MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY

UNITED STATES OF AMERICA v. **KHALID SHAYKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI**	AE 375(MAH) **Defense Motion to Compel Production of Discovery Requested on 1 August 2014 Concerning Interrogations and Other Matters** Filed: 1 October 2015

1. **Timeliness**: This motion is timely filed.

2. **Relief Sought**: In accordance with R.M.C. 703(f)(4)(B) and 703(e)(2), the Defense moves this Commission to order the Government to produce various items from its discovery request of 1 August 2014, and especially to produce original recordings and notes from the interrogations of the accused between 2003 and 2006; or, if that evidence has been lost or destroyed, evidence concerning that destruction or loss. The Defense also requests that the Government be ordered to perform its due diligence obligations with regard to such evidence, as it has refused to do in some cases.

3. **Burden and Standard of Proof**: The burden of persuasion on this motion rests with the Defense. R.M.C. 905(c).

4. **Facts**:

A. Background

a. On 2 July 2014, the Government provided the defense with over 600 pages of English summaries of interrogations of the accused by the CIA. The Government did not provide,

or offer to provide, any of the original materials on which these summaries were based—such as recordings of the interrogations or notes taken by the interrogators.

b. Many of the interrogations, both of Mr. al Hawsawi and others, strongly focus on Mr. al Hawsawi and his role in the 9/11 attacks (e.g., att. D-H).

c. On 1 August 2014, the Defense asked for discovery related to these summaries (att. B).

B. Matters for Which the Prosecution Refused to Perform Due Diligence

d. The defense request included "all audio and video recordings of the interrogations of Mr. al Hawsawi and his co-accused, regardless of whether these recordings were made known to the government agents conducting the interrogations." (att. B, para. 1f)

e. On 29 August 2014, the Government responded, refusing to provide the recordings. In so doing, it stated that *the Prosecution* (note: "the Prosecution," not "the Government") was unaware of any such recordings. It did not claim to have performed any due diligence on the subject (att. C, para. 2f).

f. The Defense request included notes taken by agents who observed the interrogations. The Government refused, claiming that production of these notes "if, in fact, any were taken" would not be warranted unless the Government itself chose to call the agents who took them. Again, the Government did not claim to have performed any due diligence (att. C, para. 3c).

g. The Defense likewise requested all audio and video recordings of Mr. al Hawsawi made while he was in custody. The Government's response again stated that *the Prosecution* was unaware of any such recordings. It did not claim to have performed any due diligence on the subject (att C, para. 3b).

h. In the book *Hard Measures*, Jose A. Rodriguez, Jr. (formerly of the CIA's Counterterrorism Center) said that in 2005 the CIA had destroyed tapes of the interrogations of

Abu Zubadayah and Abdul Rahim al-Nashiri, two other detainees allegedly involved in al Qaeda; and had done so to cover up evidence of "Enhanced Interrogation Techniques" (i.e., torture) (att. K). Citing this book and these concerns, the Defense asked for evidence related to any such destruction in *this* case, to include the names of the persons who ordered the destruction and surviving paper and e-mail traffic on the subject.

i. The Government once more refused without even pretending to perform due diligence, stating once again that "*the Prosecution* is unaware" of any such destruction (att. C, para. 3q).

j. One of the summaries (att. I) [redacted] The defense therefore asked the Government for the recording of this conversation, and all recordings made of conversations between the accused. Once again, the Government refused to perform any due diligence, and simply declared that the Prosecution was "unaware" of any such recording (att. C, para. 3o). Since then, litigation in the case of *United States v. Abd al-Hadi al-Iraqi* has shown that surreptitious recordings of Mr. al Hawsawi do indeed exist and have been long concealed by the Government.[1]

C. Other Matters

k. In addition to the recordings, the Defense requested all notes taken by Government agents who observed the interrogations. The Government said that it would only produce those notes of agents whom it intended to call as witnesses (att. C, paras. 2e, 4) and that it did not intend to call any CIA agents as witnesses (*id.* para. 2e, 2f).

l. The Defense also requested "all letters, emails, notes, or other correspondence, and all audio and video recordings providing government agents with guidance or information regarding the interrogation of Mr. Hawsawi and his co-accused." The Government promised to

[1] *See* AE 369, filed 24 July 2015, p. 1 & att. B; *United States v. Abd al-Hadi al-Iraqi*. AE 049A, entered 23 July 2015, p. 1.

provide an "advisement checklist" without saying whether other responsive materials exist (att. C, para. 2g).

m. The Defense requested any transcripts prepared of the various interrogations mentioned in its request. The Government promised to provide only those transcripts "it intends to use as evidence," and suggested that such transcripts would not be "relevant." (att. C, para. 3p).

n. The Defense requested the personnel files of the translators used in the interrogations. The Government promised to provide anything "relevant" (in its own judgment) on the FBI translators to the defense (att. C, para. 2k) but outright refused to provide anything on the CIA translators (*id.* para. 2k).

o. The Defense requested correspondence discussing the establishment, creation, and selection of an FBI "clean team" to interrogate the accused, as well as the materials this "clean team" reviewed in preparing for these interrogations. The Government refused (att. C, para. 2h, 2i).

p. The defense requested the FBI's "Cross-Cultural Rapport-Based Interrogation Manual" as used by the FBI in January 2007. The Government refused, stating that the Prosecution had "determined" that this manual was never released by the author or used by the FBI (att. C, para. 2c).

q. The defense requested materials related to the Combatant Status Review Tribunal, including communications discussing the establishment of the tribunal for Mr. al Hawsawi and his co-accused and communications that were shown to the CSRT members before the hearings. The Government refused (att. C, paras. 4e, 4f).

r. The defense requested materials related to disciplinary reports for Mr. al Hawsawi, his co-accused, and the other detainees at GTMO. The Government said it had provided disciplinary reports for Mr. al Hawsawi after 2006, and would produce unspecified "information"

regarding his conditions of confinement before 2006. It refused to provide notes made by Government agents during any alleged disciplinary infractions as well as information regarding his co-accused or other detainees (att. C, paras. 5a, 5b, 5e).

s. The Government promised other items of discovery to the Defense once the Memorandum of Understanding (MOU) had been signed (att. C, paras. 2b, 5c). The Defense recently submitted the signed MOU but the items have not yet been provided (if they are provided while this motion is being litigated, the Defense will gladly acknowledge this fact).

5. **Argument:**

A. The Original Notes and Recordings from Mr. al Hawsawi's Interrogations Are Relevant and Necessary.

R.M.C. 701(c)(3) specifically requires the Government to produce

> [t]he contents of **all relevant statements—oral, written or recorded—made or adopted by the accused**, that are within the possession, custody or control of the Government, the existence of which is known **or by the exercise of due diligence may become known to trial counsel**, and are material to the preparation of the defense or are intended for use by trial counsel as evidence in the prosecution case-in-chief at trial.

The rule does not let the Prosecution evade the rule by refusing to perform due diligence, then declaring that it (the Prosecution) does not know whether the statements exist.

The relevance of the notes and recordings behind the CIA summaries is patent. Many of these statements as written are highly probative of Mr. al Hawsawi's role in the 9/11 operation. Thus, in a written statement provided to his interrogators (att. D, p. 5),

[redacted]

[redacted]

[redacted]

[2] [redacted]

Filed with TJ
1 October 2015

[redacted]

This is in keeping with statements of Mr. al Hawsawi (att. F) and Mr. bin al Shibh (att. G), though they were doubtless separated during their interrogations. This kind of information is highly relevant to Mr. al Hawsawi's case,[4] and cannot simply be brushed aside based on whether the Government wants to introduce it.[5]

Verbatim transcripts of these interrogations, translated under oath by *known* persons in accordance with the Rules of Evidence and checked by Defense linguists—may well be admissible as evidence, whether to rebut recent fabrication under M.R.E. 801 as adopted under M.C.R.E. 803(a), as residual hearsay under M.R.E. 807 as adopted under M.C.R.E. 803(a), or under the exceptionally broad latitude of M.C.R.E. 803(b)(2). The original recordings are obviously indispensable for this purpose, yet the Government has refused to perform even the slightest due diligence to determine whether they still exist.[6]

Furthermore, by listening to the original tapes and reading the original notes, the Defense can attempt to determine not only what the accused really said, but whether they were exhausted, in physical agony, or being unlawfully threatened at the time they were speaking, and thus which statements ought to be suppressed—or whether such tapes should be introduced as mitigation.

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[3] To its credit, the Government did promise to perform due diligence in locating the original of this written statement (att. C, para. 3g). However, in the year since, the Government never followed through and never provided the statement.

[4] At a bare minimum, his "degree of participation" in any act is relevant as mitigation. *See Tison v. Arizona*, 481 U.S. 137, 148 (1986).

[5] *See also* AE 156O (MAH Sup) (Ex Parte and Under Seal), filed 2 March 2015, p. 3.

[6] It is obvious that they must have existed at one time. The summaries are too long and detailed to have been written from memory, especially if the accused were being interrogated in their native languages instead of English. At least one record (att. H) [redacted] implying that it was written a year after parts of it were somehow recorded. The Government has made a habit of creating electronic records of interrogations of War on Terror detainees. *See Center for Constitutional Rights v. CIA*, No. 13-3684-CV, 2014 WL 4290452 at *2 (Sept. 2, 2014) (Government identified 62 "responsive records" to FOIA request about alleged 9/11 participant Mohammed al-Qahtani, mostly recordings to include "debriefings"). Also, all departments of the Government have been on notice since November 2001 that detainees connected with 9/11 would face trial, and accordingly have been obligated to preserve relevant evidence. *See* Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833, 57834-85 (Nov. 13, 2001).

This is also why video and audio recordings of the accused while in CIA detention are so important.[7] The Government has no good-faith basis for refusing this evidence. Its refusal to even attempt due diligence is outrageous.

Likewise, any evidence that the Government destroyed such recordings, transcripts, and notes (including any evidence of *who* ordered the destruction and *why*) may support a Defense motion for appropriate relief, especially if the destroyed material is exculpatory or mitigating.[8] Unfortunately, the Government seems to have a habit of "losing" or destroying evidence related to its torture of War on Terror detainees.[9] The Prosecution must not be allowed to refuse to look for such evidence, then cite its willful ignorance as an excuse for denying discovery.

B. The Other Matters Sought by the Defense Are Likewise Relevant and Necessary.

1. Standards

R.M.C. 701(j) establishes: "Each party shall have adequate opportunity to prepare its case and no party may unreasonably impede the access of another party to a witness or evidence." In passing the Military Commissions Act (MCA) of 2009, Congress mandated this process. *See* 10 U.S.C. § 949j ("The opportunity to obtain witnesses and evidence shall be comparable to the opportunity available to a criminal defendant in a court of the United States under article III of the

[7] "The psychologist should attempt to obtain from the referring source copies of transcripts or records of the interrogation, as well as the defendant's statements . . . In any event, audio- or videotaped recordings of the interrogation, if they exist, are clearly the primary source for review, because transcripts may vary in accuracy and level to which they capture a suspect's emotional and cognitive state. . ." Dr. I. Bruce Frumkin, *Psychological Evaluation in Miranda Waiver and Confession Cases,* in *Clinical Neuropsychology in the Criminal Forensic Setting* 135, 141 (R. Denny & J. Sullivan, eds. 2008) (att. L).

[8] *See* AE 156O (MAH Sup) (Ex Parte and Under Seal), filed 2 March 2015, p. 5-6.

[9] *See* att. K; *see also* Warren Richey, *The Strange Saga of Jose Padilla: Judge Adds Four Years*, Christian Science Monitor, Sept. 9, 2014, http://www.csmonitor.com/USA/Justice/2014/0909/The-strange-saga-of-Jose-Padilla-Judge-adds-four-years-video ("During his three years and eight months in military detention, Padilla was subjected to harsh interrogation techniques and prolonged isolation that mental health experts said may have caused permanent psychological injury . . . Government officials made 88 recordings of Padilla's interrogations. But, according to court documents, the DVD recording of Padilla's final interrogation was somehow 'lost.'"). In the non-referred case against Mohammed al-Qahtani, the Government apparently preserved some records, but succeeded in withholding them from FOIA requestors, possibly because evidence of his torture would serve as anti-American propaganda. *See Center for Constitutional Rights v. CIA*, No. 13-3684-CV, 2014 WL 4290452 at *4 (Sept. 2, 2014) (refusing FOIA disclosure because the tapes would serve as propaganda for "anti-American extremists" without specifically conceding that they showed signs of al-Qahtani's torture).

Constitution"). R.M.C. 701(c)(1) states that the Government *shall* permit the defense counsel to examine any books, paper, documents, photographs, tangible objects, buildings, or places so long as they are: (1) under the control of the government, and (2) material to the preparation of the defense or intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial. Demonstrating materiality "is not a heavy burden,"[10] and the standard of materiality is broadly construed.[11]

Furthermore, in a death penalty case, the need for reliability in fact-finding is enhanced under the Fifth, Sixth, and Eighth Amendments to the United States Constitution.[12] Discovery is a major component of fact-finding, especially in a case like this where information is so tightly controlled by the Government and inaccessible to the Defense except through discovery. The Commission should be "particularly sensitive to ensure that every safeguard is observed" before a death sentence can be imposed.[13] It should likewise ensure that the accused has the full benefit of effective counsel, implying that counsel has the needed evidence to fight the case. The Government's discovery obligations should be stringently enforced.

2. Application

The notes taken by all persons who observed the interrogations of the accused are obviously relevant, material, and necessary. The interrogations are, by its admissions, the Government's most important sources on the 9/11 operation, the very subject of this case. The 9/11 Commission Report acknowledges as much, when it states that its chapters 5 and 7 rely heavily on information

[10] *United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1998).
[11] *United States v. Marshall*, 132 F.3d 63, 67 (D.C. Cir. 1998); *United States v. Libby*, 429 F. Supp. 2d 1, 7 (D.D.C. 2006).
[12] *See Ford v. Wainwright*, 477 U.S. 399, 411 (1986) ("In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability").
[13] *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) ("When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed").

obtained from these interrogations.[14] Furthermore, in the book *Hard Measures*, CIA Counterterrorism Center officer Jose Rodriguez states that

> The information [Mr. Mohammed] provided was enormously helpful in understanding [al Qaeda] . . .It is important to stress that we never took anything he said on faith but always vetted it in every way possible. Many of those listening were in fact among the most knowledgeable people on the planet about the organization and membership of al-Qa'ida . . .

