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United States Senate

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The Honorable Steven Chu
The Secretary of Energy
1000 Independence Avenue, SW
Washington, D.C. 20585

Dear Mr. Secretary:

I am writing to ask you to review the decision of the Atomic Energy Commission *In the Matter of J. Robert Oppenheimer,*[1] and to issue a declaratory order vacating the decision.

The question before the Commission in the Oppenheimer case was whether it should reinstate Dr. Oppenheimer's security clearance, thereby restoring his access to the Commission's restricted data. In practical effect, however, the Commission tried Dr. Oppenheimer on his character, his past associations, and his opinions. Although the Commission could not find any evidence that Dr. Oppenheimer was disloyal, it concluded that he was "not entitled to the continued confidence of the Government," based upon "fundamental defects in his character" and "imprudent and dangerous associations," which the Commission said reflected "his disregard of the obligations of security."

The Commission's decision did a great injustice to an outstanding scientist and a loyal public servant. "A disloyalty trial is the most crucial event in the life of a public servant," Justice Douglas wrote in another security case, three years before. "If condemned, he is branded for life as a person unworthy of trust or confidence. To make that condemnation without meticulous regard for the decencies of a fair trial is abhorrent to fundamental justice."[2] Although found loyal, J. Robert Oppenheimer was condemned as untrustworthy and unfit for further public service in a trial that should not have occurred, that used tactics that were abhorrent to fundamental justice, and that arrived at a judgment that was not supported by a fair evaluation of the evidence. The Commission violated its own rules, ignored its own precedents, abridged Dr.

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[1] Atomic Energy Commission, *In the Matter of J. Robert Oppenheimer*: Texts of Principal Documents and Letters of Personnel Security Board, General Manager, and Commissioners, May 27, 1954, through June 29, 1954, 51-67(1954) (hereinafter cited as "Opinions").

[2] *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 180 (1951) (J. Douglas, concurring).

Oppenheimer's right to counsel by eavesdropping on his conversations with his lawyers, deprived him of the right to be informed of all of the charges against him, and held him to a standard that had no basis in law.

For Robert Oppenheimer, the case was a personal tragedy from which he never recovered. For the nation, too, it was a tragedy, both because it deprived the nation of Dr. Oppenheimer's scientific expertise and counsel, and because the Commission's action was so patently unfair. "In a government like ours," Daniel Webster said, "care should be taken in every part of the system, not only to do right, but to satisfy the community that right is done."[3] From the start, the Commission's action against Dr. Oppenheimer has been viewed as having been animated by personal animosities and public policy disputes rather than the legitimate demands of national security.[4]

The Oppenheimer case was decided at the height of the McCarthy Era. It was a product of its time, but it has been allowed to persist upon the public record, like "a black mark on the escutcheon of our country,"[5] down to the present day. There was never any evidence, then or now, that Dr. Oppenheimer ever disclosed a single secret. And yet, after 57 years, the Commission's judgment that Dr. Oppenheimer was a "security risk," who was "not entitled to the continued confidence of the Government,"[6] still stands.

It stands because the President and Congress delegated to the Commission broad discretion to control access to its restricted data, and because the Commission's decisions in this arena were largely exempt from judicial review. But the delegation of power to the Atomic Energy Commission "is now a grant to the Secretary of Energy, to whom the functions of the AEC Commissioners were transferred by Congress...."[7] As the Commission's legal successor,

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[3] 5 Writings and Speeches of Daniel Webster 163, *quoted in Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. at 172 n.9 (J. Frankfurter, concurring).

[4] *See, e.g.*, Philip M. Stern, *The Oppenheimer Case: Security on Trial* (1969); Harold P. Green, *The Oppenheimer Case: A Study in the Abuse of Law*, Bulletin of Atomic Scientists 12 (Sept. 1977); Peter Goodchild, *J. Robert Oppenheimer: Shatter of Worlds* (1981); Barton J. Bernstein, *The Oppenheimer Loyalty-Security Case Reconsidered*, 42 Stan. L. Rev. 1383 (1990); Kai Bird and Martin J. Sherwin, *American Prometheus: The Triumph and Tragedy of J. Robert Oppenheimer* (2005).

[5] Opinions at 23 (minority report of Dr. Ward Evans).

[6] Opinions at 51 (Commission majority).

[7] *McDaniel v. AlliedSignal*, 896 F. Supp. 1482, 1490 n.20 (W.D. Mo. 1995)

you have the authority to "undo what was wrongfully done" by the Commission.[8]

You cannot, as a practical matter, reinstate Dr. Oppenheimer's security clearance, 44 years after his death. But you can and should vacate the Commission's decision that Dr. Oppenheimer was untrustworthy and unfit to serve his country. "The government of a strong and free nation does not need" unjust decisions to protect its security. "It cannot afford to abide with them. The interests of justice call for a reversal"[9] of the Oppenheimer decision.

The origins of the Oppenheimer case

The Atomic Energy Commission initiated its proceeding against Dr. Oppenheimer to answer two closely related questions. The first was whether permitting Dr. Oppenheimer access to restricted data—that is, reinstating his suspended security clearance— would "endanger the common defense or security" under the Atomic Energy Act of 1946. The second was whether his continued employment as a consultant by the Commission was "clearly consistent with the interests of national security" under Executive Order 10450.[10]

Few, if any, people have ever known more restricted data than Dr. Oppenheimer. As the scientific director of the Manhattan Project from 1942 to 1945, Dr. Oppenheimer either conceived or knew all of the nation's atomic secrets. And as Chairman of the General Advisory Committee to the Atomic Energy Commission from 1947 to 1952, he continued to have complete access to the Commission's restricted data. By December 1953, however, his employment with the Commission was largely over. His term on the General Advisory Committee had expired in June 1952. The Commission still retained him as a consultant, under an annual consulting contract, but it had consulted him on only six occasions between June 1952 and December 1953. As a consultant, though, he retained a security clearance.

