



## The Center for Public & Nonprofit Leadership

### ISSUES IN PHILANTHROPY: THE POST 9/11 FUNDING CHILL

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As a nation, we continue to grieve for the victims of the 9/11 attacks. We are fearful that more will occur. Three years have passed. Two wars have been waged. Thousands of lives have been lost, along with the prospect of more. Our presidential candidates both stress the threat of terrorism and use what *Washington Post* staff writers Jim VandeHei and Howard Kurtz recently coined “the politics of fear.”<sup>1</sup>

They do so, because, according to the independent 9/11 Commission Report, “Americans are still thinking and talking about how to protect our nation in this new era.”<sup>2</sup> The report claims that, “The national debate continues.”

Today, I hope to add to that debate, although frankly, I disagree that there has actually been much public debate. We may talk among ourselves, but we expect/entrust the U.S. government to find the solutions and take on the major responsibility for protecting us, its citizens. I think we would all agree that this is one of the primary functions of any state.

Once again, according to *The 9/11 Commission Report*, “Countering terrorism has become, beyond any doubt, the top national security priority of the United States.” But, while the concluding chapter of the Commission’s findings calls for “a different way of organizing the government,” including coordination “across agencies and across the foreign-domestic divide,” as well as reform of Congressional oversight and rules, we have heard almost nothing about either candidate’s plan to address these problems.

As an activist, anthropologist, nonprofit capacity builder and sometime academic with only 8 months left in Washington, DC, I’m obviously not going to be in a position to reorganize government. But in the years ahead, many of you – especially the students, and maybe even some of the faculty – will have that kind of influence.

While I will make some broad statements for framing purposes, my focus here is on the strange relationship between the US War on Terrorism and what is generally called the charitable, nonprofit or third “sector.” I am especially interested in how emerging public policy impacts grantmakers that help finance the work of the more than one million 501(c)(3) organizations in the United States - often labeled civil society - and countless other groups engaged in similar activities around the world. These are the very activities, I would argue, that might lead us to a more peaceful future.

Yet organized charity has become a target of the new security regime. In an inconsistent but insidious manner, unorganized, uncoordinated US government agencies with little real knowledge of the charitable sector have found it to be a vulnerable scapegoat. I propose, along with a coalition of leading nonprofit groups, that current policy is both ineffective and aimed at the wrong enemy. On the whole, charities, foundations, international relief organizations, and

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<sup>1</sup> VandeHei, Jim and Howard Kurtz. “The Politics of Fear, Kerry Adopts Bush Strategy of Stressing Dangers,” *The Washington Post*, September 29, 2004, pg. A01

<sup>2</sup> *The Final Report of the National Commission on Terrorist Attacks Upon the United States* (New York: W.W. Norton & Company, 2004)

nongovernmental groups working for positive social change in the world are not a major source of funding for terrorism.<sup>3</sup>

When (or if) the general public thinks of security legislation, the USA PATRIOT Act is invoked. The USA PATRIOT Act was signed into law October 24, 2001 (without, as Michael Moore showed us, most of the Congress that voted for it having read the document.)

As we know, the impact of any legislation is in its enforcement. The USA PATRIOT Act gives the government the power to conduct secret and wide-ranging surveillance of ‘any individual or entity,’ including nonprofit organizations. A key facet of its provisions is that the government can now seize property and freeze assets without first producing any evidence of wrongdoing. Making matters worse, the government can label evidence collected in such raids ‘confidential’ for national security reasons, which puts organizations in the untenable position of having to defend themselves against claims to which they are not privy.<sup>4</sup> In pursuit of terrorists, the Act also revoked *habeas corpus*.

The infringement of civil rights and liberties has been expanded to charity, but especially Islamic relief organizations and potentially to advocacy groups critical of the current administration. In addition, many other related laws apply to what we are now calling “homeland security,” an apparently widely accepted set of policies that undermine basic human rights.

With this speech I aim to join an outcry against civil rights abuses, with specific reference to the blacklists and ‘certification’ that may very well be leading to a funding chill. History seems to repeat itself, but we can learn from it and avoid earlier mistakes.

