


## The Secretary of Energy

Washington, DC 20585

December 16, 2022

### SECRETARIAL ORDER

FROM: JENNIFER M. GRANHOLM 

SUBJECT: VACATING 1954 ATOMIC ENERGY COMMISSION DECISION: *IN THE MATTER OF J. ROBERT OPPENHEIMER*

### BACKGROUND

In June 1954 the Atomic Energy Commission (AEC) revoked Dr. J. Robert Oppenheimer's security clearance. Over the prior decade, Dr. Oppenheimer had served as Director of the Los Alamos National Laboratory and as Chairman of the General Advisory Committee to the AEC. In his years of public service, Dr. Oppenheimer had perhaps more access to information about U.S. nuclear weapons programs than any other individual in the government. And yet, in reaching its decision on his clearance, the AEC did not claim that Dr. Oppenheimer had ever divulged or mishandled classified information. Nor did it question his loyalty to the United States. Rather, the AEC based its decision on the conclusion that there were "fundamental defects" in Dr. Oppenheimer's character.

When informed by the AEC in December 1953 that his eligibility for access to restricted data had been conditionally suspended, Dr. Oppenheimer requested a hearing, no doubt trusting that a fair process would clear his name. Ultimately, the proceeding went through three layers of review within the AEC. First, pursuant to the AEC's security clearance regulations at the time, the AEC convened a three-member Personnel Security Board to adjudicate Dr. Oppenheimer's clearance. On May 27, 1954, by a 2-1 vote, the Personnel Security Board recommended to the General Manager of the AEC that Dr. Oppenheimer's clearance not be reinstated. The Personnel Security Board issued a report outlining the basis for its decision. The Personnel Security Board found "no evidence of disloyalty" and "much responsible and positive evidence of the loyalty and love of country of the individual concerned."<sup>1</sup> Nevertheless, the Personnel Security Board based its recommendation on its appraisal of Dr. Oppenheimer's past associations (which had already been examined when Dr. Oppenheimer's clearance was renewed in 1947) and on a finding that if Dr. Oppenheimer had not opposed the development of the hydrogen bomb, "the project would have been pursued with considerably more vigor, thus increasing the possibility of earlier success in this field."<sup>2</sup>

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<sup>1</sup> 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, at 13 (1954).

<sup>2</sup> *Id.*

Next, the General Manager of the AEC referred the matter to the full Commission with a detailed letter of his own recommending affirmance. Although the General Manager recommended affirmance of the Personnel Security Board, he did so based on reasons that diverged from those offered by the Board. On the factor central to the Personnel Security Board's decision, the General Manager found that "the evidence establishes no sinister motives on the part of Dr. Oppenheimer in his attitude on the hydrogen bomb."<sup>3</sup> Instead, the General Manager's letter focused on Dr. Oppenheimer's past candor regarding his associations, and on the associations themselves. Notably, however, the General Manager's letter found "no direct evidence that Dr. Oppenheimer gave secrets to a foreign nation or that he is disloyal to the United States."<sup>4</sup> Third, and finally, on June 29, 1954, two days before the expiration of Dr. Oppenheimer's consulting contract, an event that would have rendered its decision moot, the AEC affirmed the Personnel Security Board's recommendation on a 4-1 vote, with a majority opinion that was based on the reasoning of the General Manager's letter.

The Department of Energy (DOE) is a successor agency to the AEC and inherited many of its functions including overseeing personnel security matters.<sup>5</sup> In that capacity, DOE recently received requests from 43 U.S. Senators, the current and preceding directors of the Idaho National Laboratory, and all living directors of the Los Alamos National Laboratory to review the AEC's 1954 decision *In the Matter of J. Robert Oppenheimer*. I agree that this issue, while having been reviewed in the past, is worth reconsideration.

## DISCUSSION

The reconsideration of an order of the AEC concerning an individual long-deceased is not something this Department has ever done and not something that would ordinarily be considered. And yet, the *Oppenheimer* matter was extraordinary in several respects that merit its reconsideration. The *Oppenheimer* matter concerned a man who, not long before, had played an indispensable and singular role in the war effort, a man whose loyalty and love of country were never seriously questioned. More troubling, historical evidence suggests that the decision to review Dr. Oppenheimer's clearance had less to do with a *bona fide* concern for the security of restricted data and more to do with a desire on the part of the political leadership of the AEC to discredit Dr. Oppenheimer in public debates over nuclear weapons policy. Such political motives must have no place in our personnel security process. For these reasons, I directed Departmental staff to review the *Oppenheimer* matter.