The question of whether Dr. Oppenheimer's access to atomic secrets endangered the common defense or security had been raised before. It was originally raised by the Army in 1943, when General Leslie Groves personally cleared Dr. Oppenheimer to head the Manhattan Project's scientific program. It was raised again—twice—in 1947, when the Atomic Energy Commission first issued Dr. Oppenheimer's security clearance in February 1947, and when, after further review, it reaffirmed that decision in August 1947.

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8 *United Gas Improvement Co. v. Callery Properties*, 382 U.S. 223, 229 (1965).

9 *Mesarosh v. United States*, 352 U.S. 1, 14 (1956) (overturning disloyalty conviction based on untruthful testimony).

10 Letter from General Nichols to Dr. Oppenheimer (Dec. 23, 1953), *reprinted in* AEC, *In the Matter of J. Robert Oppenheimer*: Transcript of Hearing before Personnel Security Board, April 12, 1954, through May 6, 1954, at 3 (1954) (hereinafter cited as "Transcript").

The question arose again in December 1953 because William Borden, a former staff director of the Joint Committee on Atomic Energy, accused Dr. Oppenheimer of being a Soviet spy in a letter to the Director of the Federal Bureau of Investigation, J. Edgar Hoover.[11] The FBI analyzed Borden's allegations in light of its own extensive files on Dr. Oppenheimer and concluded that Borden had no new evidence and that his charges were not supported by the evidence.[12] Nevertheless, Hoover informed President Eisenhower of Borden's accusations, and the President ordered a "blank wall be placed between Dr. Oppenheimer and secret data," pending an investigation.[13] The Commission's proceeding against Dr. Oppenheimer followed.

The Commission formally notified Dr. Oppenheimer that his clearance had been suspended by a letter from the Commission's General Manager, General Kenneth D. Nichols, dated December 23, 1953. General Nichols' letter contained 24 charges against Dr. Oppenheimer, 23 of which related to past associations with communists or communist sympathizers formed prior to Dr. Oppenheimer's involvement in the Manhattan Project. The final item related to Dr. Oppenheimer's opposition to the development of the hydrogen bomb and accused him of having "declined to cooperate fully in the project," and having "slowed down" the bomb's development.[14]

The Commission should not have pursued the case against Dr. Oppenheimer. The Commission did not need to question Dr. Oppenheimer's loyalty or character to deny him access to restricted data or to terminate his employment. It could have simply terminated Dr. Oppenheimer's consulting contract, at any time, without cause.[15] Even after initiating the proceeding, the Commission did not need to push it to a final decision because Dr. Oppenheimer's contract was scheduled to expire, by its own terms, and his security clearance with it, on June 30, 1954. For his part, Dr. Oppenheimer could have chosen to resign, but, unable to "accept the suggestion that I am unfit for public service,"[16] he exercised his right to a hearing under the Commission's rules.

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11 Borden's letter is printed in the Transcript at 837-838.

12 Barton J. Bernstein, *The Oppenheimer Loyalty-Security Case Reconsidered,* 42 Stan. L. Rev. 1383,1439-1440 (1990).

13 Harold P. Green, *The Oppenheimer Case: A Study in the Abuse of Law*, Bulletin of Atomic Scientists 12, 13 (Sept. 1977)

14 Nichols' letter is printed in the Transcript at 3-7.

15 Brief on Behalf of J. Robert Oppenheimer to the Members of the AEC at 70 (June 7, 1954).

16 Dr. Oppenheimer's reply to the charges (Mar. 4, 1954), Transcript at 7.

The legal basis for the proceeding

The Commission based its decision to suspend Dr. Oppenheimer's security clearance and his employment with the Commission on section 10 of the Atomic Energy Act of 1946 and on Executive Order 10450.[17] Section 10 of the Atomic Energy Act gave the Atomic Energy Commission broad authority to control access to restricted data. It required the Commission, before allowing a person access to restricted data, to consider the person's "character, associations, and loyalty," and to determine that "permitting such person to have access to restricted data will not endanger the common defense or security." [18] The Atomic Energy Act did not define what Congress meant by "endanger the common defense or security," but the legislative history indicates it meant the disclosure of "information which might help other nations ... build atomic weapons."[19]

The relationship between "character, associations, and loyalty" and the endangerment of "the common defense or security" is clear from the text of section 10. Whether a person would "endanger the common defense or security" was the statutory standard for determining whether that person could have access to restricted data. The person's "character, association, and loyalty" were factors that the Commission should consider in determining whether the statutory "common defense or security" standard was met, not independent standards in themselves.

The Commission had, by 1953, adopted rules governing this determination. It had adopted "Security Clearance Procedures," which provided for the appointment of personnel security boards to conduct hearings and make recommendations to the appropriate Commission official "concerning eligibility of an individual for security clearance," and established "procedures and methods for the conduct of ... hearings and administrative review of questions or recommendations concerning eligibility of an individual for a security clearance."[20] In addition, the Commission had "adopted basic criteria for the guidance of the responsible officers of the Commission in determining the eligibility for personnel security clearance." The criteria listed specific categories of information bearing on whether someone posed a security risk. The criteria were "designed to maintain the security of the atomic energy program in a manner consistent with traditional American concepts of justice and rights of citizenship."[21]

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17 Letter from General Nichols to Dr. Oppenheimer (Dec. 23, 1953), Transcript at 3.

18 Atomic Energy Act of 1946 § 10(b)(5)(B)(i), 60 Stat. 767 (superseded by Atomic Energy Act of 1954 § 145b., 42 U.S.C. 2165(b)).

19 S. Rept. 1211, 79th Cong., 2d Sess. at 23 (1946).

20 15 Fed. Reg. 6241 (Sept. 19, 1950).