In his 1950 dissenting opinion, Supreme Court Justice Robert Jackson wrote, “Security is like liberty in that many are the crimes committed in its name.” (I recommend Ellen Schrecker’s book, *Many Are the Crimes: McCarthyism in America*, to you.)<sup>5</sup>

The case on which Justice Jackson’s opinion was based is eerily familiar to those we read about (or don’t) today. An immigrant—a war bride trying to join her American husband—was held for several years on Ellis Island without any charges. She was accused, in some vague way, of being a communist spy. While the Supreme Court upheld the legality of her detention, eventually the case became such a cause célèbre that pressure through the Congress got her released.

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<sup>3</sup> The 911 Commission’s Monograph on Terrorist Financing notes al Qaeda’s use of more informal, decentralized methods of moving funds (such as the hawala system and the use of couriers), and states that at this point, “the premise behind the government’s efforts here—that terrorist operations need a financial support network—may itself be outdated. Some terrorist operations do not rely on outside sources of money, and cells may now be self-funding, either through legitimate employment or through low-level criminal activity (Monograph on Terrorist Financing, p.51).” For a more detailed discussion, Barnett Baron also makes the case that U.S. philanthropy is at minimal risk for diversion of funds to support terrorism. See “Philanthropy and Homeland Security” in the May/June 2004 issue of *Foundation News & Commentary*.

<sup>4</sup> For further discussion, see “The USA Patriot Act and Its Impact on Nonprofit Organizations,” OMB Watch, September 10, 2003

<sup>5</sup> Schrecker, Ellen, *Many Are the Crimes: McCarthyism in America* (Little Brown: New York, 1998)

The fear of terrorism seems to have replaced that of Communism in the American psyche and governmental policy.

Fifty-one years later, Executive Order 13224, made effective by President Bush immediately following the 9/11 attacks, a month before the USA PATRIOT Act passed, and therefore without the check of Congressional deliberation, broadly prohibits “transactions with persons who commit, threaten to commit, or support terrorism.” The authority for this Executive Order comes from the International Emergency Economic Powers Act (IEEPA). “The term ‘person’ means an individual or an entity”... an association, corporation, organization, group or subgroup.” “[T]he term ‘terrorism’ means an activity that... involves a violent act,” or **“appears to be intended”** among other things **“to influence the policy of a government by intimidation or coercion.”** I worry about this language because dissent and pressure by advocacy groups to influence policy might be construed as illegal.<sup>6</sup>

Executive Order 13224 introduces a blacklist of individuals and organizations suspected of terrorism, materially aiding terrorism, or associating with terrorists. IEEPA, by the way, permits humanitarian assistance, including food, clothing and medicine, but this is also outlawed under the Executive Order. Even the children of suspected terrorists are not entitled to assistance under 13224. (This puts the Executive Order, by the way, in contradiction with international law.) 13224 was actually released with the first “list” of only 27 names, which by September, 2004, had grown to some 86 pages.

The Treasury Department also established Operation Green Quest, “a multi-agency terrorist financing task force...Green Quest includes representatives from the Customs Service; Internal Revenue Service; Secret Service; Bureau of Alcohol, Tobacco and Firearms; Office of Foreign Assets Control (OFAC); Financial Crimes Enforcement Network; Federal Bureau of Investigation; Postal Inspection Service; Naval Criminal Investigative Service; and [the] Department of Justice. In a brochure produced by the U.S. Customs Service Office of Investigations, the first reputed source of terrorist funding listed in a US Customs Service pamphlet are “Charity or Relief Organizations,” followed by “Legitimate,” and then “Illicit Enterprises.” The brochure tells the reader to help by reporting any suspicious activity. “Red Flag Indicators” are said to include, “transfers between bank accounts of related entities or charities...” You can see a copy of that brochure in the handouts.

All of this furor seems based on questionable ‘evidence’ that charities are a *significant* source of funding for terrorist activities. The irony, of course, is that the CIA and State Department have materially supported terrorists to a much greater extent than philanthropists ever have.

Nearly a year after the Executive Order became law, Kenneth Dam, Deputy Secretary of the Department of Treasury claimed, when speaking before the Senate Committee on Banking,

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<sup>6</sup> This is also a point made by Anthony Romero of the ACLU, in a front page story from October 19, 2004: "What do they mean by terrorism? What constitutes support for terrorism? We need to know precisely what those words mean. It is certainly appropriate for Ford and Rockefeller to require grantees to comply with existing federal law, but in a climate of fear and intimidation, vague language that goes beyond the legal requirements is regrettable and ill advised (Strom, Stephanie, “ACLU rejects foundation grants over terror language,” *The New York Times*, October 19, 2004)."