Among the most credible sources regarding the *Oppenheimer* matter were those produced by employees of the AEC itself. In 1959, an AEC attorney conducted an internal review that included legal analysis of the matter for the General Counsel of the AEC. After detailing numerous procedural flaws, the author of this review concluded that "the system failed . . . [and] that a

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<sup>3</sup> *Id.* at 47.

<sup>4</sup> *Id.* at 45.

<sup>5</sup> See 42 U.S.C. §§ 5814, 7151, 7293. See also *McDaniel v. Allied Signal, Inc.*, 896 F. Supp. 1482, 1490 n.20 (W.D. Mo. 1995) ("The delegation of power from the President to 'the Commissioners of the Atomic Energy Commission' (AEC) is now a grant to the Secretary of Energy, to whom the functions of the AEC Commissioners were transferred by Congress pursuant to 42 U.S.C. §§ 5814, 7151, 7293.").

substantial injustice was done to a loyal American.”<sup>6</sup> Among the procedural flaws identified in the review was the fact “the Commission had before it recommendations [from the General Manager] which differed importantly in emphasis from the [Personnel Security Board] report, and indeed, introduced factors not theretofore considered by the [Personnel Security Board].”<sup>7</sup> Accordingly, as per the review, the “unfairness to Oppenheimer’s attorneys is manifest. They were forced to write a review taking into consideration only the recommendations of the [Personnel Security Board].”<sup>8</sup> In 1977, another former AEC lawyer, who had drafted the letter notifying Dr. Oppenheimer of the security charges against him and later recused himself from the case “for reasons of personal conscience,” reflected that “[n]ever before had an AEC security proceeding been launched with the predetermined objective of establishing that the individual concerned was a security risk.”<sup>9</sup>

Later, a book published in 1989 by historians who served at the AEC, Energy Research and Development Administration (ERDA), and DOE, reviewed the factual underpinnings of the case. This review was part of a robust effort that began in 1957 to trace the history of the Atomic Energy Commission, including seminal events such as the *Oppenheimer* hearing, and was supported by numerous chairmen of the AEC, administrators of ERDA, and secretaries of DOE. The historians had unfettered access to AEC documents, which served as the primary source material for the book. The historians concluded that the Commission “could not in good conscience say that Oppenheimer’s clearance would ‘endanger the national security’ or be inconsistent with the requirements of the security system.”<sup>10</sup>

These analyses, and the sources they drew upon, identified numerous irregularities in the *Oppenheimer* matter. Although many of the asserted flaws are difficult to evaluate from our standpoint of historical remove, two stand out as in clear conflict with the AEC’s rules in place at the time.

First, the Personnel Security Board did not comply with the requirements of the AEC’s Security Clearance Procedures regarding *ex parte* communications. The Security Clearance Procedures allowed the Personnel Security Board members to receive assistance in conducting a hearing, but expressly prohibited them from receiving assistance from any person who would “participate in the deliberations of the board” or who would express any “opinions to the Board concerning the merits of the case.”<sup>11</sup> Over the week prior to the hearing that commenced April 12, 1954, the

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<sup>6</sup> Memorandum from Jack Newman to L.K. Olson regarding “Analysis of the Oppenheimer Case,” at 44 (September 9, 1959) (National Archives) (“Newman Memo”).

<sup>7</sup> *Id.* at 26.

<sup>8</sup> *Id.*

<sup>9</sup> Harold P. Green, *The Oppenheimer Case: A Study in the Abuse of Law*, 33 *Bulletin of Atomic Scientists* 12, at 14, 59 (Sept. 1977).

<sup>10</sup> Richard G. Hewlett and Jack M. Holl, *Atoms for Peace and War 1953-1961: Eisenhower and the Atomic Energy Commission*, at 109 (1989).

<sup>11</sup> “When the nature of the case is complex or the Board desires assistance in conducting the hearing, the Manager should designate such person or persons to aid the Board as may be necessary. The person thus named shall not be a member of the Board, shall not participate in the deliberations of the Board, shall express no opinion to the Board concerning the merits of the case, but shall assist the Board in such manner as to bring out a full and complete disclosure of all facts having any bearing upon the issues before the Board.” Security Clearance Procedures § 4.15(o), 15 Fed. Reg. at 6243.