(att. K). Information from these observers, whether in the form of notes or anything else, is as important for the Defense in evaluating the interrogations as it was to the CIA. It is also important in helping the Defense to understand the facts of the case, especially if it comes from such highly qualified experts. Also, these notes might further detail which "Enhanced Interrogation Techniques" (i.e., torture) were being employed against Mr. al Hawsawi and the other accused, and so help the Defense to determine whether their statements ought to be suppressed or what other relief might be appropriate.[15] For the same reasons, the Government's correspondence and guidance regarding interrogations (beyond the promised "advisement checklist") are likely to contain useful material for the defense. These notes and communications are vital evidence regardless of whether the Government intends to call the agents as witnesses, and should be produced.

Given the importance of the interrogations, the Government should also have to turn over any transcripts it has in its possession, regardless of whether it intends to use them in evidence. Any such transcripts are "recorded statements" of the accused that have to be provided under the plain language of R.M.C. 701. For the same reason, the Defense should be allowed to examine the personnel files of whichever persons translated the transcripts—to determine if they were biased or

[14] *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* 146 (2004).

[15] A prior Convening Authority refused entirely to refer a case against Mohammed al-Qahtani precisely because she saw evidence that he was tortured; evidence of torture is of enormous importance to the defense, and the Government may neither refuse to look for such evidence nor destroy it. *See* Bob Woodward, *Guantanamo Detainee Was Tortured, Says Official Overseeing Military Trials*, Wash. Post, Jan. 14, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/01/13/AR2009011303372.html.

otherwise unfit for the job, especially if the Defense does not have access to the recordings from which the transcripts were prepared. The Government should be required to hand over the files. Likewise, in determining whether statements obtained by the FBI "clean team" should be suppressed, it is important for the Defense to know how that team was chosen and what methods it used to get statements from the five accused. The correspondence describing the establishment of this team is important to the defense. The Government has stated, on a "trust-us" basis, that the FBI did not use its "Cross-Cultural Rapport-Based Interrogation Manual." The Defense should be allowed to evaluate that claim by examining the manual itself and comparing it with Mr. al Hawsawi's own recollections, rather than simply trusting the Government. The weight and admissibility of any statement are affected by the totality of the circumstances under which it was obtained; the Defense needs to know as much about those circumstances as possible. The correspondence and the manual should be produced.

The Government has refused to produce materials related to the establishment of the Combatant Status Review Tribunal, including communications discussing the establishment of the tribunal for Mr. al Hawsawi and his co-accused and communications that were shown to the CSRT members before the hearings. The Government has refused on the grounds that it is not planning to use such evidence itself on the subject of whether Mr. al Hawsawi is an "unlawful enemy combatant." But the materials shown to the tribunal, whatever they may have been, are materials in the Government's hands to help the members understand the 9/11 operation. As such they are likely to help the Defense understand what the Government knows about that operation. Since 9/11 is the subject of this case, and the Government's claims about Mr. al Hawsawi's role in 9/11 are the case against him, the Defense should be sure to receive whatever the Government has on the subject—especially if the Government saw fit to show it to the CSRT members, so as to persuade them to find Mr. al Hawsawi to have the status they desire.

Finally, the Defense may well wish to seek relief from the Commission based on any mistreatment of Mr. al Hawsawi. "Disciplinary Actions" are a common excuse for mistreatment of prisoners, and for that reason it is important for the Defense to know about the occasions when Mr. al Hawsawi was disciplined, and whether he (or the 9/11 detainees in general) were arbitrarily "disciplined" more than other detainees as a kind of pretrial punishment. The Government should therefore be required to provide *all* disciplinary reports for Mr. al Hawsawi, even those from before 2006; the notes made by Government observers related to alleged infractions; and, for the sake of comparison, disciplinary reports for the other detainees being held at the same time.

C. Conclusion.

The Commission should order the Government to produce the disputed discovery.

6. **Request for Oral Argument**: The Defense requests oral argument on this motion.

7. **Conference with Opposing Counsel**: On 18 September 2015, the Prosecution responded as follows:

> We are in the process of now responding to your written request, but we are having some difficulty determining who has signed the MOUs without modification. Please verify whether your team has signed without modification. If you have, we will have a response to your discovery request within 7 days that may obviate the need for you to file a motion to compel, and that, at a minimum, would likely narrow the number of items you seek to compel. I suspect the litigation will be easier for both parties if you wait for our response.

The same day, the Defense confirmed that it had, in fact, signed and filed the MOU's without modification. As of 30 September 2015, no response has been forthcoming.

8. **Witnesses**: None at this time.

9. **Attachments:**

A. Certificate of Service;

B. Defense Request for Discovery dated 1 August 2014;

C. Government Discovery Response dated 29 August 2014;

D. Written Statement of Mr. Mohammed (as translated and provided by the Government);

E. [redacted]

F. Notes from CIA interrogation of Mr. al Hawsawi;

G. Notes from CIA interrogation of Mr. bin al Shibh;

H. Notes from CIA interrogation of Mr. al Hawsawi (from interrogations in "late 2003" and "late 2004");

I. Notes from monitored conversation of Mr. bin al Shibh;

J. Extract from *Hard Measures* by Jose A. Rodriguez, Jr.;

K. Second Extract from *Hard Measures* by Jose A. Rodriguez, Jr.;

L. Extract from I. Bruce Frumkin, *Psychological Evaluation in Miranda Waiver and Confession Cases*, in *Clinical Neuropsychology in the Criminal Forensic Setting* 135, 141 (R. Denny & J. Sullivan, eds. 2008).

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A

CERTIFICATE OF SERVICE

I certify that on the 1st day of October, 2015, I electronically filed **AE 375(MAH) Defense Motion to Compel Production of Discovery Requested on 1 August 2014 Concerning Interrogations and Other Matters** with the Clerk of the Court and served the foregoing on all counsel of record by e-mail.

//s//
WALTER B. RUIZ
Learned Defense Counsel

B

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
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1600 DEFENSE PENTAGON
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01 August 2014

From: Defense Counsel for Mr. Hawsawi, *United States v. Khalid Shaikh Mohammad, et al.*
To: Trial Counsel

Subj: REQUEST FOR DISCOVERY ICO *UNITED STATES v. MOHAMMED, et al.*

1. The Defense requests the production of un-redacted copies of the following discovery pertaining to the FBI "Clean Team" Interrogations:

a. Names and contact information for all persons who conducted the interrogations of Mr. Hawsawi and his co-accused or were present when they took place.

b. All un-redacted Letterhead Memorandum statements of Mr. Hawsawi and his co-accused.

c. All FBI, OSI, and CITF reports generated from the interrogations of Mr. Hawsawi and his co-accused.

d. An un-redacted copy of the FBI "Cross Cultural Rapport-Based Interrogation" manual used by the FBI in January 2007.

e. All notes taken by every government agent who was present during, or remotely observed, the interrogations of Mr. Hawsawi and his co-accused. This request should include, but not be limited to, any notes taken by the government agents during breaks in the interrogation of Mr. Hawsawi and his co-accused, and any notes proved to the interrogators by other government agents not present in the interrogation room.

f. All audio and video recordings of the interrogations of Mr. Hawsawi and his co-accused, regardless of whether these recordings were made known to the government agents conducting the interrogations.

g. All letters, emails, notes, or other correspondence, and all audio and video recordings providing government agents with guidance or information regarding the interrogation of Mr. Hawsawi and his co-accused. Any response to this request should include, but not be limited to, guidance on whether and/or how to advise Mr. Hawsawi and his co-accused of their Miranda or other U.S. Constitutional rights, their right to an attorney, their right to speak with consular representatives; any guidance regarding the use or offering of interpreter assistance during the interrogations; any guidance on recording the interrogations; and any other guidance provided to the interrogators during breaks in the interrogation.

h. All letters, emails, notes, audio or video recordings, or other correspondence discussing the establishment, creation, and selection of a "Clean Team" of government agents to interrogate Mr. Hawsawi and his co-accused.

i. All letters, emails, notes, or other correspondence, and all audio or video recordings, government agents referred to as the "Clean Team" reviewed in preparation for their interrogation of Mr. Hawsawi and his co-accused. This request should include, but not be limited to, all FBI 302s, CIA reports, interrogator reports, intelligence reports, and all other documents or videos that were reviewed by these interrogators.

j. All *Henthorn/Brady/Giglio* information for each of the government agents, to include translators, who conducted the interrogations of Mr. Hawsawi and his co-accused.

k. The personnel files of the translators used during the interrogations of Mr. Hawsawi's co-accused, to include, but not be limited to, their language testing results, records of performance reviews, any derogatory information, and the nationality of the translator.

2. The Defense requests un-redacted copies of the following discovery pertaining to CIA Interrogations:

a. Names and contact information for all persons who conducted the interrogations of Mr. Hawsawi and his co-accused or were present when they took place.

b. All audio and video recordings, photos, or medical records of Mr. Hawsawi while in CIA custody, regardless of whether these recordings, photographs, or medical records were generated in conjunction with any interrogations or whether they were made known to the government agents conducting the interrogations.

c. All notes taken by every government agent who was present during, or remotely observed, the interrogations of Mr. Hawsawi and his co-accused. This request should include, but not be limited to, any notes taken by the government agents during breaks in the interrogation of Mr. Hawsawi and his co-accused, and any notes proved to the interrogators by other government agents not present in the interrogation room.

d. All letters, emails, notes, or other correspondence, and all audio and video recordings providing government agents with guidance or information regarding the interrogation of Mr. Hawsawi and his co-accused. Any response to this request should include, but not be limited to, guidance on whether and/or how to advise Mr. Hawsawi and his co-accused of their Miranda or other U.S. Constitutional rights, their right to an attorney, their right to speak with consular representatives; any guidance regarding the use or offering of interpreter assistance during the

interrogations; any guidance on recording the interrogations; and any other guidance provided to the interrogators during breaks in the interrogation.

e. All *Henthorn/Brady/Giglio* information for each of the government agents, to include translators, who conducted the interrogations of Mr. Hawsawi and his co-accused.

f. The personnel files of the translators used during the interrogations of Mr. Hawsawi's co-accused, to include, but not be limited to, their language testing results, records of performance reviews, any derogatory information, and the nationality of the translator.

g. The unedited original written statements of Mr. Mohammed, which are translated and (possibly) edited from MEA-STA-000045 to 000050.

h. All the "several documents" identified at MEA-STA-000288 as ones typed by Mr. Mohammed.

i. All the letter(s) discussed at MEA-STA-0000027 and MEA-STA-0000328;

j. All the 100-minute al-Qaeda video discussed at MEA-STA-0000106;

k. The letter discussed at MEA-STA-0000302;

l. The little blue notebook identified at MEA-STA-0000304;

m. The faked e-mail messages identified at MEA-STA-0000475;

n. The instant message chat discussed at MEA-STA-0000553;

o. The Defense requests the recording of the conversation between Mr. bin al-Shibh and other detainees referred to at MEA-STA-461, and all other recorded conversations between the detainees in this case, from 2002 to the present.

p. If any Government agency has prepared a transcript of any recording mentioned in this discovery request, the Defense requests a copy of that transcript.

q. The book *Hard Measures* by Jose A. Rodriguez, Jr. (p. 185-94), strongly suggests that the Government has already destroyed some of the evidence sought in this discovery request. In the event the Government *has* destroyed any such evidence, the Defense is requesting:

i. The names, and contact information for, all persons involved in the destruction of this evidence;

ii. The names, and contact information for, all persons who saw the contents of the evidence before it was destroyed;

iii. All letters, memos, e-mails, and other written traffic ordering, authorizing, or otherwise indicating the destruction of this evidence;

iv. All legal opinions authorizing the destruction of evidence; and

v. All documents (including letters, memos, and e-mail traffic) indicating what was in the destroyed evidence.

3. The Defense requests un-redacted copies of the following discovery pertaining to CSRT hearings:

a. Names and contact information for all persons participated in the CSRT hearings of Mr. Hawsawi and his co-accused.

b. An un-redacted copy of the unclassified and classified transcripts of the CSRT hearings of Mr. Hawsawi and his co-accused.

c. All audio and video recordings of the unclassified and classified CSRT hearings of Mr. Hawsawi and his co-accused.

d. All letters, emails, notes, or other correspondence, and all audio or video recordings, providing the CSRT with guidance regarding the conduct of the hearings involving Mr. Hawsawi and his co-accused. Any response to this request should include, but not be limited to, guidance on advising Mr. Hawsawi and his co-accused of Miranda or other U.S. constitutional rights, their right to an attorney, their right to speak with consular representatives; any guidance regarding the use of interpreters during the CSRT hearing; any guidance on recording or transcribing the CSRT hearing; and any guidance provided to the CSRT members during, after, or before the CSRT hearing of Mr. Hawsawi and his co-accused.

e. All letters, emails, notes, or other correspondence, and all audio or video recordings, discussing the establishment of a CSRT for Mr. Hawsawi and his co-accused.

f. All letters, emails, notes, or other correspondence, and all audio or video recordings, the CSRT Panel members, Personal Representative, and Recorder reviewed in preparation for, and during, the CSRT hearing of Mr. Hawsawi and his co-accused. This request should include, but not be limited to, all FBI 302s, CIA reports, interrogator reports, intelligence reports, and all other documents or videos that were reviewed.

g. All *Henthorn/Brady/Giglio* information for each of the CSRT Panel Members, Recorders, Personal Representatives, translators, and court reporters involved with the CSRT hearing of Mr. Hawsawi and his co-accused.

h. The personnel files of the translators used during the CSRT hearings of Mr. Hawsawi and his co-accused, to include, but not be limited to, their language testing results, records of performance reviews, any derogatory information, and the nationality of the translator.

