

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA

v.

KHALID SHAIKH MOHAMMAD, WALID
MOHAMMAD SALIH MUBARAK BIN
'ATTASH, RAMZI BIN AL SHIBH, ALI
ABDUL-AZIZ ALI, MUSTAFA AHMED
ADAM AL HAWSAWI

AE 200 (Mohammad)
Mr. Mohammad's Notice of Joinder,
Factual Supplement & Argument
To AE 200(MAH,RBS,WBA) Defense
Motion to Dismiss Because Amended
Protective Order #1 Violates the Convention
Against Torture

3 September 2013

1. **Timeliness:** This Notice of Joinder, Factual Supplement, and Argument is timely filed in accordance with AE 200-2 (Ruling) which established that joinder for Mr. Mohammad to AE 200 would be due no later than 3 September 2013.

2. **Relief Sought:**

a. Violation of Right to Complain. Mr. Mohammad joins, in part, the previously filed defense Motion to Dismiss Because Amended Protective Order #1 Violates the Convention Against Torture. Mr. Mohammad joins all the arguments advanced therein regarding the violation of the right to complain under the Convention against Torture in Article 13. Specifically, Mr. Mohammad adopts the following arguments relevant to violations of the right to complain: (i) States Parties to the Convention Against Torture are Bound to Refrain from Torturing and to Preserve the Rights of Torture Survivors (AE 200, para. 6(a)) and (ii) In Violation of U.S. and International Law, Amended Protective Order #1 Prohibits the Accused from Seeking Relief Available under the Convention Against Torture. (AE 200, para. 6(b)). Mr. Mohammad only adopts the argument presented in AE 200, paragraph 6(c) to the extent that the unlawful constraints on his right to complain

infringe on his ability to fully develop mitigation evidence before appropriate international bodies.

b. Newly Requested Relief. Mr. Mohammad requests the Commission dismiss this case, or in the alternative, modify Amended Protective Order #1 to strike paragraphs 2(g)(3), 2(g)(4), and 2(g)(5).

3. Facts:

a. Existing Facts. Counsel for Mr. Mohammad joins and adopts the facts as set out and filed in AE 200 at paragraphs A through C.

b. Supplemental Facts. Upon information and belief, Counsel for Mr. Mohammad provides the following facts to assist the Commission:

i. ***Date and place of arrest and subsequent torture***: U.S. agents captured Mr. Mohammad in Rawalpindi, Pakistan on 1 March 2003.¹ The U.S. Government immediately acquired extra-legal custody of Mr. Mohammad, and applied methods tantamount to torture and cruel, inhuman, and degrading treatment at overseas detention facilities for a period of years.² Mr. Mohammad's treatment was authorized by the highest levels of the U.S. Government under a state-sanctioned rendition, detention,

¹ Declassified and Redacted Declaration of David Z. Nevin, Motion to Compel Discovery, D-95, Attachment C, pg. 2, US v. Mohammed, et al, 19 Jan. 2009 (dismissed without prejudice), available at http://www.defense.gov/news/mohammed_et_al-d-095_motion_to_compel_discovery.pdf (last accessed 29 August 2013) (Hereinafter "Nevin Declaration"); Declassified and Redacted *Central Intelligence Agency, Office of the Inspector Gen., Counterterrorism, Detention and Interrogation Activities (September 2001 – October 2003)*, Appendix B, (7 May 2004) available at http://www.aclu.org/torturefoia/released/052708/052708_Special_Review.pdf (hereinafter "IG Report").

² IG Report, pg. 1-2 ¶ 2 ("In November 2002, the Deputy Director for Operations (DDO) informed the Office of Inspector General (OIG) that the Agency had established a program in the Counterterrorist Center to detain and interrogate terrorists at sites abroad ("the CTC Program") . . . Separately, OIG received information that some employees were concerned that certain covert Agency activities at an overseas detention and interrogation site might involve violations of human rights"), pg. 107 ¶ 256 ("At these foreign locations, Agency personnel . . . followed guidance and procedures and documented their activities well.") (last accessed 29 August 2013 (Hereinafter the "IG Report").

and interrogation program conducted by the Central Intelligence Agency (hereinafter the “Torture Program”).³ Following his custody and treatment by the CIA, U.S. agents transferred Mr. Mohammad from foreign, overseas detention locations to the U.S. Naval Station in Guantánamo Bay sometime in early September 2006.⁴

ii. *The U.S. Purpose in Torturing Mr. Mohammad*: The CIA’s

Torture Program operated to deconstruct a detainee’s personality and place him mentally in a position of extreme helplessness, fear, and distress:

Captured terrorists turned over to the C.I.A. for interrogation may be subjected to a wide range of legally sanctioned techniques . . . these are designed to psychologically “dislocate” the detainee, maximize his feeling of vulnerability and helplessness, and reduce or eliminate his will to resist our efforts to obtain critical intelligence.⁵

Effective interrogation is based on the concept of using both physical and psychological pressures in a comprehensive, systematic, and cumulative manner to influence HVD behavior, to overcome a detainee’s resistance posture. The goal of interrogation is to create a state of learned helplessness and dependence conducive to the collection of intelligence in a predictable, reliable, and sustainable manner.⁶

This description of the CIA’s goals is eerily consistent with one of the central aims of torture as outlined in the Istanbul Protocol:

Perpetrators often attempt to justify their acts of torture and ill treatment by the need to gather information. Such conceptualizations obscure the purpose of torture and its intended consequences. One of the central aims of torture is to reduce the individual to a position of extreme helplessness and distress that can lead to a deterioration of cognitive, emotional and behavioral functions. Thus, torture can be a means of attacking the individual’s fundamental modes of psychological and social functioning. Under such circumstances, the torturer strives not only for physical incapacitation of the victim, but for the

³ *Id.*

⁴ Nevin Declaration, pg. 7.