21 15 Fed. Reg. 8093 (Nov. 25, 1950). The Department of Energy's current security rule uses the term "traditional American concepts of justice and *fairness*." 10 C.F.R. 710.4(a).

Executive Order 10450 was issued by President Eisenhower on April 27, 1953, pursuant to the Summary Suspension Act. [22] The Summary Suspension Act authorized the Atomic Energy Commission and certain other federal agencies to suspend and terminate any employee "in the interest of national security." Executive Order 10450 extended this authority to all federal agencies. It established "minimum standards and procedures" to ensure that employees would "receive fair, impartial, and equitable treatment." Like the Commission's eligibility criteria, the Executive Order established factors to be considered in determining whether a person's employment was "clearly consistent with the interests of national security."[23]

The Supreme Court construed the Summary Suspension Act and Executive Order 10450 in a case in 1956, two years after the Oppenheimer decision. The Court interpreted "national security" to mean "only those activities ... that are directly concerned with the protection of the Nation from internal subversion or foreign aggression."[24] It interpreted the Executive Order's "clearly consistent with the interests of national security" standard as requiring the employee to be "clearly loyal—that is, unless there is no doubt as to his loyalty."[25] It then struck down the Executive Order as not authorized by the Summary Suspension Act to the extent that the loyalty standard in the Executive Order was applied to employees whose jobs could not adversely affect national security.[26]

General Nichols, in his letter notifying Dr. Oppenheimer that his security clearance and his employment had been suspended, cited both section 10 of the Atomic Energy Act and Executive Order 10450 as the bases for the Commission's action.[27] Both General Nichols and the hearing board cited both authorities in their recommendations to the Commission.[28] But the Commission's final decision only "decided that Dr. Oppenheimer should be denied access to restricted data," and was based on section 10 of the Atomic Energy Act alone.[29] It was silent on the question of Dr. Oppenheimer's employment (which terminated the next day under the terms of his contract anyway) and did not cite the Executive Order.

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22 Act of August 26, 1950, Pub. L. No. 81-733, 64 Stat. 476.

23 Exec. Order No. 10450, 18 Fed. Reg. 2489 (Apr. 27, 1953).

24 *Cole v. Young*, 351 U.S. 536, 543-544 (1956).

25 351 U.S. at 552 (internal quotation marks omitted).

26 351 U.S. at 557-558.

27 Letter from General Nichols to Dr. Oppenheimer (Dec. 23, 1953), Transcript at 3.

28 Opinions at 2-3 and 20 (Gray Board majority); and 44-45 (General Nichols).

29 Opinions at 51 (Commission majority).

The United States Court of Appeals for the Third Circuit has recently said that the Department of Energy's authority to revoke a security clearance derives from the President's constitutional authority and "exists quite apart from any explicit congressional grant" in the Atomic Energy Act.[30] But the Atomic Energy Commission made no such sweeping claims in the Oppenheimer case. It said it based its decision on section 10 of the Atomic Energy Act of 1946 alone, and its action must be judged on the basis that it gave.[31]

Section 10 of the Atomic Energy Act gave the Commission broad discretion to control access to restricted data, subject only to the statutory requirement that granting a person access must "not endanger the common defense or security." Broad as the Commission's discretion to revoke Dr. Oppenheimer's security clearance may have been, it was not unlimited. It was limited by the terms of the authorizing statute,[32] by the implementing rules adopted by the Commission,[33] and by the "traditional American concepts of justice and rights of citizenship" enshrined in the

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30 *El-Ganayni v. Department of Energy*, 591 F.3d 176, 189-190 (3d Cir. 2010).

31 *Vitarelli v. Seaton*, 359 U.S. 535, 539 (1959) (holding that the Secretary of the Interior could have terminated an employee without giving a reason, but since "the Secretary gratuitously decided to give a reason, and that reason was national security, he was obligated to conform to the procedural standards he had formulated ... for the dismissal of employees on security grounds"). *See also* 359 U.S. at 546 (J. Frankfurter, concurring in part and dissenting in part) ("An executive agency must be rigorously held to the standards by which it professes its action to be judged"); *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based").

32 *Cole v. Young*, 351 U.S. 536, 557-558 (1956) (noting that in overturning the Secretary of Health, Education, and Welfare's termination of an employee under Executive Order 10450, "we are not confronted with the problem of reviewing the Secretary's exercise of discretion, since the basis of our decision is simply that the standard ... applied by the Secretary is not in conformity with the Act.").

33 *Service v. Dulles*, 354 U.S. 363, 388 (1957) (stating that the State Department "was not obligated to impose upon" itself the "more rigorous" requirements of its loyalty rules, but "having done so ... could not ... proceed without regard to them"). Indeed, the Supreme Court has said that "scrupulous observance of departmental procedural safeguards is clearly of particular importance" in cases where employees are dismissed on national security grounds. *Vitarelli v. Seaton*, 359 U.S. 535, 540 (1959). "It is procedure that spells out much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 179 (1951) (J. Douglas, concurring).

Commission's rules and guaranteed by the Constitution.[34] The hearing board, the General Manager, and the Commission itself repeatedly abused that discretion in the Oppenheimer case.

The hearing

Dr. Oppenheimer's case was heard by a specially appointed three-member personnel security board made up of Gordon Gray, Thomas A. Morgan, and Ward V. Evans. The board held four weeks of hearings from April 12 through May 6, 1954. It heard from 40 witnesses and compiled over 3,000 pages of testimony.