Housing and Urban Affairs, Subcommittee on International Trade and Finance, that “Our first actions after the tragedies of September 11 were to identify known terrorists and terrorist entities, freeze their assets in the U.S., and work with our allies to extend those freezes world wide...We have obtained significant results in this effort...Since these first actions, our fight against financing of terror has expanded to the abuse of charities.”<sup>7</sup>

You are probably aware that some of the nation’s largest Islamic public charities have come under suspicion: the Holy Land Foundation was the first listed on 12/04/01 (but the indictment was not announced until July of this year), the Global Relief Foundation, added to the list 10/18/02, and the Benevolence International Foundation, added 11/19/02. More than \$1 million in assets of the last two groups were frozen in December, 2001, months before OFAC officially put them on the terrorist list. Since then, according to the 9/11 Commission’s Monograph on Terrorist Financing and OMB-Watch, “the government has neither proven either group was guilty of any terrorism-related crimes<sup>8</sup>, nor convicted anyone involved.” Both charities were permanently closed down. The co-founder of Global Relief was deported.

Just last week the Islamic African Relief Agency, with offices in Missouri and Connecticut, was closed down, although no charges have been announced. Faithful Muslims must tithe to the poor, and these are the kinds of charities that dispense those gifts, especially during Ramadan.

In November, 2002, with the Executive Order and the Patriot Act as the (presumed) legal basis, the most direct source of new government oversight of charities came (again) from the Department of Treasury’s OFAC. It’s called the “Anti-Terrorist Financing Guidelines: *Voluntary Best Practices for US-Based Charities.*” Arab-American and Muslim-American organizations had asked Treasury for “guidance on how to avoid legal penalties.” I recommend Barnett Baron’s summary in the *International Journal of Not-for-Profit Law*.<sup>9</sup>

The Guidelines have been called unrealistic, impractical, costly and potentially dangerous. I’m told that Treasury issued them and they have not been withdrawn or modified in spite of protests from charities, because President Bush specifically wanted something like this out of Treasury.

While they may seem obscure, these confusing Guidelines, in conjunction with the Executive Order, directly affect corporate grantmaking and matching gift programs, foundation funding (especially abroad), and international charitable organizations. As the sub-title indicates, they might be interpreted to apply to all “U.S.-Based Charities.” In the opinion of many, they also place the onus of ferreting out terrorists and terrorist activities on grantmakers and nonprofit groups, rather than the US government.

The Treasury Guidelines actually muddle the normal regulatory schema for the third sector as the Internal Revenue Service is usually the government agency charged with oversight of 501(c)(3) organizations. A whole body of mandatory law already governs nonprofit organizations

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<sup>7</sup> Transcript available online at <http://japan.usembassy.gov/e/p/tp-se1560.html>

<sup>8</sup> The leader of BIF was convicted on non-terrorism-related charges. The 9/11 Commission Report’s Monograph on Terrorist Financing, pg. 11.

<sup>9</sup> Baron, Barnett, “Deterring Donors: Anti-Terrorist Financing Rules and American Philanthropy,” *The International Journal for Not-for-Profit Law*, Volume Six, Issue Two, January 2004

(although the extent of oversight or regulation is open to question and would need to be the topic of another speech.) It doesn't appear that OFAC and IRS communicated before the guidelines came out. Some items in the Guidelines are incongruous with existing law.

The Guidelines were released without any meaningful dialogue or input. Major nonprofit organizations and trade associations coalesced in protest against them. Treasury received a flurry of letters. Although many organizations have been involved in the formulation of a strategic response to Treasury, the role of the Council on Foundations is a useful place to start when considering the nonprofit industry's response. The Council is the largest trade association representing grantmakers and the coordinator of what became the Treasury Guidelines Working Group...

The Working Group is comprised of some 25 loosely organized and participating organizations, representing civil liberties advocates, corporate giving programs, foundations, and international relief organizations. The Working Group has formulated its own draft "Principals of International Grantmaking" which they have just released to Treasury and for public comment, in the hopes that the Guidelines will be reconsidered or even withdrawn.