4. The Defense requests un-redacted copies of the following discovery pertaining to the disciplinary infractions:

a. All un-redacted disciplinary reports for Mr. Hawsawi and his co-accused while in confinement.

b. All notes taken by every government agent who was present during, or remotely observed, the alleged disciplinary infractions committed by Mr. Hawsawi and his co-accused.

c. All audio and video recordings of the alleged disciplinary infractions committed by Mr. Hawsawi and his co-accused. This request shall include, but not be limited to any video recordings of ERFs conducted in response to such infractions.

d. All *Henthorn/Brady/Giglio* information for each of the government agents, to include translators, who alleged or wrote the disciplinary reports regarding Mr. Hawsawi and his co-accused.

e. All disciplinary reports for all other detainees confined at Guantanamo from January 2002 to the present time. The information is required to put Mr. Hawsawi's alleged disciplinary infractions in context with the infractions committed by all other detainees held at Guantanamo.

5. Should you require further information regarding this discovery request, please contact LtCol Sean Gleason at (703) 588-0406, or sean.gleason[redacted]

//s//
Sean M. Gleason
LtCol, USMC
Detailed Defense Counsel

C

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF PROSECUTOR OF MILITARY COMMISSIONS
1610 DEFENSE PENTAGON
WASHINGTON, DC 20301-1610

OFFICE OF THE
CHIEF PROSECUTOR

29 August 2014

MEMORANDUM FOR Defense Counsel for Mr. Hawsawi

SUBJECT: Prosecution Response to 1 August 2014 Request for Discovery

1. The Prosecution received the Defense request for discovery on 1 August 2014. The Prosecution hereby delivers its initial response to the Defense request, below, in bold.

2. The Defense requests the production of un-redacted copies of the following discovery pertaining to what the Defense terms the FBI "Clean Team" Interrogations:

a. Names and contact information for all persons who conducted the interrogations of Mr. Hawsawi and his co-accused or were present when they took place;

The Prosecution will provide a point of contact through which the Defense can seek to speak with those who interviewed Mr. Hawsawi. Regarding names of those who interviewed Mr. Hawsawi, see the Prosecution's response to letter (b) below.

b. All un-redacted Letterhead Memorandum statements of Mr. Hawsawi and his co-accused;

We have provided redacted copies of the Letterhead Memorandum statements (LHM) to the Defense for Mr. Hawsawi. Once the Memorandum of Understanding Regarding the Receipt of Classified Information (MOU) is signed, we can immediately provide unredacted copies, as has been the case with counsel for Mr. Ali. This unredacted copy will contain the names of those who interrogated Mr. Hawsawi.

c. All FBI, OSI, and CITF reports generated from the interrogations of Mr. Hawsawi and his co-accused;

The Prosecution has provided the Defense with Mr. Hawsawi's LHM and will provide the classified statements when the Defense signs the Memorandum of Understanding Regarding Receipt of Classified Information. The LHM is the only report generated from the interrogations of Mr. Hawsawi and his co-accused.

d. An un-redacted copy of the FBI "Cross Cultural Rapport-Based Interrogation" manual used by the FBI in January 2007;

The Prosecution has confirmed that the requested document was not the policy of the Federal Bureau of Investigation and was, in fact, never released by the author.

As such, the Prosecution respectfully declines to produce the requested materials.

e. All notes taken by every government agent who was present during, or remotely observed, the interrogations of Mr. Hawsawi and his co-accused. This request should include, but not be limited to, any notes taken by the government agents during breaks in the interrogation of Mr. Hawsawi and his co-accused, and any notes proved to the interrogators by other government agents not present in the interrogation room;

Notes will be provided in accordance with R.M.C. 701 and R.M.C 914 for those agents who testify against Mr. Hawsawi.

f. All audio and video recordings of the interrogations of Mr. Hawsawi and his co-accused, regardless of whether these recordings were made known to the government agents conducting the interrogations;

The Prosecution is aware of no such recordings.

g. All letters, emails, notes, or other correspondence, and all audio and video recordings providing government agents with guidance or information regarding the interrogation of Mr. Hawsawi and his co-accused. Any response to this request should include, but not be limited to, guidance on whether and/or how to advise Mr. Hawsawi and his co-accused of their Miranda or other U.S. Constitutional rights, their right to an attorney, their right to speak with consular representatives; any guidance regarding the use or offering of interpreter assistance during the interrogations; any guidance on recording the interrogations; and any other guidance provided to the interrogators during breaks in the interrogation;

The Prosecution will provide the Defense with the advisement checklist used at the interrogation of Mr. Hawsawi.

h. All letters, emails, notes, audio or video recordings, or other correspondence discussing the establishment, creation, and selection of a "Clean Team" of government agents to interrogate Mr. Hawsawi and his co-accused;

The Defense does not cite to any specific theory of relevance that would reasonably warrant production of the requested information, nor does the Defense request appear to be material to the preparation of the defense, pursuant to R.M.C. 701.

As such, the Prosecution respectfully declines to produce the requested material.

i. All letters, emails, notes, or other correspondence, and all audio or video recordings, government agents referred to as the "Clean Team" reviewed in preparation for their interrogation of Mr. Hawsawi and his co-accused. This request should include, but not be limited to, all FBI 302s, CIA reports, interrogator reports, intelligence reports, and all other documents or videos that were reviewed by these interrogators;

The Defense does not cite to any specific theory of relevance that would reasonably warrant production of the requested information, nor does the Defense request appear to be material to the preparation of the defense, pursuant to R.M.C. 701.

As such, the Prosecution respectfully declines to produce the requested material.

j. All *Henthorn/Brady/Giglio* information for each of the government agents, to include translators, who conducted the interrogations of Mr. Hawsawi and his co-accused;

This information will be provided in accordance with R.M.C. 701 and R.M.C. 914 following the identification of witnesses per future order of the Military Judge.

k. The personnel files of the translators used during the interrogations of Mr. Hawsawi's co-accused, to include, but not be limited to, their language testing results, records of performance reviews, any derogatory information, and the nationality of the translator.

The Prosecution will review these and provide anything that is relevant to the preparation of the defense.

3. The Defense requests un-redacted copies of the following discovery pertaining to CIA Interrogations:

a. Names and contact information for all persons who conducted the interrogations of Mr. Hawsawi and his co-accused or were present when they took place;

This issue is currently being litigated in AE 308.

b. All audio and video recordings, photos, or medical records of Mr. Hawsawi while in CIA custody, regardless of whether these recordings, photographs, or medical records were generated in conjunction with any interrogations or whether they were made known to the government agents conducting the interrogations;

Upon signing the Memorandum of Understanding Regarding Receipt of Classified Information the Prosecution will provide medical records and photos of Mr. Hawsawi while he was in the custody of the Central Intelligence Agency (CIA). The Prosecution is not aware of any audio or video recordings of Mr. Hawsawi while he was in the custody of the CIA.

c. All notes taken by every government agent who was present during, or remotely observed, the interrogations of Mr. Hawsawi and his co-accused. This request should include, but not be limited to, any notes taken by the government agents during breaks in the interrogation of Mr. Hawsawi and his co-accused, and any notes proved to the interrogators by other government agents not present in the interrogation room;

Notes will be provided in accordance with R.M.C. 914(a)(1) for those agents that testify against Mr. Hawsawi regarding statements he has given.

The Defense does not cite to any specific theory of relevance that would reasonably warrant production of notes taken (if, in fact, any were taken) of interviews with Mr. Hawsawi when those statements will not be entered into evidence by the Prosecution. Nor does the Defense request appear to be material to the preparation of the defense, pursuant to R.M.C. 701.

As such, the Prosecution respectfully declines to produce the additional requested material.

d. All letters, emails, notes, or other correspondence, and all audio and video recordings providing government agents with guidance or information regarding the interrogation of Mr. Hawsawi and his co-accused. Any response to this request should include, but not be limited to, guidance on whether and/or how to advise Mr. Hawsawi and his co-accused of their Miranda or other U.S. Constitutional rights, their right to an attorney, their right to speak with consular representatives; any guidance regarding the use or offering of interpreter assistance during the interrogations; any guidance on recording the interrogations; and any other guidance provided to the interrogators during breaks in the interrogation;

This issue is currently being litigated in AE 308.

As such, the Prosecution respectfully declines to produce the requested material.

e. All *Henthorn/Brady/Giglio* information for each of the government agents, to include translators, who conducted the interrogations of Mr. Hawsawi and his co-accused;

The Prosecution does not intend to call any CIA interrogators as witnesses. As such, the Prosecution respectfully declines to produce the information.

f. The personnel files of the translators used during the interrogations of Mr. Hawsawi's co-accused, to include, but not be limited to, their language testing results, records of performance reviews, any derogatory information, and the nationality of the translator;

The Prosecution does not intend to call any CIA interrogators as witnesses. As such, the Prosecution respectfully declines to produce the information regarding the translators.

g. The unedited original written statements of Mr. Mohammed, which are translated and (possibly) edited from MEA-STA-000045 to 000050;

The Prosecution is currently conducting its due diligence and will respond accordingly upon completion of its due diligence.

h. All the "several documents" identified at MEA-STA-000288 as ones typed by Mr. Mohammed;

The referenced document contains only information regarding letters typed by Mr. Hawsawi, not Mr. Mohammed. Upon signing Memorandum of Understanding

Regarding Receipt of Classified Information, the Defense will receive a digital copy of the computer hard drive seized during the capture of your client.

i. All the letter(s) discussed at MEA-STA-0000027 and MEA-STA-0000328;

To the extent you refer to a hard copy, you will be given an opportunity to inspect all of the material from the raids for which you have a courtesy copy photo. Please contact the Prosecution to arrange a date to view these items. Upon signing the Memorandum of Understanding Regarding Receipt of Classified Information, you will receive a digital copy of the computer hard drive seized during the capture of your client.

j. All the 100-minute al-Qaeda video discussed at MEA-STA-0000106;

The Prosecution is currently conducting its due diligence and will respond accordingly upon completion of its due diligence.

k. The letter discussed at MEA-STA-0000302;

To the extent you refer to a hard copy, you will be given an opportunity to inspect all of the material from the raids for which you have a courtesy copy photo. Please contact the Prosecution to arrange a date to view these items. Upon signing the Memorandum of Understanding Regarding Receipt of Classified Information, you will receive a digital copy of the computer hard drive seized during the capture of your client.

l. The little blue notebook identified at MEA-STA-0000304;

The Prosecution provided this to the Defense in discovery on 27 Nov 2013. Bates numbers MEA-RAW-000000708-000000769

m. The faked e-mail messages identified at MEA-STA-0000475;

The Prosecution is currently conducting its due diligence and will respond accordingly upon completion of its due diligence.

n. The instant message chat discussed at MEA-STA-0000553;

The Prosecution is currently conducting its due diligence and will respond accordingly upon completion of its due diligence.

o. The Defense requests the recording of the conversation between Mr. bin al-Shibh and other detainees referred to at MEA-STA-00000461, and all other recorded conversations between the detainees in this case, from 2002 to the present;

There is no indication that the conversation referred to in MEA-STA-00000461 was recorded, but rather overheard during the transport. The Prosecution is not aware of any recordings made during the transport.

p. If any Government agency has prepared a transcript of any recording mentioned in this discovery request, the Defense requests a copy of that transcript;

The Prosecution will provide transcripts it intends to use as evidence, if any.

To the extent this request seeks transcripts other than those the Prosecution intends to use, the Defense does not cite to any specific theory of relevance that would reasonably warrant production of the requested information, nor does the Defense request appear to be material to the preparation of the defense, pursuant to R.M.C. 701.

As such, the Prosecution respectfully declines to produce the requested material.

q. The book *Hard Measures* by Jose A. Rodriguez, Jr. (p. 185-94), strongly suggests that the Government has already destroyed some of the evidence sought in this discovery request. In the event the Government *has* destroyed any such evidence, the Defense is requesting:

i. The names, and contact information for, all persons involved in the destruction of this evidence;

ii. The names, and contact information for, all persons who saw the contents of the evidence before it was destroyed;

iii. All letters, memos, e-mails, and other written traffic ordering, authorizing, or otherwise indicating the destruction of this evidence;

iv. All legal opinions authorizing the destruction of evidence; and

v. All documents (including letters, memos, and e-mail traffic) indicating what was in the destroyed evidence.

The book *Hard Measures*, in pages 185-94, as referred to by the Defense, references documentation of the destruction of the taped interrogations of individuals who are not the Accused in this case. As such, the Prosecution respectfully declines to produce the requested material.

The Prosecution is unaware of the destruction of any evidence relating to the five Accused in this case at this time.

4. The Defense requests un-redacted copies of the following discovery pertaining to CSRT hearings:

As an initial matter regarding the CSRT hearings, it is important to note that the Prosecution will be relying only on the statements given to the CSRT by the Accused and not the CSRT's determination of the Accused's status as an unlawful enemy combatant. As such, only material related to these statements, and to witnesses the Prosecution calls regarding the statements, will be material to the preparation of the Defense.

a. Names and contact information for all persons participated in the CSRT hearings of Mr. Hawsawi and his co-accused.

The Prosecution is seeking to identify a point of contact for defense counsel so the Defense can seek to speak with these individuals.

b. An un-redacted copy of the unclassified and classified transcripts of the CSRT hearings of Mr. Hawsawi and his co-accused;

The Prosecution will provide the transcript to the Defense.

c. All audio and video recordings of the unclassified and classified CSRT hearings of Mr. Hawsawi and his co-accused;

The Prosecution will provide this to the Defense.

d. All letters, emails, notes, or other correspondence, and all audio or video recordings, providing the CSRT with

guidance regarding the conduct of the hearings involving Mr. Hawsawi and his co-accused. Any response to this request should include, but not be limited to, guidance on advising Mr. Hawsawi and his co-accused of Miranda or other U.S. constitutional rights, their right to an attorney, their right to speak with consular representatives; any guidance regarding the use of interpreters during the CSRT hearing; any guidance on recording or transcribing the CSRT hearing; and any guidance provided to the CSRT members during, after, or before the CSRT hearing of Mr. Hawsawi and his co-accused;

The Combatant Status Review Tribunal directives are available via open source documentation.

e. All letters, emails, notes, or other correspondence, and all audio or video recordings, discussing the establishment of a CSRT for Mr. Hawsawi and his co-accused;

The Defense does not cite to any specific theory of relevance that would reasonably warrant production of the requested information, nor does the Defense request appear to be material to the preparation of the defense, pursuant to R.M.C. 701.