The Gray Board did not conduct the hearing in accordance with the Commission's own rules or traditional American concepts of justice and fairness. The Commission's rules required the Board to make "every effort ... to protect the interests" of the employee and to "avoid the attitude of a prosecutor and ... always bear in mind and make clear to all concerned that the proceeding is an inquiry and not a trial."[35] In Dr. Oppenheimer's case, the Commission appointed Roger Robb, a highly successful, former criminal prosecutor, to serve as a special prosecutor. The Board allowed Robb to conduct the hearing like a criminal prosecution, though without the procedural protections afforded criminal defendants. Robb's aggressive trial tactics "tended to give to the proceedings an atmosphere of an adversary proceeding, that is to say, a trial—but a trial in which the customary safeguards of an adversary case were absent."[36]

The customary safeguards were absent because of the drastic disparity between the special prosecutor and Dr. Oppenheimer's lawyers. The Commission gave Robb a security clearance and access to classified documents and FBI files, which were denied to Dr. Oppenheimer's attorneys.[37] Robb repeatedly cross-examined witnesses on the basis of documents withheld from the witnesses and Dr. Oppenheimer's lawyers, then produced the documents "to contradict and show the witness to be fallible," or "to cause surprise, confusion,

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[34] *Webster v. Doe*, 486 U.S. 592 (1988) (stating that nothing in the National Security Act of 1947 "persuades us that Congress meant to preclude" judicial review of "colorable constitutional claims" arising out of the termination of a CIA employee).

[35] Security Clearance Procedures § 4.15, 15 Fed. Reg. at 6242.

[36] Brief on Behalf of Dr. J. Robert Oppenheimer filed with the AEC's Personnel Security Board at 3 (May 17, 1954).

[37] The Commission cleared Roger Robb in 8 days; it still had not cleared Dr. Oppenheimer's lead attorney, Lloyd Garrison, when the hearings ended, 8 weeks after he requested clearance. Philip M. Stern, *The Oppenheimer Case: Security on Trial* 245-247, 509-514 (1969).

and apparent conflicts in testimony."[38] "As a result of these tactics," Dr. Oppenheimer's lead attorney politely observed, "it is understandable that at some points in the testimony limitations of memory may have been mistaken for disingenuousness."[39]

In addition, Robb was allowed to spend a week reviewing roughly 3,000 pages of "file material" with the Board, *ex parte*, before the hearings began. Dr. Oppenheimer's lawyers believed that this "week's immersion in FBI files" created "a cloud of suspicion" and "an uneasy feeling" about Dr. Oppenheimer, "which never quite dissipated," even after the testimony established that "he could not be charged with disloyalty or want of patriotism," and "which may have been just enough to tip the scales against his clearance."[40]

Even more troubling, the FBI tapped Dr. Oppenheimer's telephones, recorded his conversations with his attorneys, and passed to the prosecution privileged information about Dr. Oppenheimer's intended defense and what his witnesses would say,[41] in probable violation of section 605 of the Federal Communications Act.[42] The Commission's rules afforded Dr. Oppenheimer the right to "be represented by counsel,"[43] and it was "well established," even before the Oppenheimer case, that a person "does not enjoy the effective aid of counsel if he is denied the right of *private* consultation with him."[44]

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[38] Brief on Behalf of Dr. J. Robert Oppenheimer filed with the AEC's Personnel Security Board at 2 (May 17, 1954). *See also* Stern at 529-542.

[39] Letter from Lloyd Garrison to General Nichols (June 9, 1954) *reprinted in* Stern at 544. *See also* Brief on Behalf of Dr. J. Robert Oppenheimer to the Members of the AEC at 48 (June 1954) ("Under this form of cross-examination the fallibility of memory could well be mistaken for lack of frankness").

[40] Stern at 527-528 (1969) (Lloyd Garrison's critique of the Commission's procedure).

[41] Harold P. Green, *The Oppenheimer Case: A Study in the Abuse of Law*, Bulletin of Atomic Scientists 12 (Sept. 1977); Bernstein, 42 Stan. L. Rev. at 1461-1462; Richard Pfau, *No Sacrifice Too Great: The Life of Lewis L. Strauss* 162 (1984).

[42] *Nardone v. United States*, 302 U.S. 379 (1937) (disclosure of conversations intercepted by federal agents in criminal trial violated prohibition in Federal Communication Act).

[43] Security Clearance Procedures § 4.11(f), 15 Fed. Reg. at 6242.

[44] *Coplon v. United States*, 191 F.2d 749, 757 (D.C. Cir. 1951) (emphasis added). *See also Black v. United States*, 385 U.S. 26, 28-29 (1966) (holding that "justice requires that a new trial be held" where FBI monitored conversations between criminal defendant and his attorney).

The Gray Board recommendation

The Gray Board made findings on each of the 24 charges against Dr. Oppenheimer. It found most of 23 charges relating to Dr. Oppenheimer's past associations to be true or substantially true, as Dr. Oppenheimer had largely conceded.[45] The most damaging of these charges related to the so-called "Chevalier incident." Haakon Chevalier was a friend of Dr. Oppenheimer, who, in the first weeks of 1943, told Dr. Oppenheimer that another acquaintance, George Eltenton, could pass secrets to the Russians. Dr. Oppenheimer made it immediately, firmly, and unequivocally clear to Chevalier that he would have nothing to do with revealing secrets, but he did not report the incident to security officials for several months. When he did, in August 1943, he only identified Eltenton, and refused to name Chevalier. Worse, he "invented a cock-and-bull story" about additional people being involved to conceal Chevalier's involvement.[46] He did not identify Chevalier until December 1943, and did not correct his story until 1946. He admitted to the Gray Board that he had lied about the incident in August 1943. Two of the Board members, Gray and Morgan, viewed the incident as evidence of Dr. Oppenheimer's lack of "enthusiastic support of the security system," and his continuing friendship with Chevalier as impermissible in "our security system."[47]

The Gray Board exonerated Dr. Oppenheimer on the final charge of having tried to obstruct development of the hydrogen bomb. The Board found "no lack of loyalty" in his opposition to the program, and it did not find that he had tried to obstruct the program. It did, however, find him guilty of a lack of "enthusiastic support," which it said "undoubtedly had an adverse effect" on the program,[48] and it found his opposition "disturbing."[49]

Two of the members of the Gray Board, Gray and Morgan, said they were unable to conclude that reinstating Dr. Oppenheimer's clearance "would be clearly consistent with the security interests of the United States," and thus recommended it not be reinstated.[50] The third, Dr. Evans, the only scientist on the board, recommended that Dr. Oppenheimer's clearance be restored on the grounds that most of the derogatory information against him was known to the Commission when it cleared him in 1947, and that he was "certainly less of a security risk" as a

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45 Brief on Behalf of J. Robert Oppenheimer to the Members of the AEC at 1 (June 7, 1954).