As a sidenote, some six months after the Treasury Guidelines were released, the IRS requested public comment on how it might clarify existing requirements that 501(c)(3) organizations must meet with regard to international grantmaking, particularly with the goal of reducing the diversion of assets to terrorists. Most of the same groups that sent letters to Treasury, responded in a similar manner to the IRS. Nothing has been heard from the IRS since then.

Getting back to list checking, let me pause and make clear that it is not required by the Executive Order, although with the lists attached, it is implied. The Treasury Guidelines, on the other hand, have a section on Anti-Terrorist Financial Procedures that advise international funders to gather information on potential grantee groups, their employees, subcontracting organizations, and vendors, as well as to check the lists. In several references, the Guidelines suggest that: "The charity should run the names through public databases..." They presume that charitable organizations are primarily laundering money, and demonstrate little understanding of charitable intent, mission or grantmaking practices.

When we think of lists and list checking, we almost immediately think of the communist blacklists of McCarthyism. There are other clear parallels ...related to the politics of fear (flamed by the constantly changing threat levels – it is elevated to yellow today, for example, meaning there is a *significant* risk of terrorists attacks), and the ideas suggested in the Operation Green Quest brochure of becoming informants and weeding out a threat from within. And, of course, no funder wants to be seen as standing in the way of the fight against terrorism. This raises the unavoidable question as to whether the hunt for terrorists has a political leaning the way McCarthyism did- are progressive philanthropies or advocacy groups under more scrutiny?<sup>10</sup>

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<sup>10</sup> For further reading on this subject I recommend the July 2003 OMB Watch report: An attack on Nonprofit Speech: Death by a Thousand Cuts, and the follow-up report, Continuing Attacks on Nonprofit Speech: Death by a Thousand Cuts II.

It is perhaps ironic that suspicion in the 1940s and 50s centered on artists/intellectuals. Now the targets are nonprofit groups and philanthropists. However, the movie industry in Hollywood of the 1940s was not asked by the government to enforce the black lists. Yet the Executive Order, the Treasury Guidelines, statements of government officials and advice of lawyers has taken America's foundations dangerously close to acting as the enforcement or police arm of the lists.

In addition to the main OFAC list of 'Specially Designated Nationals and Blocked Persons'—which is 163 pages long, with an another 65 pages of changes made since January 1, 2004—the Treasury Guidelines suggest checking the Department of Justice's Terrorist Exclusion List, the United Nations list designated by U.N. Security Council, a European Union list, and *any other official list available to the charity*.

The lists have been proliferating since enactment of the Executive Order. According to a recent front page *Wall Street Journal* article there are at least a dozen different watch lists currently in use by federal agencies. “The inspector general of the Homeland Security Department, in a sometimes scathing report, cites poor cooperation among many agencies and says his own agency failed “to play a lead role” in oversight. Three years later, there is no single, consolidated watch list.”<sup>11</sup>

Furthermore, the lists are inaccurate. There may be many false positive names. No one knows how to remove a name once it is incorrectly added. The most famous cases include Senator Ted Kenney and singer Cat Stevens, who are both on one or another list, as well as an Anthony Romero, listed five times, who might the Anthony Romero of the ACLU?

There is also the question of the political motivations behind appointments to the lists, as there have been numerous examples of foreign governments requesting the designation of opposition groups and insurgents.

In the vacuum of government guidance and inaction, commercial groups have stepped in to help charities with list checking. These businesses include Bridger Systems, ChoicePoint (which has acquired Bridger), CreateHope and InformationAgeAssociates. One of CreateHope's corporate clients enthusiastically told me that the firm checks the lists, runs background checks on employees and vendors of nonprofit groups that might receive funding, and (this is a new service) monitors the press for any stories critical of the charity. CreateHope then provides a risk assessment to the corporate client.

So-called risk assessment and risk management tools are not new to nonprofit groups, although the approach is clearly more corporate. Yet much of the literature on the nonprofit sector, and the role of philanthropy in particular, urges taking risks, experimenting, being innovative, holding government accountable, and even testing solutions to problems for which government might take ultimate responsibility.