As such, the Prosecution respectfully declines to produce the requested material.

f. All letters, emails, notes, or other correspondence, and all audio or video recordings, the CSRT Panel members, Personal Representative, and Recorder reviewed in preparation for, and during, the CSRT hearing of Mr. Hawsawi and his co-accused. This request should include, but not be limited to, all FBI 302s, CIA reports, interrogator reports, intelligence reports, and all other documents or videos that were reviewed;

As previously stated, the Prosecution only intends to rely on admissions made by the several of the Accused at the CSRT, and as such, the information sought is not relevant or material to the preparation of the Defense. As such, the Prosecution respectfully declines to produce the information.

g. All *Henthorn/Brady/Giglio* information for each of the CSRT Panel Members, Recorders, Personal Representatives, translators, and court reporters involved with the CSRT hearing of Mr. Hawsawi and his co-accused;

The Prosecution will be relying only on the statements given to the CSRT by the Accused and not the CSRT's

determination of the Accused's status as an unlawful enemy combatant. As such, only material related to these statements, and to witness(s) the Prosecution calls regarding the statements, are material to the preparation of the Defense.

As such, only the information in accordance with R.M.C. 701 and R.M.C. 914 following the identification of witnesses per future order of the Military Judge, will be provided.

h. The personnel files of the translators used during the CSRT hearings of Mr. Hawsawi and his co-accused, to include, but not be limited to, their language testing results, records of performance reviews, any derogatory information, and the nationality of the translator;

The Prosecution will review these for any witnesses it intends to call, and provide anything that is relevant to the preparation of the defense.

5. The Defense requests un-redacted copies of the following discovery pertaining to the disciplinary infractions:

a. All un-redacted disciplinary reports for Mr. Hawsawi and his co-accused while in confinement;

The Prosecution has provided disciplinary reports for Mr. Hawsawi from 2006 forward and will produce information regarding his conditions of confinement prior to 2006.

Regarding disciplinary reports of his co-accused the Defense does not cite to any specific theory of relevance that would reasonably warrant production of the requested information, nor does the Defense request appear to be material to the preparation of the defense, pursuant to R.M.C. 701.

As such, the Prosecution respectfully declines to produce the requested material.

b. All notes taken by every government agent who was present during, or remotely observed, the alleged disciplinary infractions committed by Mr. Hawsawi and his co-accused;

The Defense does not cite to any specific theory of relevance that would reasonably warrant production of

the requested information, nor does the Defense request appear to be material to the preparation of the defense, pursuant to R.M.C. 701.

As such, the Prosecution respectfully declines to produce the requested material.

c. All audio and video recordings of the alleged disciplinary infractions committed by Mr. Hawsawi and his co-accused. This request shall include, but not be limited to any video recordings of ERFs conducted in response to such infractions;

The Prosecution will make available video recordings of the forced cell extractions once the Defense has signed the MOU.

d. All *Henthorn/Brady/Giglio* information for each of the government agents, to include translators, who alleged or wrote the disciplinary reports regarding Mr. Hawsawi and his co-accused;

This information will be provided in accordance with R.M.C. 701 and R.M.C. 914 following the identification of witnesses per future order of the Military Judge.

The Prosecution notes it required only to provide this information for government witnesses and to the extent this request is for persons other than government witnesses, the Prosecution respectfully declines to produce the information.

e. All disciplinary reports for all other detainees confined at Guantanamo from January 2002 to the present time. The information is required to put Mr. Hawsawi's alleged disciplinary infractions in context with the infractions committed by all other detainees held at Guantanamo.

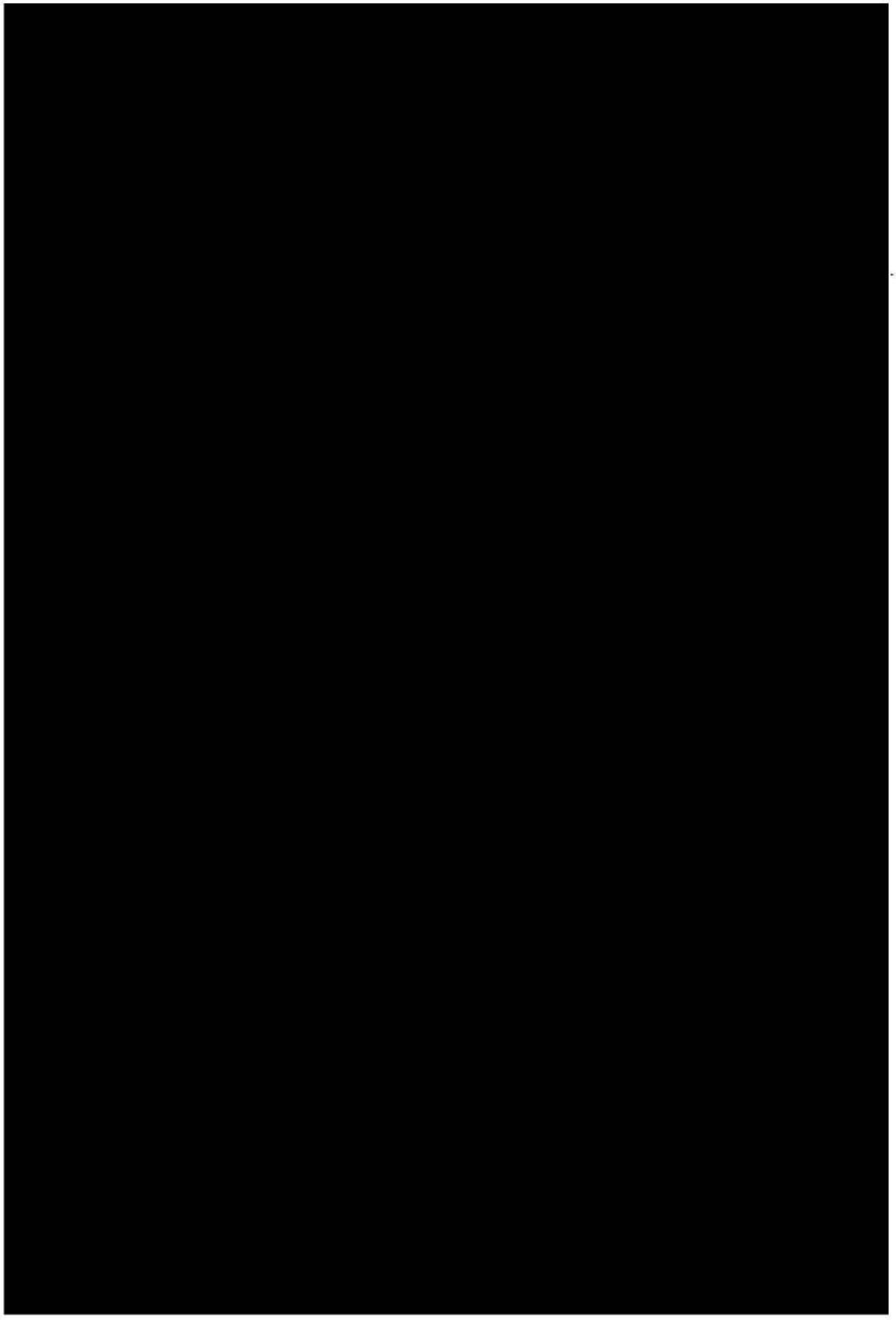
The Defense does not cite to any specific theory of relevance that would reasonably warrant production of the requested information, nor does the Defense request appear to be material to the preparation of the defense, pursuant to R.M.C. 701.

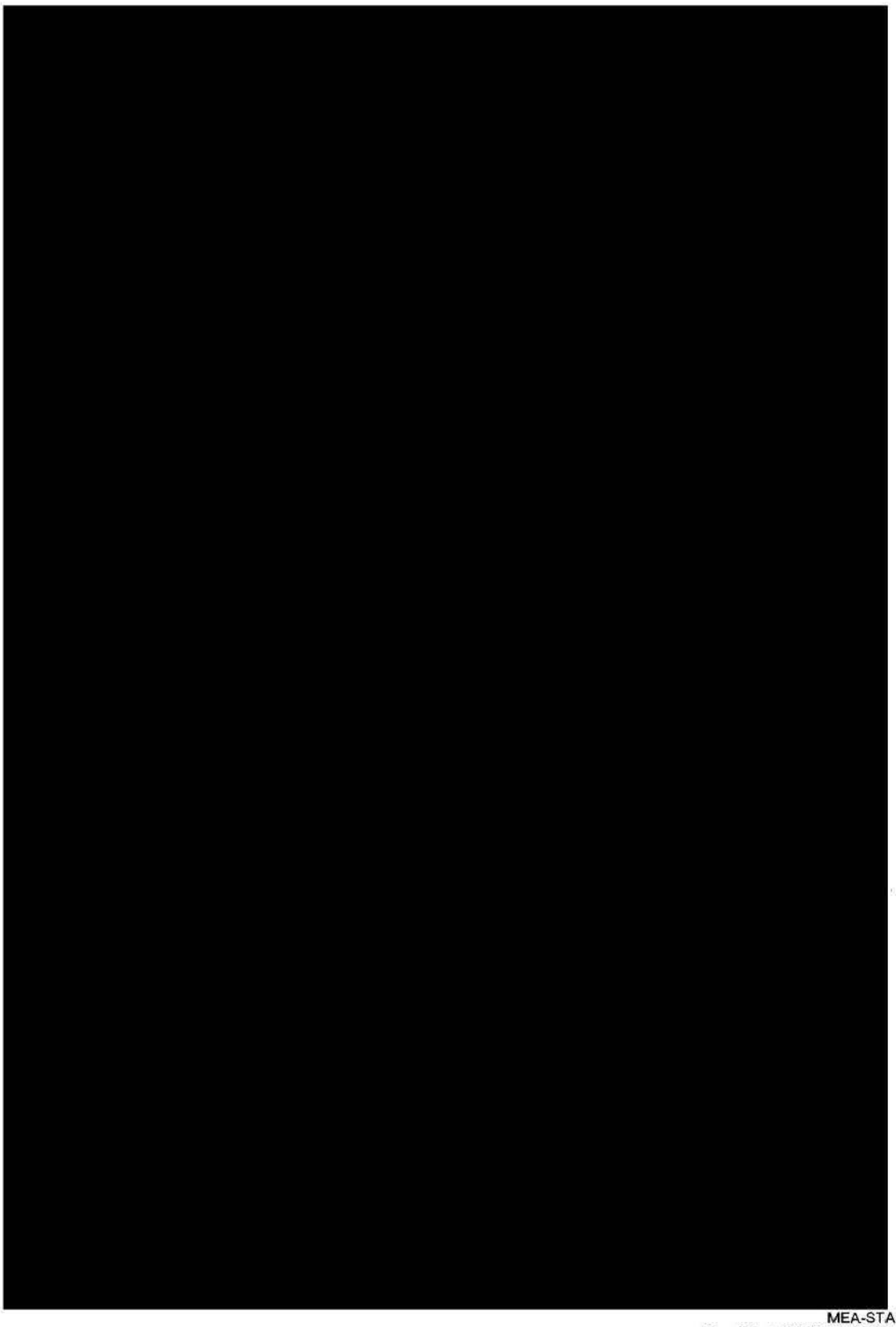
As such, the Prosecution respectfully declines to produce the requested material.