46 Transcript at 137.

47 Opinions at 20-21 (Gray Board majority).

48 Opinions at 13 (Gray Board majority).

49 *Id.* at 21.

50 *Id.*

consultant in 1954 than he had been as Chairman of the General Advisory Committee when he was cleared in 1947.[51] All three board members came to the "clear conclusion" that Dr. Oppenheimer was loyal, and Gray and Morgan said that if "this were the only consideration," they would join Evans in recommending reinstatement of Dr. Oppenheimer's clearance. They recommended that it not be restored, however, for four reasons: (1) his "conduct and associations," which they said "reflected a serious disregard for the requirements of the security system"; (2) his "susceptibility to influence"; (3) his opposition to the hydrogen bomb program; and (4) their belief that he had "been less than candid" in his testimony on the hydrogen bomb.[52]

In reaching this conclusion, Gray and Morgan applied the wrong legal standard. The Commission's rules required the hearing board to apply what was known as the "whole man" test. The whole man test required the board to make "an overall-all, common-sense judgment, ... after consideration of all the relevant information...." It required the board to give "due recognition to the favorable as well as unfavorable information concerning the individual," and to balance "the cost to the program of not having his services against any possible risks involved."[53] Yet the board, tutored in the Commission's rules by the special prosecutor, appears to have applied what was known as the "Caesar's wife" test. Under the Caesar's wife test, there was no weighing or balancing; any significant derogatory information required denial of a security clearance. "Any doubts whatsoever must be resolved in favor of the national security," Gray and Morgan believed. They had doubts about Dr. Oppenheimer's conduct, character, and associations, they said, so they concluded that they had to recommend that his clearance not be reinstated.[54]

In fairness to Gray and Morgan, they may have honestly believed that Executive Order 10450 required them to apply a Caesar's wife standard instead of the whole man standard in the Commission's rules. The Supreme Court itself was later to say that Executive Order 10450 "prescribed an absolute standard of loyalty,"[55] because "it enjoins upon the agency heads the duty of discharging any employee of doubtful loyalty," "unless he is 'clearly' loyal—that is, unless there is no doubt as to his loyalty."[56] But the Gray Board came to the "clear conclusion" that Dr.

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51 Opinions at 22-23 (Dr. Evans, dissenting).

52 Opinions at 21 (Gray Board majority).

53 Criteria for Determining Eligibility, 15 Fed. Reg. at 8093.

54 Opinions at 13 (Gray Board majority).

55 *Cole v. Young*, 351 U.S. 536, 543 (1956).

56 *Id.* at 552.

Oppenheimer was loyal.[57] The Gray Board found "no evidence of disloyalty," and "much responsible and positive evidence" of Dr. Oppenheimer's loyalty.[58] Dr. Oppenheimer met the "absolute standard of loyalty" in Executive Order 10450.

Executive Order 10450 did not impose a Caesar's wife test on character and associations. The Supreme Court read the criteria listed in the Executive Order as relevant only as they "reflect upon the employee's 'loyalty,'" or "upon the employee's reliability, trustworthiness, or susceptibility to coercion." [59] Unlike loyalty, an adverse determination on character or association did not require, by its own force, the employee to be discharged.

In any event, Executive Order 10450 did not require the Gray Board to apply the Caesar's wife test in Dr. Oppenheimer's security clearance proceeding. Section 10 of the Executive Order expressly stated that it did not modify "in any way ... any determination as to security which may be required by law," which presumably included security clearance determinations under section 10 of the Atomic Energy Act of 1954. Moreover, Deputy Attorney General William P. Rogers had previously advised the Commission that, since the Commission's security rules exceeded the minimum standards of the Executive Order, the Commission did not need to make any change in its security clearance rules.[60]

Yet the Gray Board appears to have applied the Executive Order's Caesar's wife test instead of the Commission's whole man test. Gray and Morgan complained that they were not "allowed to exercise mature practical judgment without the rigid circumscription of regulations and criteria established for us," when in fact, the Commission's rules required them,"as practical men of affairs," to "be guided by the same consideration that would guide them in making a sound decision in the administration of their own lives."[61]

General Nichols' recommendation

Under the Commission's rules, a hearing board's recommendations normally went to the General Manager for a final decision. In Dr. Oppenheimer's case, however, the Commission had reserved the final decision to itself. Even so, General Nichols reviewed the record *de novo* and

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57 Opinions at 21 (Gray Board majority); Opinions at 22 (minority report of Dr. Evans) ("He is loyal, we agree on that").

58 Opinions at 13 (Gray Board majority).

59 *Cole v. Young*, 351 U.S. at 553.

60 Harold P. Green, *The Oppenheimer Case: A Study in the Abuse of Law*, Bulletin of Atomic Scientists 12, 15 (Sept. 1977)

61 Security Clearance Procedures § 4.16(a), 15 Fed. Reg. at 6243.

made his own findings and recommendations. He submitted them in the form of a memorandum, along with the Gray Board's opinions, to the Commission. He did not, however, share his memorandum with Dr. Oppenheimer or his lawyers.