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<sup>11</sup> Block, Robert and Gary Fields, “Effort to create terror watch list is falling behind, report finds,” *The Wall Street Journal*, October 1, 2004

The Council on Foundations initially issued a response to Treasury urging a better balance between the need for government oversight and the need to support grantmakers and avoid untenable burdens. But the Council's comments in this and other documents on their website calls for a risk-based approach that helps grantmakers identify grants that 'present a greater risk for diversion' to terrorists. Unfortunately, these include groups that are not already well-known to the foundation, start up efforts, smaller organizations and the like. These could have a disproportionate effect on small or grassroots advocacy groups, especially those outside the US.

For example, I've now seen a few different matrices suggesting that project specific grants are less risky than general operating grants. All this flies in the face of what many in the field have been advocating for at least 30 years.

Is a risk-based approach the principled response, or is it rather more utilitarian? Is this 'grant profiling'? Might it potentially change the character of the nonprofit sector?

*A Handbook on Counter-Terrorism Measures: What US Nonprofits and Grantmakers Need to Know* was recently published by the Independent Sector (a coalition of approximately 600 national organizations, foundations, and corporate philanthropy programs), InterAction (an alliance of 160 US-based international development and humanitarian nongovernmental organizations), Day, Berry & Howard (basically a law firm), and the Council on Foundations (with 2000 members). This document is a summary of the law and the voluntary 'requirements'. In conversation, one representative of the Council noted, "It is not an advocacy statement. It is written in neutral, lay language." But does this give the measures de facto legitimacy by operationalizing policies?

Most corporate funders, major foundations, international relief organizations and large nonprofits have paid serious attention to the Executive Order and voluntary guidelines. The threat of liability, the penalty of frozen assets, and the advice of conservative attorneys has lead many grantmakers to comply. In fact, in an informational session for new funders at the annual meeting of Grantmakers without Borders (GwoB), just four days ago, a speaker recommended that funders demonstrate "a culture of compliance."

Many grantmakers are now engaged in list checking. And list checking and 'certification' – asking the groups receiving the funds to sign a form or letter swearing the money is not going to terrorism (also reminding me of the loyalty oaths under McCarthyism) seem to be emerging as the primary tools in the "culture of compliance."

Not all funders are willing to be compliant. The board of a grantmaking organization giving emergency assistance to women in conflict and war torn situations is reconsidering relocating its main offices outside this country so that it is not directly subject to US policy. Former grantees of this group have shown up on the lists. But unfortunately, other funders are deciding not to make "risky" grants, especially to Palestinian groups or US groups supporting the Palestinian cause.

I'd like to point you to Stephanie Strom's *New York Times* article of last year: "Threats and Responses: Philanthropy; Small Charities Abroad Feel Pinch of US War on Terror," which

mentions the curious case of a small environmental organization called Environment Tabago that is feeling the effect of the Treasury guidelines. In the article, she quotes Eileen Growald, Chairperson of Rockefeller Philanthropy Advisors, as saying “If these guidelines became the de facto standard of best practices for giving abroad, we might very well have to stop making grants outside the United States.”<sup>12</sup>

In addition, the voluntary policies are creating conflict within funding organizations, particularly between program staff (whose jobs involve building trust with the groups they may fund) and grants administrators trying to comply with the guidelines. I know of disagreements occurring in the offices of both the large and small foundations. Boards are also pressuring staffs who are not comfortable with the practice to look into software for list checking.

Nonprofit groups, and especially grantmaking intermediaries, report that foundations are increasingly requiring certification from the groups they fund. The directors of two international grantmaking intermediaries report that at least three of its funders to date are requiring certification. One of them has had several unpleasant interactions with a funder: the first around the mere reference in a narrative report about indigenous movements to groups that had once advocated violence and again with regard to a funding recommendation for a group in Bolivia. The grantmaker in question thought there *might* be the possibility that *at some time in the future* groups in Bolivia would use violent methods that *could* be labeled terrorist.

US AID also now requires certification from all grantees.

Amidst all of these new certifications and requirements, some nonprofits seem at a loss for how to further allay suspicion and align themselves with current policies. The Palestine Children’s Relief Fund, for example, simply posts a link to the Treasury Department guidelines on its website home page.