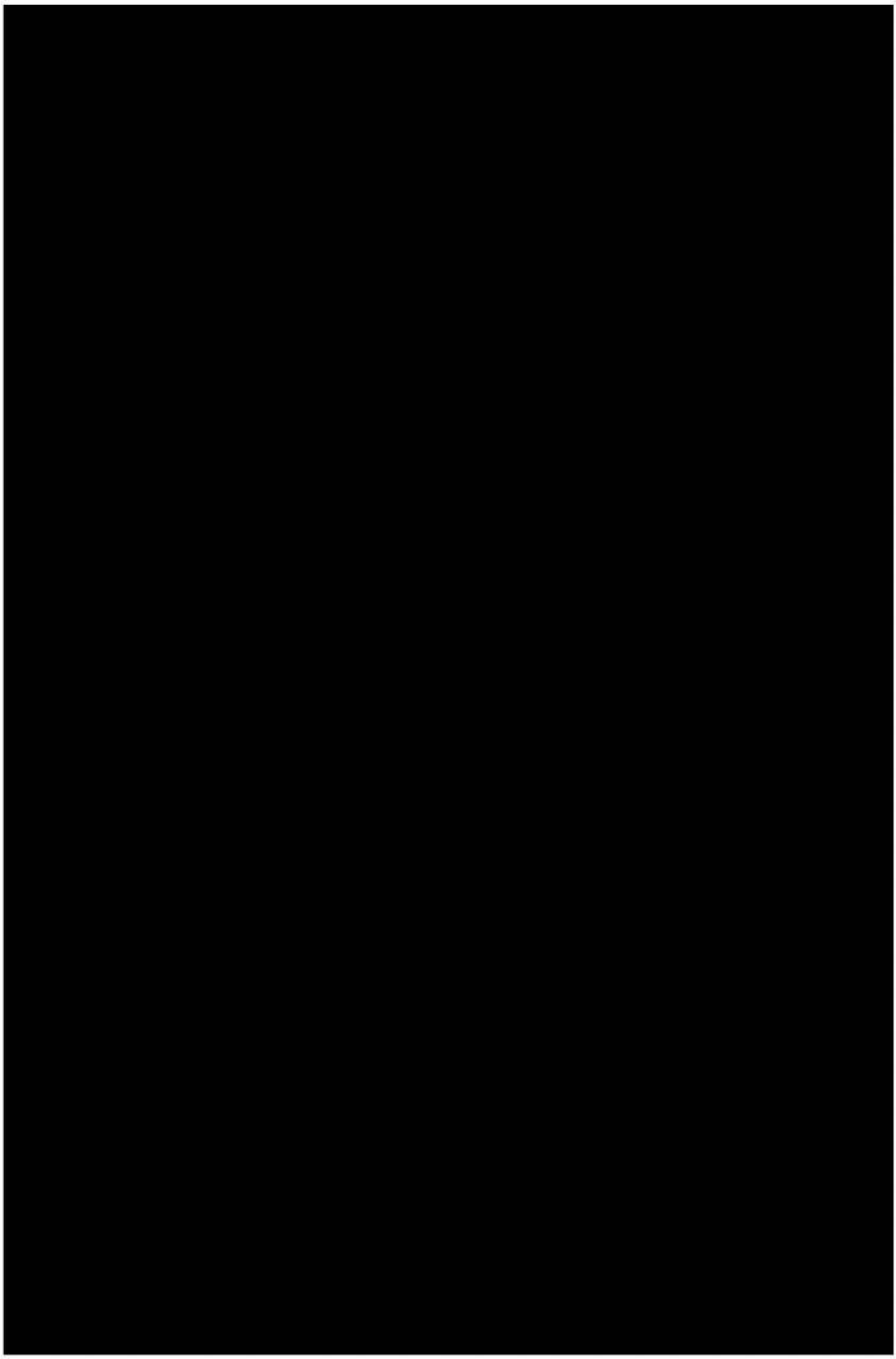
Respectfully submitted,

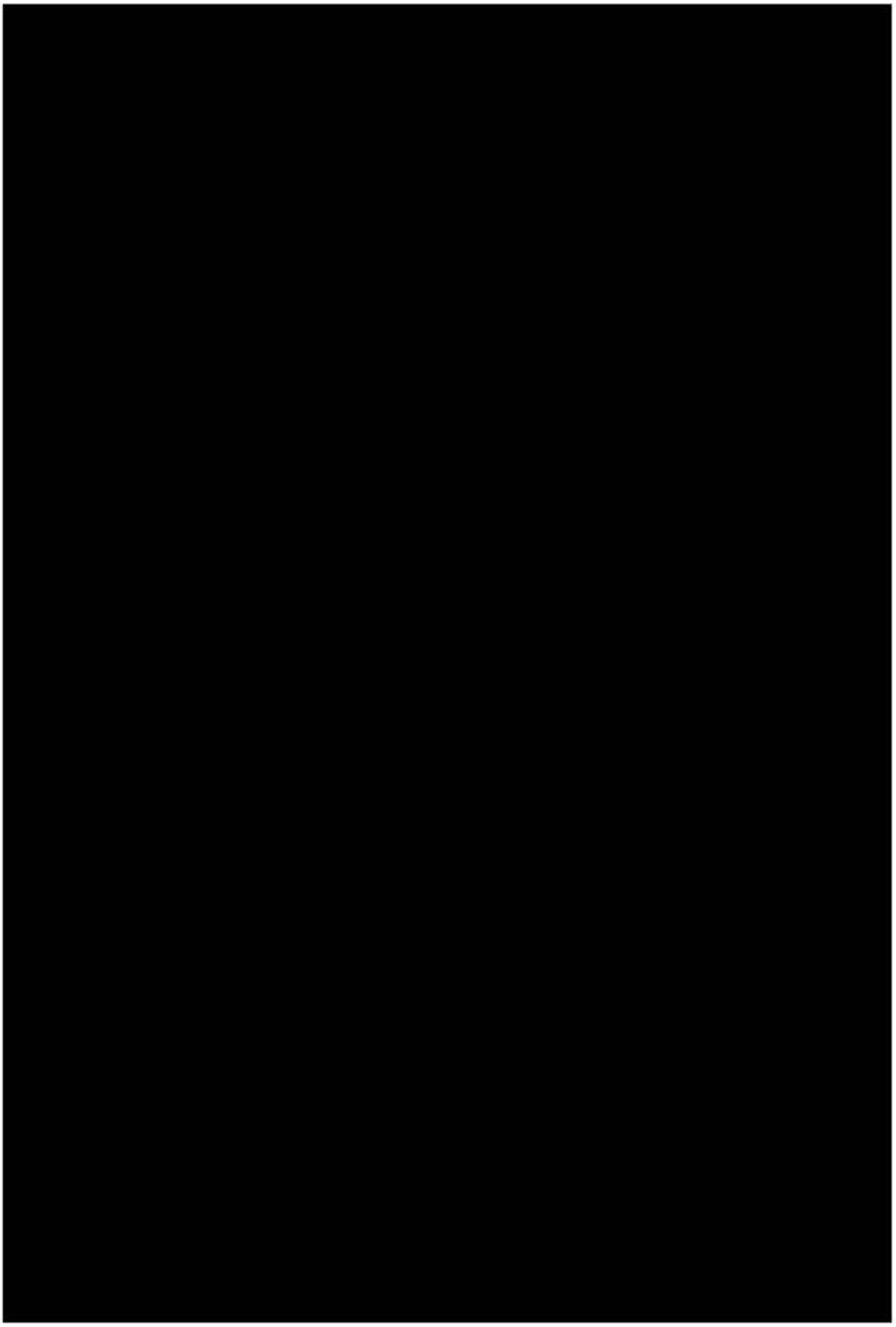
//s//
Nicole A. Tate
Assistant Trial Counsel