General Nichols' failure to provide Dr. Oppenheimer with a copy of his memorandum is significant because his findings differed so substantially from those of the Gray Board. Nichols said he concurred with the Board's findings and recommendations, but failed to acknowledge that the Gray Board had absolved Dr. Oppenheimer of the original hydrogen bomb charges (though he did acknowledge that "the evidence establishes no sinister motives"[62]), ignored the Board's "susceptibility to influence" finding altogether, and found Dr. Oppenheimer's memory lapses under cross-examination, which the Board thought showed a "lack of candor," to be grounds for questioning his "credibility" before the Board and his "character and veracity in general."

Like Borden, Nichols did not proffer new evidence; he viewed the record through his own dark prism to arrive at dramatically darker conclusions. Where the Gray Board had found Dr. Oppenheimer to have been "an active fellow-traveler" before the war, Nichols found him to have been "a Communist in every respect except for the fact that he did not carry a party card."[63] Where the Board accepted Dr. Oppenheimer's confession that he had lied about the Chevalier incident 11 years before, Nichols accused Dr. Oppenheimer of lying to the Board during the hearing.[64] Where the Board thought Dr. Oppenheimer had "been less than candid" on the hydrogen bomb, Nichols accused him of "deliberate misrepresentations and falsifications" and even perjury in his testimony on the Chevalier incident.[65] It was on these "considerations relating to the character and associations of Dr. Oppenheimer," that Nichols based his finding that Dr. Oppenheimer was a security risk and his recommendation that his security clearance not be reinstated.[66]

"Certain principles have remained relatively immutable in our jurisprudence," the Supreme Court would say in another security case, five years later. "One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the

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62 Opinions at 47 (General Nichols).

63 *Id.* at 44.

64 *Id.* at 45.

65 Opinions at 44-45 ("the Chevalier incident shows he is not reliable or trustworthy").

66 *Id.* at 47.

individual so that he has an opportunity to show that it is untrue."[67] Dr. Oppenheimer was not given an opportunity to show General Nichols' new case against him was true. Unaware of the content of General Nichols' memorandum, Dr. Oppenheimer's lawyers continued to argue the case made against their client by the Gray Board in their brief to the Commission, not knowing that Nichols had largely eclipsed the Gray Board.[68]

The Commission decision

The Commission voted four-to-one not to reinstate Dr. Oppenheimer's security clearance. The majority opinion, in which Commissioners Zuckert and Campbell joined, was written by Chairman Strauss. Strauss was not an impartial decision maker.[69] He disliked Dr. Oppenheimer personally and had made up his mind that Dr. Oppenheimer was a security risk before the proceeding began.[70] He was willing to do whatever it took for the Commission to rule against Dr. Oppenheimer. It was Strauss who insisted that the FBI continue recording Dr. Oppenheimer's conversations with his lawyers, even after the FBI wanted to stop.[71]

Strauss based his opinion squarely on Nichols' memorandum. Like Nichols,[72] Strauss passed over the Gray Board's "clear conclusion" that Dr. Oppenheimer was loyal, and asserted instead, as had Nichols, that disloyalty was only "one basis for disqualification, but not the only one. Substantial defects of character and imprudent and dangerous associations ... are also reason for disqualification."[73] Strauss, like the Gray Board, abandoned the "whole man" standard codified in the Commission's rules and precedent without explanation or even acknowledging

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67 *Greene v. McElroy*, 360 U.S. 474, 496 (1959).

68 Philip M. Stern, *The Oppenheimer Case: Security on Trial* at 538-541 (1969) (Lloyd Garrison's critique of the nature and importance of the undisclosed Nichols memorandum).

69 An "impartial decision maker is essential" to due process in administrative proceedings. *Arnett v. Kennedy*, 416 U.S. 134, 198 (1974) (J. White, concurring in part and dissenting in part), *quoting Goldberg v. Kelly*, 397 U.S. 254 (271 (1970).

70 Richard Pfau, *No Sacrifice Too Great: The Life of Lewis L. Strauss*, 132 and 170 (1984).

71 *Id.* at 159-160; Barton J. Bernstein, *The Oppenheimer Loyalty-Security Case Reconsidered,* 42 Stan. L. Rev. 1383,1461-1462 (1990)

72 Opinions at 44 (General Nichols) ("any one of the three factors—character, associations, or loyalty—may prevent the determination that permitting such person to have access to restricted data will not endanger the common defense or security").

73 Opinions at 51 (Commission majority).

that he was doing so. The Commission had ruled in an earlier case that associations "have a probative value in determining whether an individual is a good or bad security risk," but "it is the man himself the Commission is actually concerned with, ... associations are only evidentiary, and common sense must be exercised in judging their significance."[74] For Strauss, and for Zuckert and Campbell, however, association and character alone were enough to establish that Dr. Oppenheimer was a security risk.

For them, instances where Dr. Oppenheimer had failed to answer questions on security matters or had been misleading were not just factors to be weighed in determining whether he might be a security risk, but violations of an unwritten security standard. They believed that these violations, by their own force, warranted denial of his security clearance. In Strauss's view, Dr. Oppenheimer's position as a "Government official having access to the most sensitive areas of restricted data" imposed upon him "exemplary standards of reliability, self-discipline, and trustworthiness," and "high obligations of unequivocal character and conduct,"[75] which he had failed to meet by maintaining "imprudent and dangerous associations,"[76] and by "his falsehoods, evasions, and misrepresentations" to security officials.[77]

This view of "the security system as a body of positive law imposing obligations and restraints upon individuals subject to it,"[78] is a common thread running through the Gray Board's majority opinion, General Nichols' memorandum, and the Commission's decision. The leading reason given by the Gray Board majority for recommending against reinstatement of Dr. Oppenheimer's security clearance was his "serious disregard for the requirements of the security system." The Gray Board majority defined Dr. Oppenheimer's duty to the security system as "the protection and support of the entire system itself." This duty included "acceptance of security measures adopted by responsible Government agencies," "active cooperation with" security agencies, "subordination of personal judgment" to the security officials, and "wholehearted commitment to the preservation of the security system."[79]

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[74] Memorandum of Decision Regarding Dr. F. P. Graham (Dec. 18, 1948), *quoted in* Brief on Behalf of Dr. J. Robert Oppenheimer filed with the AEC's Personnel Security Board at 3 (May 17, 1954).