Now keep in mind, I’ve been referring to voluntary measures. But related developments are not always meaningfully voluntary. Most of us are aware of a new government regulation requiring the more than 10,000 nonprofit members of the Combined Federal Campaign (CFC) - the government’s workplace giving program - to certify that they are not employing people whose names appear on three terrorist watch lists, or giving money to any groups on those lists.

According to Jon Small, Executive Director of the Nonprofit Coordinating Committee of New York, “If the government believes an organization is supporting terrorist activities, it has extensive powers to investigate and prosecute those organizations. It should use those powers and not a blacklist that convicts people without due process.”<sup>13</sup>

The American Civil Liberties Union is leading a coalition of nonprofits fighting the CFC rule. The ACLU, Amnesty International USA, the Global Fund for Women, and World Neighbors are a few that have quit the CFC in protest. However, they were able to withdraw from the campaign because they have other funding streams, whereas the CFC is the lifeblood of many groups that

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<sup>12</sup> Strom, Stephanie, “Threats and Responses: Philanthropy; Small Charities Abroad Feel Pinch of US War on Terror,” *The New York Times*, August 5, 2003

<sup>13</sup> Woverton, Brad, “Federal Campaign Flap,” *The Chronicle of Philanthropy*, August 19, 2004

do not believe they have such recourse. Staying in the campaign, however, and refusing to sign the requirements, will allow other groups to be party to a prospective lawsuit.

The inconsistency of foundations' and nonprofits' responses shows a general confusion about how to interpret current law and guidelines. Once again, the ACLU has led the way in refusing to comply. Today there is an article in the *New York Times* announcing that the ACLU has rejected \$1.15 million from the Ford and Rockefeller foundations over new language used in grant contracts.<sup>14</sup> Both of these foundations have incorporated the new guidelines into their application and grantmaking procedures. MacArthur was even promulgating its language at a recent Donor's Forum of Chicago meeting.

Over the course of the next year, Amanda Horwitz and I will be investigating when and why foundations accepted these 'voluntary' measures and started list checking, and to what extent the Executive Order and Treasury Guidelines have inhibited or altered the nature of international charitable giving. We have requested information from the largest international grantmakers in the US and will be surveying the membership of Grantmakers Without Borders (GwoB). Will we find a declining rate of international grantmaking? I understand that a Council on Foundations/Foundation Center study soon to be released finds a five-fold increase in international giving (of all types) in the last decade, but U.S. grantmaking directly overseas is declining, with a trend toward funding intermediaries.

We will be looking at the broad range of effects the Guidelines have had on the nonprofit sector, including the responses it has illicited. Who's speaking up? What is being said? At this early stage in our research, I have been more surprised by the lack of protest and debate, especially from within the philanthropic community itself...Well, maybe I'm not so surprised, but I am concerned.

Earlier, I touched on the idea of a culture of compliance, and this seems at odds with the potentially independent, idealistic, progressive nature of much international funding. What changes are we unwittingly making when we start talking about weighing the risks of charity rather than the benefits?

As I mentioned earlier, this is a time when international outreach efforts are more necessary than ever. But, as Paul Light of the Brookings Institution showed in a report that came out last month, in September 2004, it is also a time when public confidence in charities, which plummeted after 9/11, is showing little sign of improvement.

Of course, at this point the public is largely unaware about the threats new government oversight of charities poses—although it is very aware of the threats of terrorism. The challenge, then, lies in illuminating the ways in which the funding chill has consequences beyond the nonprofit world.

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<sup>14</sup> Strom, Stephanie, "ACLU rejects foundation grants over terror language," *The New York Times*, October 19, 2004

In conclusion, I will read a well-known quotation from Pastor Martin Niemoller:

*First they came for the Jews  
and I did not speak out because I was not a Jew.  
Then they came for the Communist  
and I did not speak out because I was not a Communist.  
Then they came for the trade unionists  
and I did not speak out because I was not a trade unionist.  
Then they came for me  
and there was no one left to speak out for me.*

Let me substitute a few words to make the point that should be obvious by now:

*First they came for the Muslims  
and I did not speak out because I was not a Muslim.  
Then they came for the terrorists  
and I did not speak out because I was not a terrorist  
Then they came for the charity workers,  
especially those in advocacy, human rights and international relief groups...*

Thank you. I invite comment, discussion and questions.

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I'd like to thank my graduate research assistant, Amanda Horwitz, for all of her help in preparing for this discussion