Personnel Security Board reviewed the facts of the case with the assistance of the very lawyers assigned to present the case for revoking Dr. Oppenheimer's security clearance, Roger Robb and Arthur Rolander.<sup>12</sup> In fact, the Personnel Security Board was informed by AEC's General Counsel, William Mitchell, that "Mr. Robb and Mr. Rolander had been assigned by the Commission to the Board full time for the purpose of assisting the Board in preparing for and conducting the hearing . . . and that they would be at the call of the Board during the first week, when the Board was reading the files."<sup>13</sup> Neither Dr. Oppenheimer nor his counsel were allowed to be present during the discussions between the prosecuting team and the Personnel Security Board that occurred prior to the commencement of the Personnel Security Board hearing.<sup>14</sup>

Mr. Robb and Mr. Rolander's *ex parte* communications with the Personnel Security Board also continued after the initiation of the proceeding. Indeed, they were actively involved in the deliberations of the Personnel Security Board during the hearing,<sup>15</sup> again without Dr. Oppenheimer's counsel present.

Mr. Robb and Mr. Rolander's actions violated the Security Clearance Procedures provisions regarding *ex parte* communication. Their actions also placed serious doubt on whether the Personnel Security Board complied with the AEC's rule prohibiting anyone from sitting on a case who had "prejudged the matter" or "who for bias or prejudice for any reason would be unable to render a fair and impartial recommendation."<sup>16</sup>

Second, the AEC did not provide Dr. Oppenheimer's counsel with an opportunity to rebut the letter presenting the General Manager's findings and recommendations, which was a critical document on which the AEC's own final decision was based. The Security Clearance Procedures stipulated that the General Manager of the AEC would "make a final determination from the entire record, accompanied by all recommendations, whether security clearance shall be granted or

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<sup>12</sup> See e.g., in an April 12 memo to file, Rolander noted: "On April 8, 1954, Mr. Gordon Gray advised that he understood that Earl Browder and his wife were reported to have been house guests of Dr. Oppenheimer at Princeton. I told Mr. Gray that I was not aware of this allegation, that it was not reflected in AEC files on Dr. Oppenheimer, but that I would contact the FBI." Rolander later contacted Gray on April 9: "Mr. Gray was advised of the above information on April 9." Memorandum to File re: "J. Robert Oppenheimer Case", C.A. Rolander, Jr. (April 12, 1954) (National Archives).

<sup>13</sup> Memorandum from William Mitchell to K.D. Nichols, May 7, 1954 (National Archives).

<sup>14</sup> Dr. Oppenheimer's counsel, Lloyd Garrison, lamented this in his closing statements to the Personnel Security Board: "I remember a kind of sinking feeling that I had at that point – the thought of a week's immersion in FBI files which we would never have the privilege of seeing, and of coming to the hearings with that intense background study of the derogatory information." Transcript of Hearing before Personnel Security Board, April 12, 1954, through May 6, 1954, at 3244.

<sup>15</sup> See e.g., Gordon Gray [Chairman of the PSB], Dwight D. Eisenhower Library Interview by Paul L. Hopper (March 7, 1967), at 202 ("At the end of the recess, on Monday, May 17, I met Mr. Morgan at the Raleigh Durham Airport . . . Mr. Morgan and I were amazed that afternoon to find that Dr. Evans clearly had undergone a complete reversal of view . . . Mr. Rolander and Mr. Robb both expressed amazement at this about-face."); Hewlett & Holl, *supra* note 10, at 101 ("[A]fter completing his work on the majority decision, Robb in turn assisted Evans in preparing his brief.")