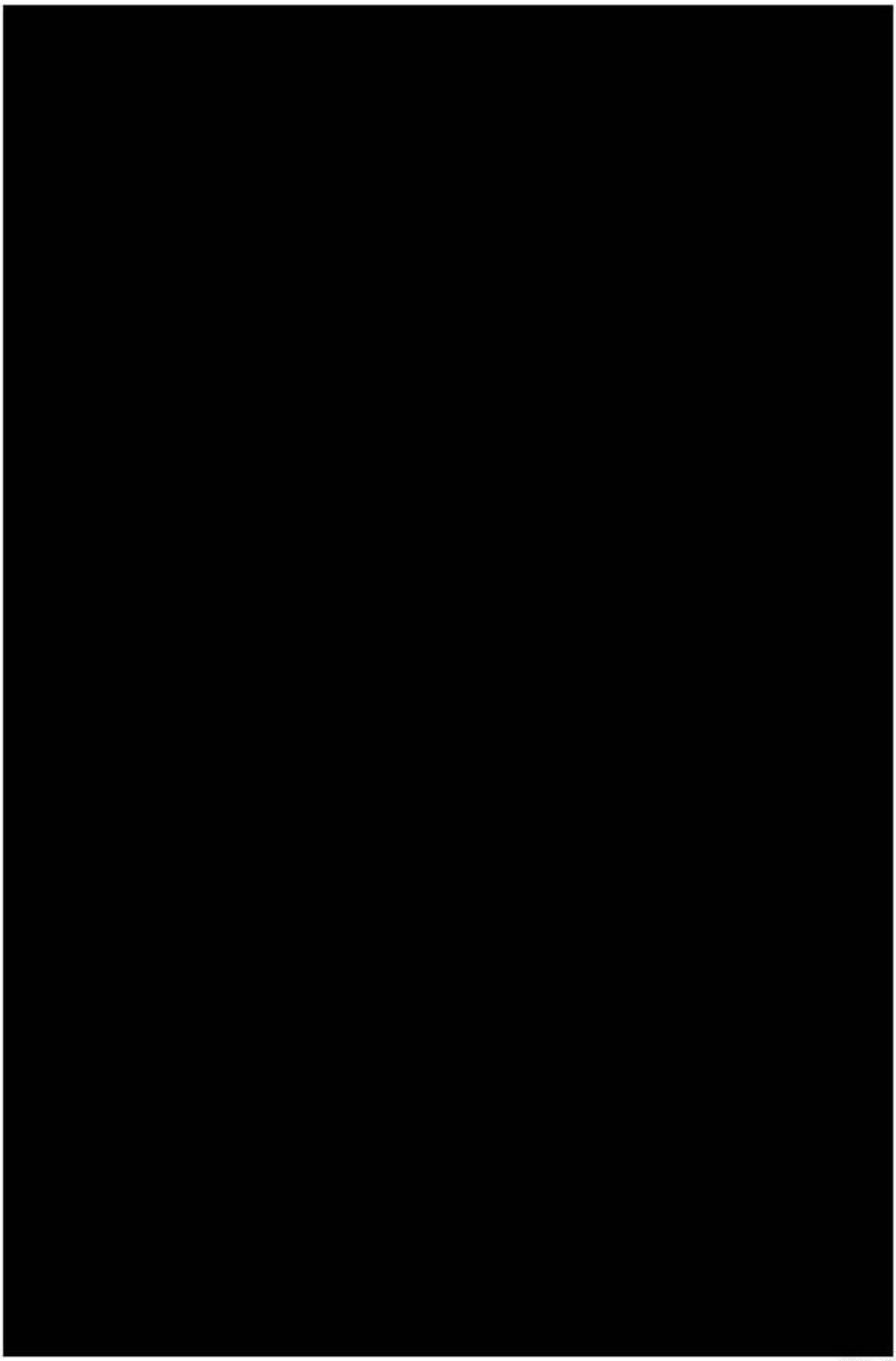
D

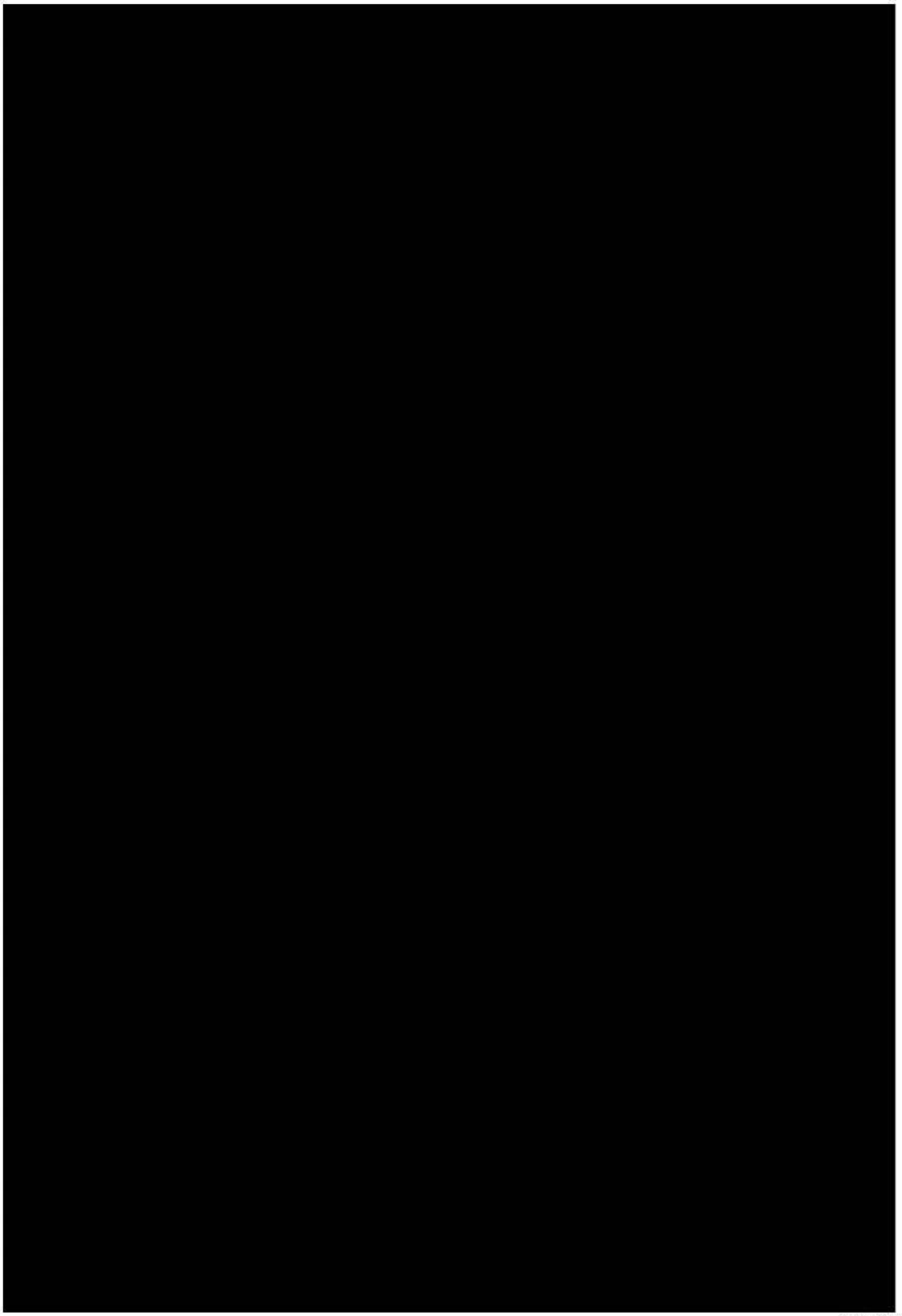












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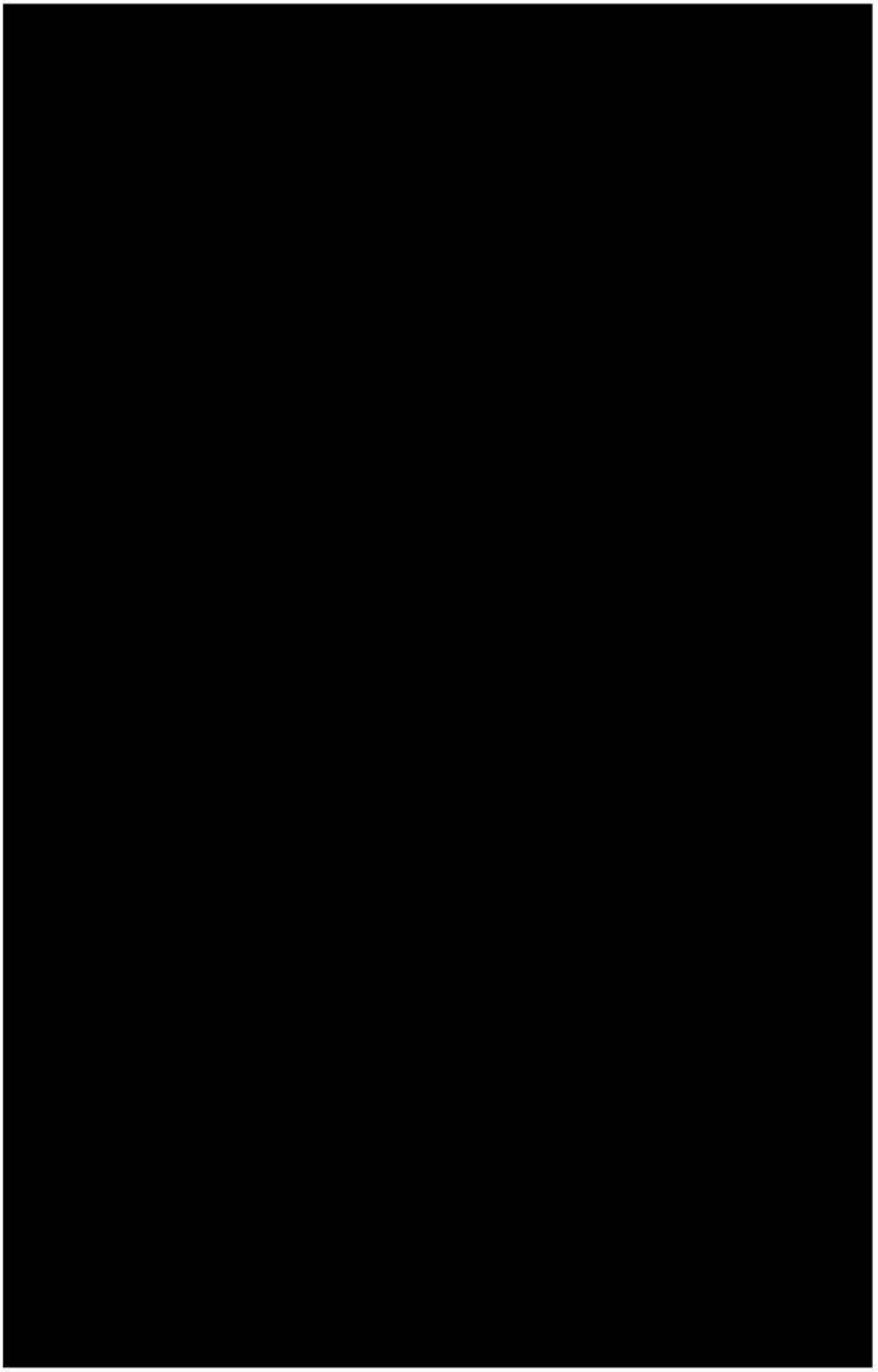

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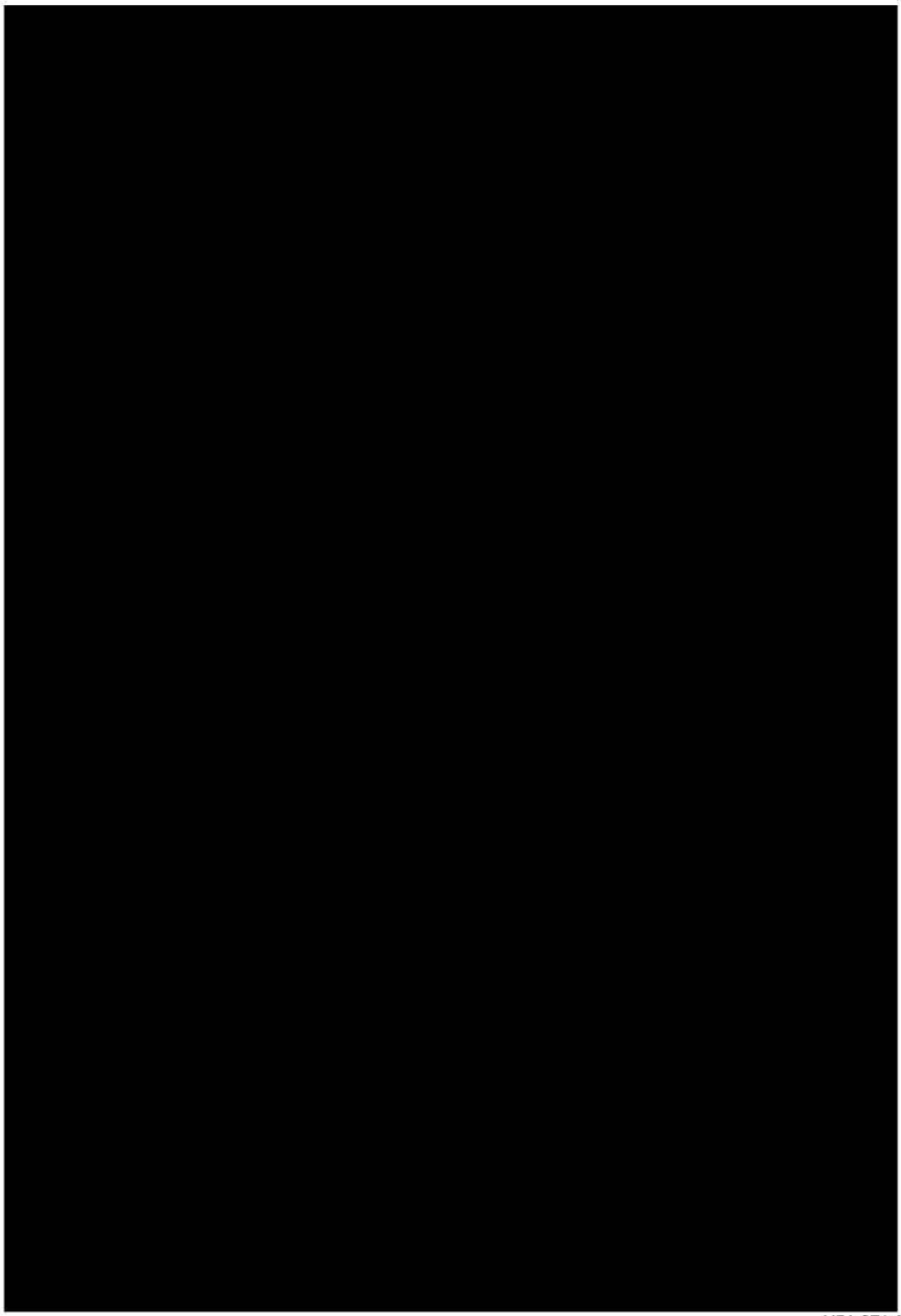

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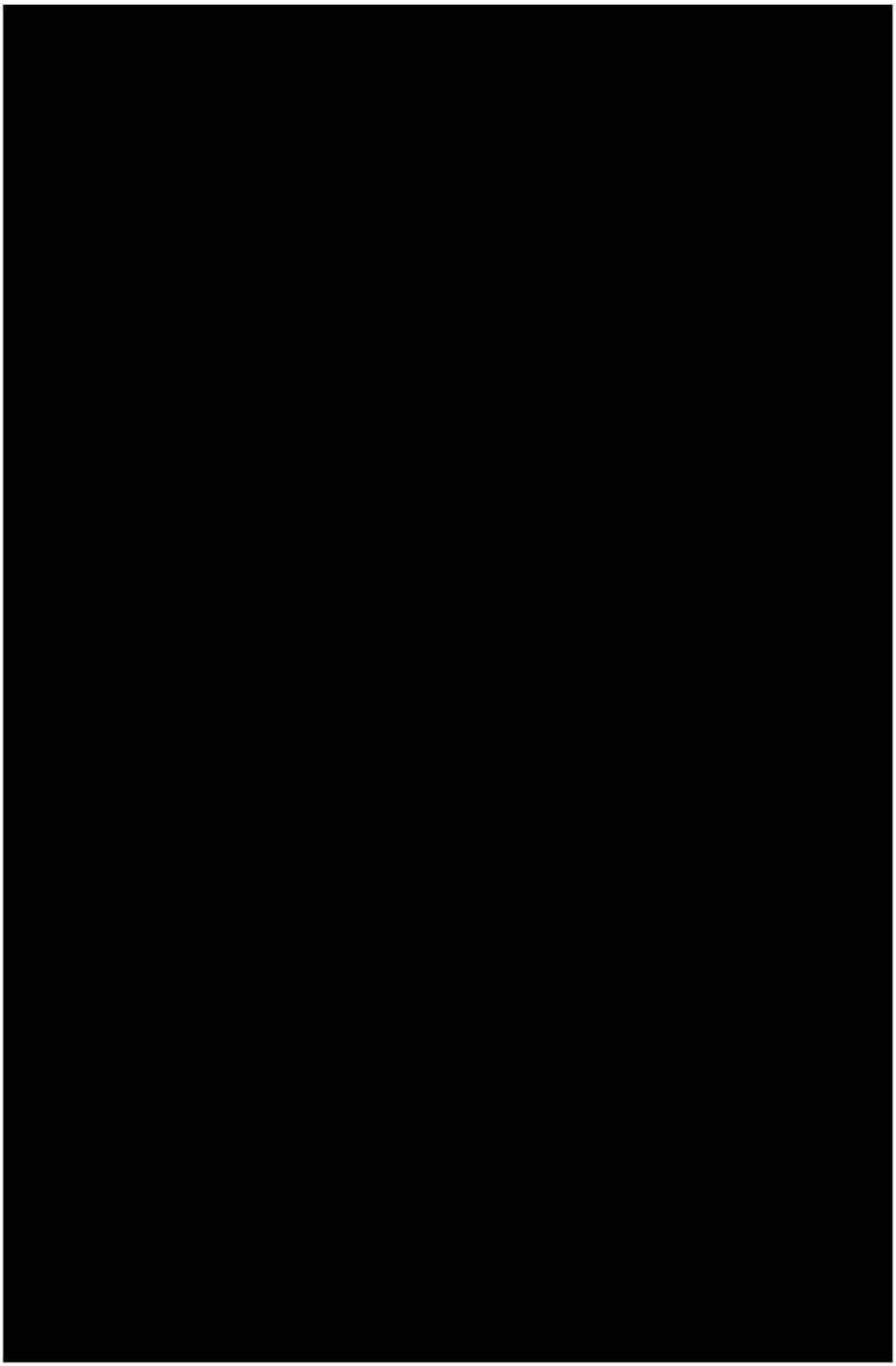

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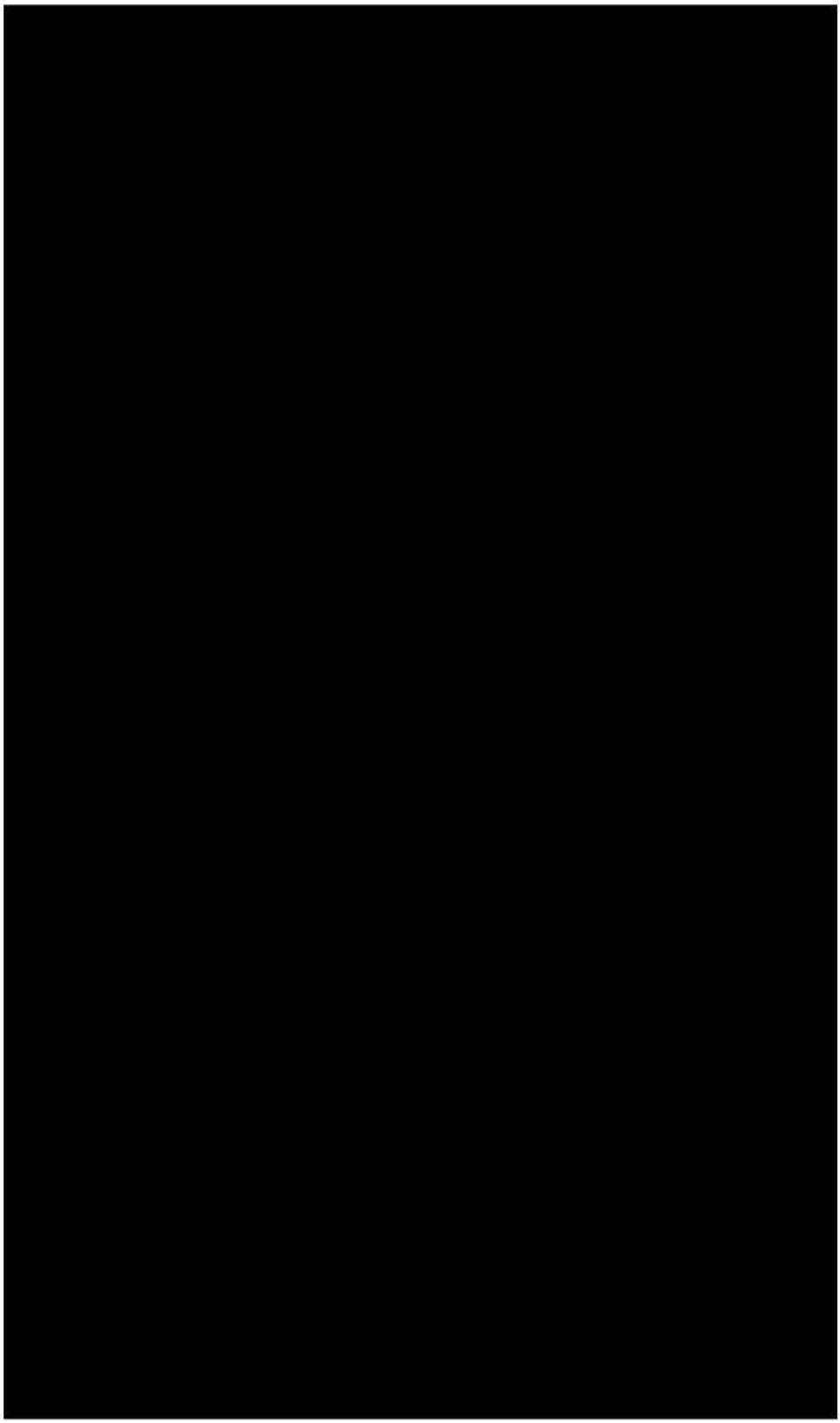

