're ordinary criminals, and they should be tried as the criminals they are.

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