<sup>16</sup> "No person shall sit in a case as a member of a Personnel Security Board who has prejudged the matter, or who possesses information that would make it embarrassing to render an impartial recommendation, or who for bias or prejudice generated for any reason would be unable to render a fair and impartial recommendation." Security Clearance Procedures § 4.14(d), 15 Fed. Reg. at 6242.

denied.”<sup>17</sup> The AEC deviated from this rule by reserving final judgment of the clearance determination for the Commissioners themselves. This would not have been objectionable had the AEC followed its own rule that provided the opportunity to respond to the General Manager’s findings and recommendations. The Security Clearance Procedures required that the individual “be furnished a copy of the Manager’s findings” and be informed “of his right to submit a brief in support of his contentions.”<sup>18</sup> This right was not provided to Dr. Oppenheimer. Indeed, Dr. Oppenheimer and his counsel were not informed, until after the AEC reached its decision, that the General Manager had provided his own recommendation to the Commissioners.<sup>19</sup>

Depriving Dr. Oppenheimer’s counsel of the opportunity to address the General Manager’s findings and recommendations was particularly significant because the General Manager had departed in important ways from the conclusions of the Personnel Security Board, emphasizing different facts from the Personnel Security Board report and presenting certain new charges.<sup>20</sup> Dissenting Commissioner Henry D. Smyth made this point to his colleagues in a memo, stating: “I believe that the General Manager’s letter of findings and recommendations differs substantially in emphasis from the [Personnel Security Board] Report and even introduces some considerations that are not in that report . . . if we give Dr. Oppenheimer’s attorneys no opportunity to comment on the Nichols’ letter, we will be open to grave criticism when that letter is published.”<sup>21</sup>

## CONCLUSION

The question of whether Dr. Oppenheimer, or any other individual of that time, ought to have been eligible for access to restricted data is not one that this Department can or should attempt to answer seventy years later. Security clearance adjudication proceedings necessarily depend on sensitive judgments regarding the credibility of oral testimony and other evidence best evaluated within its own context. Therefore, we will not reconsider the substantive merits of *In the Matter of J. Robert Oppenheimer*.

Nevertheless, even with the passage of time, we can say with confidence that, in conducting the *Oppenheimer* proceeding, the AEC failed to follow its own rules. We can also conclude that these failures were material to the fairness of the proceeding. There can be little question that allowing the lawyers charged with making the case for revocation to serve as assistants to the Board and to guide them through the documentary evidence for an entire week before the hearing may have colored the Board members’ perception of the issues and prevented them from entering the hearing with open minds. Further, when the matter proceeded to the AEC for final action, Dr.

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<sup>17</sup> Security Clearance Procedures § 4.18(j), 15 Fed. Reg. at 6244.

<sup>18</sup> *Id.* § 4.18(c)(1).

<sup>19</sup> See Responses by Lloyd Garrison to Various Questions Asked by Philip M. Stern *included in* Philip Stern, *The Oppenheimer Case: Security on Trial*, at 537 (1969) (“The [Nichols] memorandum was not made known to us until July . . . after the case was over.”)

<sup>20</sup> See *id.* (“If oral argument had been permitted, [the Nichols memorandum] . . . might have come to light, and we might then have had an opportunity to answer it. It constituted in effect a brief for the prosecution . . . it contained certain new charges that we had not had an opportunity to answer, and it appears to have been heavily relied upon by the majority of the Commissioners.”).

<sup>21</sup> Commissioner Henry D. Smyth, Memorandum for the Chairman and Commissioners, June 21, 1954 (National Archives).

Oppenheimer's counsel was kept unaware of the actual findings and recommendations presented to the AEC by the General Manager, which differed substantially from those of the Personnel Security Board. By preventing its subject from addressing the charges made against him, the AEC undeniably compromised the effectiveness of its proceeding.

These failures warrant vacating the AEC's order and, in the case of an active clearance seeker, would warrant a new adjudication conducted in accordance with the applicable rules. In the case of Dr. Oppenheimer there will of course be no new adjudication. Vacatur of the AEC's 1954 decision *In the Matter of J. Robert Oppenheimer* will conclude the Department's actions in this matter.

Pursuant to the authority vested in the Secretary of Energy to carry out the functions of the Atomic Energy Commission, I hereby order that the decision rendered on June 29, 1954, *In The Matter of J. Robert Oppenheimer* be vacated.

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When Dr. Oppenheimer died in 1967, Senator J. William Fulbright took to the Senate floor and said "Let us remember not only what his special genius did for us; let us also remember what we did to him." Today we remember how the United States government treated a man who served it with the highest distinction. We remember that political motives have no proper place in matters of personnel security. And we remember that living up to our ideals requires unerring attention to the fair and consistent application of our laws.

Jennifer M. Granholm