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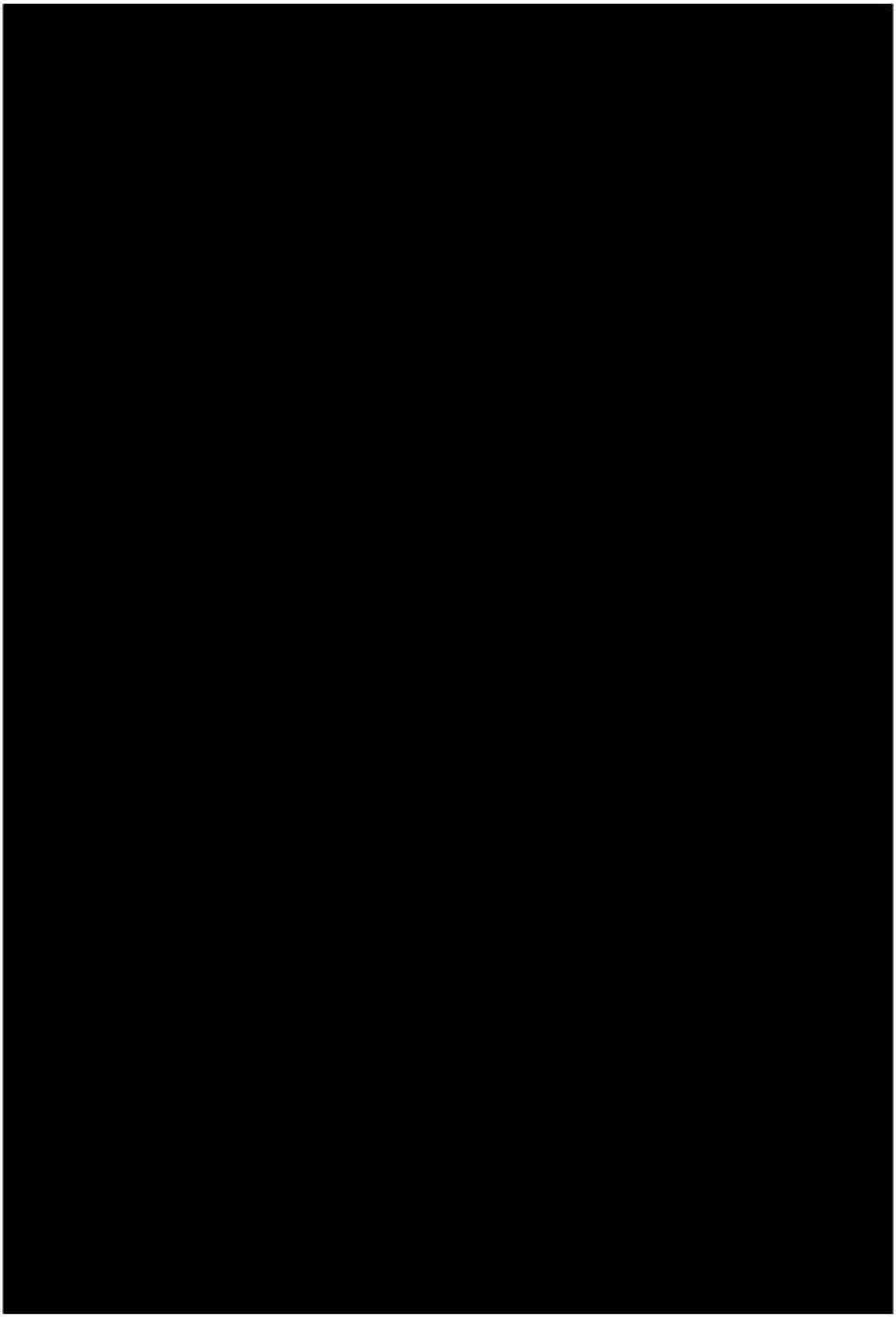

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HARD MEASURES

HOW AGGRESSIVE CIA ACTIONS AFTER 9/11 SAVED AMERICAN LIVES

JOSE A. RODRIGUEZ, JR.
WITH BILL HARLOW

THRESHOLD EDITIONS
New York London Toronto Sydney New Delhi

Preface

WHO I AM

I am Jose A. Rodriguez, Jr., the Puerto Rican–born son of two teachers. I grew up largely in South America and in the Caribbean, coming to the continental United States for the first time for any length of time when I attended the University of Florida, where I received my BA and law degree. For the next thirty-one years I served my country, undercover, as an officer of the Central Intelligence Agency.

After September 11, 2001, I was assigned to the CIA's Counterterrorist Center. There, I was responsible for helping develop and implement the Agency's techniques for capturing the world's most dangerous terrorists and collecting intelligence from them, including the use of highly controversial "enhanced interrogation techniques."

I am certain, beyond any doubt, that these techniques, approved by the highest levels of the U.S. government, certified as legal by the Department of Justice, and briefed to and supported by bipartisan leadership of congressional intelligence oversight committees, shielded the people of the United States from harm and led to the capture and killing of Usama bin Ladin.

What follows is the story of how my colleagues and I came to take those hard measures and why we are certain that our actions saved American lives.

e KSM was staying, our officer
1 about his involvement in the
d his finger at the American,
id: "Not now."
able to spirit KSM out of Paki-
te. There the process began with
recent senior detainees, to try to
ie information we knew he had.
cation of his capture we had in-
ent contact with bin Ladin and
es we knew that he was instru-
plans that led to 9/11. And from
what al-Qa'ida planned next we
n you will know." With all that,
t for a chance to bond with our
error of his ways and open up to
perate, the EITs were methodi-
in an effort to stave off another
tates or one of our allies.
cooperate after little more than
bit more convincing but would
itively small dose of EITs. And
officers in charge of his deten-
il." He was very strong-minded
had considerable training in how
the most severe technique, wa-
yed on him and only two other
mmediate results. KSM seemed
weren't going to push things too
a gurney and as water was being
tick off the seconds. What even-
compliant stage was more sleep
eached his limit, he decided that

continued resistance was unwise and he began to cooperate. That doesn't mean that he told us everything he knew. And it doesn't mean that he told us what we wanted most. But he did begin to open up and fill in many, many blanks in our knowledge of al-Qa'ida.

As with the others, once KSM reached the compliant stage, the EITs stopped. We moved from the "interrogation" phase to the "debriefing" mode. Agency officers on scene had long before figured out that KSM had an enormous ego, and they played on it to our advantage. He enjoyed thinking of himself as a professor. He leaped at the chance to show off his knowledge.

The information he provided was enormously helpful in understanding our foe and finding ways to thwart their plans. It is important to stress that we never took anything he said on faith but always vetted it in every way possible. Many of those listening were in fact among the most knowledgeable people on the planet about the organization and membership of al-Qa'ida and could spot it when KSM might be trying to lead them astray or shade the truth.

The information that came from KSM, like that from Abu Zubaydah before him, was a treasure trove. A study by NBC News in 2008 showed that 441 of the 1,700 footnotes in the 9/11 Commission's final report came from senior al-Qa'ida detainee interrogation. The percentage of information that came from them in Chapters 5, 6, and 7 of the report, the portions dealing directly with the 9/11 plot, were well over 50 percent from the interrogations.

The windfall reported in the intelligence reports coming out of KSM's interrogation was so dramatic that FBI officials petitioned the CIA to get back into the interrogation program, which they had abandoned during the early days at the first black site. At the time they said they didn't want to be party

K

gust 4, 2002, AZ was reengaged and
/ significant EITs, as described in an
his period, Zubaydah was, once again,
terrogation.

: taping was of limited value as far as
its from his demeanor. We had enough
vith him as he was interrogated and
closed-circuit TV, that our officers had
ip the significance of whatever he said
ut that Agency personnel at the black
videotape as they were preparing their
id back to Washington. Their contem-
ervations were detailed and accurate.
videotaping to demonstrate that "if he
also melted away as AZ's medical con-
grew stronger.

ard the end of the application of EITs
officers at the black site asked them-
taping?" They weren't getting anything
e Agency officers could clearly be seen
ig AZ, it was clear that if the videos
ed they could pose serious safety con-
cted on the tapes and their families.

Abu Zubaydah were in their final
the black site sent word back to CIA
iewed the continued retention of the
rious counterintelligence and security
hat they be authorized to stop taping
eady on hand. There was no mention
re embarrassed by their own actions
they recognized that there was little to
making the tapes and it was clear that
ency officers at risk. So, as I recall, on

August 20, 2002, our people at the black site made a seemingly simple request that the tapes and taping be done away with. What followed was more than three years of hand-wringing and bureaucratic backpedaling until I made what turned out to be a fateful decision.

The request from the field to destroy the tapes went to our lawyers for consideration. The public, I suspect, would be very surprised to find out how ubiquitous lawyers are at the Agency. We had a ton of them. Don't get me wrong, I valued their counsel and support very much. We had a number of excellent lawyers assigned directly to CTC and many more throughout the Agency and on the staff of the general counsel. I am not sure exactly how many lawyers there were at the CIA but before 9/11, I believe they would have outnumbered the paramilitary officers we had in our Special Activities Division. General Mike Hayden, who was CIA director from May 2006 to February 2009, used to say that he had more lawyers on his staff than some of his foreign counterparts had officers.

The lawyers took the request to destroy the tapes under advisement. Meanwhile, the EIT program was just getting off the ground. When Congress came back from its annual summer recess in early September, I led a team from CTC to Capitol Hill to inform the senior leadership of our two oversight committees about the existence of the EIT program. Those discussions deserve special focus of their own, and I will get back to that—but for the tape story, suffice it to say that the congressional leadership was aware that the early interrogations had been videotaped but that we intended to stop that practice and destroy the existing tapes.

A little more than two months after the initial request from the field came in, the Agency's Office of General Counsel pronounced a decision on future taping. On October 25, headquarters told the field that in the future they should record

one day's interrogation sessions on a videotape and then record the next day's on the same tape, recording over the previous material. That prevented the stockpile of videotapes from overwhelming the black site but did nothing to alleviate the concerns about all the tapes already made (by that time numbering more than ninety). By this time, a second high-value al-Qa'ida detainee, al-Nashiri, had joined AZ at the black site, and his interrogation was also videotaped.

A month later, in November 2002, headquarters advised the field that some news organizations were working hard to identify the location of the black site and that there might be press accounts soon speculating about where this secret site might be. That raised new security concerns, and the officers on scene sent in a renewed, expedited request for permission to destroy the existing stockpile of tapes. The lawyers said "no," or, more precisely, "not yet." They wouldn't sign off on the destruction of the tapes until they assured themselves that the written record of what happened in the interrogation sessions was accurate and complete. So they launched one of the assistant general counsels, a very senior Agency officer, out to the field, where he spent ten days viewing and cataloguing what he found to be ninety-two videotapes. On twelve of the tapes were scenes of EITs being applied. Many of the others were simply surveillance of our high-profile guests in their cells. The AGC diligently worked his way through the stack of tapes and reported that what he saw was in compliance with what the Department of Justice had authorized in August and was entirely consistent with what our officers in the field had reported back to headquarters in their written reports. Still, no decision was made to authorize the destruction of the tapes.

In December 2002, John Helgerson, the CIA inspector general (no fan of the EIT program), became aware of the existence

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of the tapes. The day after Christmas 2002, the Agency's general counsel informed the director of Central Intelligence that he had no objection "in principle" to CTC's continuing requests to destroy the tapes but recommended that we hold off until January, when a new Congress would be sworn in and fresh leadership would arrive at our oversight committees. The general counsel recommended that the CIA "inform" the committees of our intent, but also noted that if they objected and told us to retain the tapes or demanded to review them themselves, we would be in a strong position to deny the requests on security and operational grounds.

In meetings and conversations throughout the fall of 2002, I keep pushing for a decision that would allow us to do the right thing regarding the tapes. The delay was frustrating, but I had so many other things on my plate that I could not afford to obsess about the tapes. After all, we'd been waiting only four months, right?

In February 2003 the new leadership of the House and Senate intelligence committees was briefed on the existence of the tapes and the Agency's intent to destroy them. On February 4, Senator Pat Roberts (R-KS) quickly gave his assent. His Democratic counterpart, Senator Jay Rockefeller of West Virginia, was not present, but his staff director and another senior staffer were there and were expected to brief Rockefeller. The next day the chairman of the House committee, Porter Goss, and his ranking member, Congresswoman Jane Harman, were also briefed. Goss was supportive of our plan but Harman later sent a classified letter to the CIA urging us to "reconsider because even if the videotapes do not constitute an official record that must be preserved under the law, they could be the best proof that the written record is accurate."

Despite firm legal opinions from within the Agency that we

had the right to destroy the tapes and either support or lukewarm opposition from the Hill, the Agency's top leaders still wouldn't pull the trigger on destroying the tapes.

Then the IG did what the IG always does and decided to investigate. I had no problem with that. There had been some problems with the interrogation program—as with every program. Those issues were self-reported by our own people. More so than other organizations, the CIA regularly conducts due diligence on itself. This was to be an investigation of the entire interrogation program. That put a hold on any possible decision to take action about the tapes. Eventually, the IG staff concluded that destroying the tapes would be within our rights. Two investigators reviewed the tapes, logs, and cables at the foreign site and concluded that it was up to Agency management to decide what to do with the tapes. I thought this was significant, since the IG shop had always been hostile to the EIT effort. Inspector General Helgerson once described it to a group of senior Agency officers as "that hideous program." If he couldn't find a reason to object to destroying the tapes, it had to be okay. But still, we waited.

In September another senior Agency attorney, a different assistant general counsel, took a crack at the legalities. After examining the issue, she reported in writing that the record showed that for "grave national security reasons," retention of the tapes presented "grave risk" to the personal safety of our officers and required the destruction of the tapes. And still, we waited.

In January 2004 the same attorney reiterated her written opinion but added that we should consult the inspector general (who had already weighed in on the matter) before taking action. And still, we waited.

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opinion in early April saying that there were no legal requirements for the Agency to retain the tapes.

In late April 2004, there was an explosive event that added to our conviction that getting rid of the tapes was vitally important. That month, truly awful photographs appeared in the media showing U.S. Army troops brutally abusing Iraqis held at the Abu Ghraib prison. The disgraceful and disgusting treatment of these prisoners had absolutely nothing to do with the interrogation program run by the CIA. Our program, blessed by the highest legal authorities in the land, conducted by trained professionals, and applied to only a handful of the most important terrorists on the planet, bore no relation to the unauthorized actions of a handful of low-level army troops. The justifiable outcry about the abusive treatment shown in the Abu Ghraib photos, first on *60 Minutes II* and later in magazines and newspapers around the globe, did huge harm to the image of the United States. President Bush apologized for the actions of these sick soldiers and Secretary of Defense Rumsfeld offered his resignation to atone for their mindless actions.