[75] Opinions at 52 (Commission majority).

[76] *Id.* at 51.

[77] *Id.* at 53.

[78] Harold P. Green, *The Unsystematic Security System*, Bulletin of Atomic Scientists 118, 122 (April 1955).

[79] Opinions at 15 (Gray Board majority).

Similarly, General Nichols also listed Dr. Oppenheimer's "consistent disregard of a reasonable security system" as a main reason for recommending his clearance not be reinstated. According to Nichols, Dr. Oppenheimer had "repeatedly exercised an arrogance of his own judgment with respect to the loyalty and reliability of his associates and his own conduct which is wholly inconsistent with the obligations necessarily imposed by an adequate security system on those who occupy high positions of trust and responsibility in the Government."[80]

Chairman Strauss continued this line of reasoning. He accused Dr. Oppenheimer of having "repeatedly exhibited a willful disregard of the normal and proper obligations of security,"[81] of "persistent and willful disregard for the obligations of security,"[82] of maintaining associations that are "part of a pattern of his disregard of the obligations of security,"[83] and of having "defaulted not once but many times upon the obligations that should and must be willingly borne by citizens in the nation service."[84]

Commissioner Murray carried this theme to the extreme in his concurrence. Murray measured Dr. Oppenheimer's loyalty to the United States by "his obedience to security regulations." In his view, "perfect" and "exact fidelity" to security requirements was required of Dr. Oppenheimer. "No violations can be countenanced." Since Dr. Oppenheimer failed to meet this "stern" and "decisive test," in Murray's mind, Dr. Oppenheimer was "disloyal."[85]

The problem with all this is that there were "no security laws or regulations instructing an individual as to those with whom he may or may not associate," and "no security regulations" on "lying."[86] If an individual had questionable associates or engaged in inappropriate behavior, it might establish a presumption that he was a security risk, "but the individual has not violated security regulations or failed to live up to his security obligations."[87] By erecting such a standard for Dr. Oppenheimer, the Commission majority created "a new test—over and above that of conduct, associations, and loyalty and compliance with the system's positive regulations and

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80 Opinions at 46-47 (General Nichols).

81 Opinions at 52 (Commission majority).

82 *Id.* at 53.

83 *Id.* at 54.

84 *Id.*

85 Opinions at 62-63 (Commissioner Murray, concurring).

86 Harold P. Green, *The Unsystematic Security System*, Bulletin of Atomic Scientists 118, 122 (Apr. 1955).

87 *Id.*

restrictions—an attitude of intellectual submission to the system's precepts."[88]

The Commission announced its decision at 4 p.m. on June 29, 1954, 32 hours before Dr. Oppenheimer's consulting contract expired and the case would have become moot. The timing and the explanation offered by Commissioner Zuckert in his concurring opinion suggest that, in the end, the Commission may have been less concerned with protecting its restricted data in the fleeting hours remaining under Dr. Oppenheimer's contract, and more with destroying his influence within the scientific community and the "Defense Establishment." It was the "unique place that Dr. Oppenheimer has built for himself in the scientific world and as a top Government adviser," that made it necessary for the Commission to provide "a clear-cut determination" that he could not be trusted, Commissioner Zuckert reasoned.[89]

The improper political motivation behind the Oppenheimer case was made even more apparent in an internal memorandum from Charter Heslep, the Commission's public information officer, to Chairman Strauss, in which Heslep recounted his conversation with Dr. Edward Teller, a week before Teller testified against Dr. Oppenheimer. Dr. Teller lamented that the Commission brought the case on security grounds, rather than on Dr. Oppenheimer's "consistently bad advice." Dr. Oppenheimer was "not disloyal," Dr. Teller insisted, but "more of a 'pacifist.'" In Dr. Teller's view, the Commission needed to diminish Dr. Oppenheimer's influence among his fellow scientists, in Heslop's descriptive phrase, with which Teller agreed, to "unfrock him in his own church."[90]

Commissioner Smyth's dissent

Only Henry DeWolf Smyth, the lone scientist on the Commission, correctly understood and applied the law to the mass of facts before the Commission in the Oppenheimer case. Most often remembered for writing the Smyth Report, which first explained the atomic bomb to the lay reader, Dr. Smyth once again saw clearly and precisely through the smoke and fog.

Correctly translating the Atomic Energy Act's common defense or security standard into layman's terms, Dr. Smyth began by saying that "the only question being determined by the Atomic Energy Commission is whether there is a possibility that Dr. Oppenheimer will intentionally or unintentionally reveal secret information to person who should not have it. To me, this is what is meant within our security system by the term security risk. Character and associations are important only insofar as they bear on the possibility that secret information will

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88 *Id.* at 164.