We knew that if the photos of CIA officers conducting authorized EITs ever got out, the difference between a legal, authorized, necessary, and safe program and the mindless actions of some MPs would be buried by the impact of the images. The propaganda damage to the image of America would be immense. But my main concern then, and always, was for the safety of my officers.

The image of Private Lynndie England holding a leash attached to a naked, anonymous Iraqi was devastating. The reaction from around the world was one of disgust. She was later (quite appropriately) sentenced to three years in prison and dishonorably discharged. But what if a photo of a senior al-Qa'ida leader being waterboarded by CIA officers were to get out? The

image might be disturbing, but more troubling to me would be the possibility that al-Qa'ida and its supporters would use the photo to track down Agency officers and exact revenge on them or their families. To me the Abu Ghraib debacle provided more evidence that it was urgent to take action about the CIA videotapes. To others it was yet another reason to do nothing.

By this time, the bureaucratic 'mother-may-I?" instincts of the CIA had kicked into high gear. The Agency's general counsel, Scott Muller, decided to check with senior lawyers at the Department of Justice and the Office of the Vice President for their views. Not unexpectedly, the answer he got was that it probably wasn't a good idea to destroy the tapes "right now." And so, we waited.

The CIA IG completed the lengthy (and in my view highly flawed) report on the Agency's overall interrogation program in May. That report was forwarded to the leadership of the House and Senate intelligence committees in June. The report contained three substantive paragraphs about the videotaping of interrogations.

We know some people on the Hill read the report. Senator Rockefeller, who would later claim that he and the committee were kept largely in the dark about the issue, requested several documents mentioned in the IG report, including the document created by the assistant general counsel who had reviewed and inventoried the tapes for the express purpose of determining whether it was okay for us to destroy them.

Frequently during the several-year period after our officers in the field first requested permission to destroy the tapes, I would bring up to the general counsel and other senior Agency officials my concerns about the lack of a decision and the foot-dragging that we were experiencing. To bureaucrats in Washington, discussions over the fate of the videos were an interesting legalistic debate. To the men and women depicted

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on the tapes, the lack of will to remove this potential threat to their personal safety was more than a little troubling. By this time I had moved up to become the deputy director of Operations. I was now one of "them," one of the "seventh-floor" people who were supposed to make all the big decisions. I remained something of a pest to the Office of the General Counsel, trying to get a decision, and the right one, made.

I later learned that in March of 2005 the acting general counsel, John Rizzo, a highly experienced and capable career Agency lawyer (known for his seemingly never-ending supply of tailored suits with matching suspenders, socks, and pocket squares), had met with CIA director Porter Goss and told him of the great angst within CTC and the Directorate of Operations about this issue, which at that point had lingered more than two and a half years since it had first been raised. Goss, like his predecessor, was reportedly uncomfortable about ordering the elimination of the tapes. Rizzo decided to raise the issue again with the White House counsel, Harriet Miers. At the time, Miers was on the brink of being nominated as a Supreme Court justice, a nomination that would be withdrawn a few months after it was made. She apparently told Rizzo that she, too, was uncomfortable with our ridding ourselves of the tape albatross just then. I say "apparently," because I have no recollection of Rizzo ever sharing with me her views, except for being told orally that she had "not yet" given her okay. Years later, the special prosecutor who would be appointed to look into the matter surfaced a single email Rizzo allegedly sent me in 2005 saying Miers had expressed qualms, but if I ever saw it (and I don't think I did), it made no impact on me. Just another lawyer saying: "I'd rather you not. . . ."

In July there were meetings at the White House during which Rizzo and other CIA lawyers met with Miers and reps from the NSC and the vice president's staff. The consensus,

I later learned, was that while there was no—repeat, no—requirement to retain the tapes, they recommended that the newly created director of national intelligence and the Office of the Attorney General be "briefed" before the destruction took place.

The DNI, Ambassador John Negroponte, reportedly told Goss that he opposed the destruction of the tapes despite the assessment that there was no legal constraint from doing so. My successor as chief of CTC told Negroponte that continued retention of the tapes would be quite distressing to our employees who were depicted on them and could place them and their families at risk. In any case, Negroponte's objections were never conveyed to me as an "order," just an "opinion."

The seemingly endless debate stretched on into the fall, now more than three years after it had started. At one point some lawyers suggested transferring the tapes from the field, where they had always been, back to headquarters. Fortunately, that idea was dropped. Bringing them back to Washington would only ensure that the tapes would be copied, passed around, widely discussed, and most likely result in a decision on someone's part to officially release or to leak them.

To say I was getting frustrated would be a massive understatement. My chief of staff held a meeting with CTC lawyers and other parties and asked two questions: (1) Is the destruction of the tapes legal? and (2) Did I, as director of the National Clandestine Service, have the authority to make that decision on my own? The answer she got to both questions was: Yes.

As must be abundantly clear by now, nothing is that easy in Washington. In order to do what the field had asked us to do thirty-eight months before, we had to require them to ask us again. To make sure we got the right question, so that we could give the right answer, on November 4, 2005, lawyers in CTC (we had our own lawyers who were separate from the larger

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contingent in the General Counsel's Office) drafted a cable that could be sent to the field with instructions that they cut and paste the appropriate language from the cable and put it into their own cable back to us. The instructions basically were: "Ask us in this way and we will say yes." The draft language was sent to the Office of the General Counsel for coordination at the same time it was sent to the field.

The next day, a Saturday, the field dutifully sent a cable to headquarters asking for permission to destroy the tapes. The language was just right, of course, since our lawyers had drafted it. I asked my chief of staff to prepare a cable granting permission. On most matters I would just instruct my staff on what action to take and let them handle the administrative details. But this had been such an ordeal that I wanted to personally handle what I thought was the end of a long bureaucratic nightmare.

In fact it was just the beginning. My chief of staff drafted a cable approving the action that we had been trying to accomplish for so long. The cable left nothing to chance. It even told them *how* to get rid of the tapes. They were to use an industrial-strength shredder to do the deed. On Tuesday, November 8, after scrutinizing the cable on my computer for a while, I thought about the decision. I was not depriving anyone of information about what was done or what was said, I was just getting rid of some ugly visuals that could put the lives of my people at risk. I took a deep breath of weary satisfaction and hit Send.

The next day, November 9, the field sent in a cable reporting that the shredder had done its work. The machine, the likes of which have been in use at U.S. government facilities for more than thirty-five years, can chew through hundreds of pounds of material in a single hour. The device's five spinning and two stationary steel blades are designed to chop up DVDs,

CDs, cell phones, credit cards, X-rays, and other optical media and produce tiny, unrecognizable bits that are vacuumed out into giant, heavy-duty, plastic trash bags. Our problem had been reduced to confetti—or so we thought.

Apparently we had gotten ahead of ourselves. We had asked the Office of General Counsel to approve the language we sent to the field providing the wording they sent back to us asking permission to destroy the tapes. The day after the tapes were destroyed, the General Counsel's Office got around to telling us that our language was okay. "That's good to hear," CTC officials told them, "because Jose directed the field to destroy the tapes pursuant to their request and they did . . . yesterday."

Although he didn't confront me, Rizzo reportedly was not a happy camper. He told my chief of staff that he thought that the plan was that when the field made their request (again), he would have a chance to review it (again) and take it to Goss for discussion (again). That wasn't my understanding and I wasn't going to sit around another three years waiting for people to get up the courage to make a decision that I had been told I could legally make on my own.

Rizzo reportedly informed Harriet Miers at the White House that I had preempted the system's ability to dither about the decision further. At the time, I did not directly hear anything about my actions from the White House. Five years later, I had an opportunity to discuss the matter with a very senior former member of the Bush White House. I don't have permission to quote him by name but he confirmed my suspicions. He said that when senior White House and NSC officials heard about my action, there was a collective sigh of relief. He conveyed to me that they were delighted with what I had done. Just as significantly, he confirmed my belief that if I had waited for them to give me the go-ahead, I would still be waiting.

I recall only one conversation about this matter with CIA

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From: **Clinical Neuropsychology in the Criminal Forensic Setting**, (Ed. R. Denny & J. Sullivan), The Guilford Press, New York: 2008

Chapter 5

Psychological Evaluation in *Miranda* Waiver and Confession Cases

I. BRUCE FRUMKIN

Confessions and self-incriminating statements to law enforcement carry great weight with the trier of fact. They become important components of proving guilt beyond a reasonable doubt. Kassin and Neumann (1997) helped to demonstrate what is commonly believed to be true, that a confession is "devastating" to a defendant. Leo (1996) reports that 80% of suspects waive their rights, whereas Wrightsman and Kassin (1993) report that confessions are produced in 50% of criminal cases and are challenged in court in 20% of these cases. Cassell (1996), in a literature review, found that confessions are needed in 24% of cases to produce conviction. Leo studied 182 criminal cases and found that the strength of the evidence without the use of confession was weak in 33% of these cases. He also found that suspects who incriminated themselves during interrogation were 20% more likely to be charged by prosecutors, and 26% more likely to be found guilty and convicted.

Both anecdotal and empirical data support what is amazing but in fact true: Innocent people sometimes do confess to crimes they did not commit. For example, in the "Central Park Jogger" case, five teens ages 14–16 were arrested. Each confessed and implicated the others on videotape in the crime of attacking and raping a jogger in New York City's Central Park on April 19, 1989. In 2002, Matias Reyes, a convicted murderer and rapist, admitted

that he was responsible for the rape and attack of the woman. Reyes's DNA matched that obtained from the crime scene, and the convictions of the five youths were vacated on December 19, 2002.

According to Ofshe and Leo (1997a), not only do suspects sometimes falsely confess to crimes they did not commit, but in fact they also seem to do so regularly. Ofshe and Leo base their conclusions on case studies, laboratory research, and their own work on a large number of probable or confirmed cases of false confessions. It is impossible to assess accurately the number or the percentage of false confessions, because estimates of false confessions vary depending on the design of the study and how the false confessions were operationalized. Some researchers (Kassin & McNall, 1991) estimate that there are fewer than 30–60 false confessions per year, whereas another researcher (Cassell, 1996) reports that number to be as high as 600. In the United States, there is no tally kept of the number of suspects interrogated annually and how many of those result in a true confession, no confession, or false confession. In many states and jurisdictions, police are not required to record the confessions that suspects have allegedly made. A suspect, despite law enforcement claims to the contrary, may deny ever having confessed in the first place. A confession, unrecorded, may later become a challenged retracted confession. A confession is considered so crucial in prosecution that weight is still given to that confession even when a defendant is seemingly exonerated by DNA evidence. Notably, just because a suspect provides a false confession for one element of the offense, not all elements of the alleged offense are false. Thus, a confession is not necessarily completely true or false. There may be varying degrees of truth regarding certain aspects of a confession. Finally, numerous instances of laboratory errors and/or fraud have been documented. Therefore, someone who confesses and later retracts the confession, but is not cleared by laboratory results, may in fact still be innocent.

Mental health professionals have been used to assist the court in cases in which the admissibility of a confession is disputed. Although the frequency of expert testimony varies between jurisdictions, psychologists are often used to assess a defendant's *competency* to have waived *Miranda* rights at the time of the police questioning. Competency to waive testimony is generally offered pretrial at a suppression hearing. In certain circumstances, depending on the legal strategy of a defense attorney, such testimony can be offered at the time of the trial as well. Psychologists are also used to evaluate psychological factors that might be relevant in cases of alleged false and/or coerced confessions. Such expert testimony is usually offered at the time of trial, but it may occasionally be offered pretrial, again, depending on the defense's legal strategy.

Compared to evaluation in other areas of criminal forensic psychology (e.g., competency to stand trial, insanity, risk assessments), evaluating a

chologist and the defense attorney that the purpose of the evaluation is to assist the attorney in "better planning for the case." Additionally, it is best if the defense attorney keeps at a minimum any discussion pertaining to the *Miranda* rights themselves. If an attorney educates the client by speaking about the rights that should have been invoked when with the police, it is more difficult for the psychologist to extrapolate from the defendant's current knowledge what he or she knew when interacting with the police.

Record Review

The next step in the evaluation process is to seek relevant third-party data. The most important piece of this data is a copy of the signed *Miranda* waiver form or a verbatim copy of the wording used in an oral administration of the rights. Since the complexity of the wording of the warnings can vary greatly within and between jurisdictions, it is important that the psychologist evaluate the defendant, in part, based on the rights actually given. If the warnings were read, then a number of readability formulas enable one to calculate reading ease and grade level for a particular written passage. Both WordPerfect and Microsoft Word allow one to calculate a Flesch Reading Ease and Flesch–Kincaid Grade Level score for any passage based on Flesch's (1994) calculations. Obviously, the relative readability of the *Miranda* passage is important data if a defendant's reading comprehension or ability to decode written material is measured at a level far below that of the particular *Miranda* rights read by the subject.

The psychologist should attempt to obtain from the referring source copies of transcripts or records of the interrogation, as well as the defendant's statements, to compare that with the defendant's version of what transpired. Unfortunately, relatively few jurisdictions record an individual's first contact with law enforcement. If there is a recording or transcription, it may have been done after a preinterview, or after the first administration of the rights.

In any event, audio- or videotaped recordings of the interrogation, if they exist, are clearly the primary source for review, because transcripts may vary in accuracy and level to which they capture a suspect's emotional and cognitive state. It is important to obtain transcripts of depositions, again, if they exist, of witnesses (police officers, family members, etc.) who observed the defendant as close to the time as possible when rights were administered. School records, work records, psychological and medical records, and any and all third-party records that enable a clinician to better interpret the findings of the current evaluation are important to obtain. While it is important for the psychologist to obtain an arrest history of the defendant, research has shown (see Grisso, 1981) that there is "no straightforward relation between *Miranda* comprehension and number of prior felony arrests