89 Opinions at 56 (Commissioner Zuckert, concurring).

90 Kai Bird and Martin J. Sherwin, *American Prometheus: The Triumph and Tragedy of J. Robert Oppenheimer* 532 (2005).

be improperly revealed."[91]

To Dr. Smyth, "the most important evidence in this regard is the fact that there is no indication in the entire record that Dr. Oppenheimer has ever divulged any secret information. The past 15 years of his life have been investigated and reinvestigated. For much of the last 11 years he has been under actual surveillance, his movements watched, his conversations noted, his mail and telephone calls checked. This professional review of his actions has been supplemented by enthusiastic amateur help from powerful personal enemies."[92]

All the investigations and all the surveillance never turned up any evidence that Dr. Oppenheimer ever revealed a single secret. To the contrary, after four weeks of testimony and untold hours reviewing thousands of pages of FBI files, the Gray Board could only conclude "that Dr. Oppenheimer 'seems to have had a high degree of discretion reflecting an unusual ability to keep to himself vital secrets.'"[93] Dr. Smyth saw no reason to believe that Dr. Oppenheimer would not "continue to keep to himself all the secrets with which he is entrusted."

"In spite of all of this," Dr. Smyth continued, "the majority of the Commission now concludes that Dr. Oppenheimer is a security risk." In Dr. Smyth's view, that "conclusion cannot be supported by a fair evaluation of the evidence." He then proceeded to review "the whole of the evidence extracted from a lengthy record to support the severe conclusions of the majority that Dr. Oppenheimer has 'given proof of fundamental defects in his character' and of 'persistent continuing associations,'" and found it "thin." "All added together, ... the evidence is singularly unimpressive when viewed in the perspective of the 15 years of active life from which it is drawn. Few men could survive such a period of investigation and interrogation without having many of their actions misinterpreted or misunderstood."[94]

Turning "to the alleged disregard of the security system" upon which the Gray Board, General Nichols, and his fellow Commissioners placed so much weight, Dr. Smyth suggested "that the system itself is nothing to worship. It is a necessary means to an end. Its sole purpose, apart from the prevention of sabotage, is to protect secrets. If a man protects the secrets he has in

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[91] Opinions at 64 (Commissioner Smyth, dissenting). The Supreme Court has taken this view. It has said that a security "clearance does not equate with passing judgment upon an individual's character. Instead, it is only an attempt to predict his possible future behavior and to assess whether ... he might compromise sensitive information." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

[92] Opinions at 64 (Commissioner Smyth, dissenting).

[93] *Id.*, quoting the Gray Board majority, Opinions at 20.

[94] Opinions at 66 (Commissioner Smyth, dissenting).

his hands and his head, he has shown essential regard for the security system."[95]

Dr. Smyth's analysis of the facts and the law, I suggest, was correct.

Redressability

In reaching its decision in the Oppenheimer case, in sum, the Commission did not follow its own rules, it did not observe traditional American concepts of justice and fairness, it did not explain its departure from precedent, and it offered an explanation for its decision that was not supported by the substantial weight of the evidence before it. Had this been an ordinary administrative action, it would have been subject to judicial review and, quite likely, overturned.

But the Oppenheimer case was not an ordinary administrative action. The courts have long given federal agencies special deference on security clearances. They have taken "the view that an agency head who must bear the responsibility for the protection of classified information committed to his custody should have the final say in deciding whether to repose his trust in an employee who has access to such information."[96] The Supreme Court has said that courts may hear colorable constitutional claims[97] or claims asserting that an agency failed to follow its own rules in revoking a security clearance,[98] but they may not review the merits of an agency's decision to revoke a security clearance.[99] Moreover, Dr. Oppenheimer's case is now moot, his injuries no longer redressable by the courts, 44 years after his death.

You are not so constrained. "An administrative agency is not bound by the constitutional requirement of a 'case or controversy' that limits the authority of article III courts to rule on moot issues."[100] Moreover, an administrative agency "can undo what is wrongfully done by virtue of

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95 *Id.* at 67.

96 *Cole v. Young*, 351 U.S. 536, 546 (1956).

97 *Webster v. Doe*, 486 U.S. 592, 603-605 (1988).

98 *Service v. Dulles*, 354 U.S. 363 (1957).

99 *Department of the Navy v. Egan*, 484 U.S. 518, 529 (1988); *El-Ganayni v. Department of Energy*, 591 F.3d 176185 (3d Cir. 2010) (stating that the "Secretary of Energy ... cannot be ordered to justify his decisions in this area, nor can his justifications be subjected to weighing and second-guessing by ... a federal court").

100 *Climax Molbydenum Co. v. Secretary of Labor*, 703 F.2d 447, 451 (10th Cir. 1983).

its order,"[101] and "has the inherent authority to reconsider its decisions." [102]

The Atomic Energy Commission's discretion is now your discretion.[103] You may, at your "sole discretion and as resources and national security considerations permit, ... provide additional review proceedings" in security clearance cases.[104] And the Administrative Procedure Act permits you, in your "sound discretion," to "issue a declaratory order to terminate a controversy or remove uncertainty."[105]

I urge you to exercise your discretion in this case. At Dr. Oppenheimer's funeral in 1967, Dr. Smyth lamented that the wrong done to him by the Atomic Energy Commission's decision "can never be righted; such a blot on our history [can] never [be] erased...." The wrong cannot be righted, but it can be acknowledged. And the Commission's judgment that Dr. Oppenheimer was unfit to serve this nation can be vitiated. I urge you to do so.

Sincerely,

Jeff Bingaman

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101 *United Gas Improvement Co. v. Callery Properties*, 382 U.S. 223, 229 (1965).

102 *Macktal v. Chao*, 286 F.3d 822, 825-826 (5th Cir. 2002).

103 *McDaniel v. Allied Signal*, 896 F. Supp. 1482, 1490 n.20 (W.D. Mo. 1995), *citing* 42 U.S.C. 5814(c) (transferring security clearance functions of the Atomic Energy Commission to the Administrator of the Energy Research and Development Administration); 42 U.S.C. 7151(a) (transferring security clearance functions of the Administrator of the Energy Research and Development Administration to the Secretary of Energy).

104 Executive Order 12968, 60 Fed. Reg. 40245, 40252 (Aug. 7, 1995).

105 5 U.S.C. 554(e); *Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1161 (D.C. Cir. 1995).