⁵ IG Report, Appendix F.

⁶ Background Paper on CIA’s Combined Use of Interrogation Techniques (undated) (redacted), Fax from [redacted], Central Intelligence Agency, to Dan Levin, Office of Legal Counsel, Department of Justice (Dec. 30, 2004) (released 24 Aug. 2009) available at <http://www.aclu.org/files/torturefoia/released/082409/olcremand/2004olc97.pdf> (last accessed 29 August 2013).

disintegration of the individual's personality; the torturer attempts to destroy the victim's sense of being grounded in a family and society as a human being with dreams, hopes and aspirations for the future.⁷

iii. ***The Torturers:*** Declassified documents indicated that U.S. state actors, agents of the U.S. Government, to include the Central Intelligence Agency as the implementing agency, the Department of Justice as the legal advisors, and the White House as the officials with command responsibility (specifically President Bush and Vice-President Cheney), carried out the rendition, detention, and interrogation practices, and either orchestrated, conducted, or authorized the torture with assistance from undisclosed, potentially-complicit States where the overseas detention facilities were located.⁸ Amended Protective Order # 1 provides that the identities of the field agents, medical personnel, psychologists and other individuals who detained and tortured Mr. Mohammad must remain classified and therefore cannot be supplied to those international bodies charged with investigating the torture. Amended Protective Order # 1 further provides that any countries and the names of any cooperating State(s) agents who may have been complicit in the CIA's Torture Program would also be classified.

iv. ***Infringements on the Right to Complain.*** The U.S. Government has not permitted Mr. Mohammad to meet with, or speak to, his relatives or friends since his initial capture on 1 March 2003. Although other detainees in Guantánamo Bay are authorized to speak to their family members by telephone or to see their family members through video calls, Mr. Mohammad, like apparently all so called "high value detainees" [REDACTED] is not.⁹ The U.S. Government will not allow family members to travel to

⁷ See Istanbul Protocol (2004), p. 45, available at:

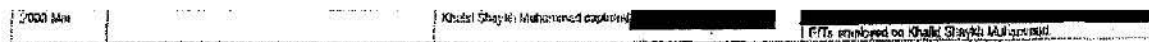
<http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf> (last accessed 29 August 2013).

⁸ *Supra*, n. 2.

⁹ See DoD Review of Department Compliance with President's Executive Order, pg. 34, (2009) available at:

Guantánamo Bay to meet with detainees. The U.S. Government did not permit Mr. Mohammad to meet with a lawyer until 24 April 2008, five years after he first requested an attorney following his capture and over one year after being interviewed by the Federal Bureau of Investigations at Guantánamo in January 2007.¹⁰ Every lawyer authorized to meet with Mr. Mohammad is instructed that Mr. Mohammad's statements, observations, and experiences during his period of mistreatment by the CIA remain classified. Amended Protective Order # 1 continues these constraints in paragraphs 2(g)(3) to 2(g)(5). The entire structure of the classification regime and the U.S. Government's control over his interactions have denied him the right to complain.

v. *Declassified Admissions of Torture.* The U.S. Government has declassified some aspects of the Torture Program as a result of Freedom of Information Act litigation conducted by the American Civil Liberties Union, which included the release of the CIA IG report. This heavily-redacted declassified document confirms in Appendix B, "Chronology: Counterterrorism, Detention and Interrogation Activities," that Mr. Mohammad was subject to enhanced interrogation techniques: "2003 Mar . . . Khalid Shaykh Muhammad captured [redacted] . . . EITs employed on Khalid Shaykh Muhammad."¹¹



2003 Mar		Khalid Shaykh Muhammad captured	[redacted]	EITs employed on Khalid Shaykh Muhammad
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Another declassified and redacted document released through the FOIA litigation concerns the design of the program. In a memorandum re-produced in the IG Report, entitled "Guidelines on Confinement Conditions For CIA Detainees," Mr. George Tenet,

http://www.defense.gov/pubs/pdfs/review_of_department_compliance_with_presidents_executive_order_on_detainee_conditions_of_confinementa.pdf (last accessed 29 Aug 2013).

¹⁰ Nevin Declaration, at pg. 8, ¶ 5.

¹¹ IG Report, Appendix B.

then-Director of the CIA, defined the two types of interrogation techniques authorized as of January 28, 2003: “Unless otherwise approved by Headquarters, CIA officers and other personnel acting on behalf of CIA may use only Permissible Interrogation Techniques. Permissible Interrogation Techniques consist of both (a) Standard Techniques and (b) Enhanced Techniques.”¹²

The Permissive Interrogation Techniques are summarized in the declassified and redacted Draft CIA Office of Medical Service (OMS) Guidelines on Medical and Psychological Support to Detainee Interrogations (dated September 4, 2003):

Standard measures (i.e., without physical or substantial psychological pressure)

- [1.] Shaving
- [2.] Stripping
- [3.] Diapering (generally for periods not greater than 72 hours)
- [4.] Hooding
- [5.] Isolation
- [6.] White noise or loud music (at a decibel level that will not damage hearing)
- [7.] Continuous light or darkness
- [8.] Uncomfortably cool environment
- [9.] Restricted diet, including reduced caloric intake (sufficient to maintain, general health)
- [10.] Shackling in upright, sitting, or horizontal position
- [11.] Water Dousing
- [12.] Sleep deprivation (up to 72 hours)

Enhanced measures (with physical or psychological pressure beyond the above)

- [1.] Attention grasp
- [2.] Facial hold
- [3.] Insult (facial) slap
- [4.] Abdominal Slap
- [5.] Prolonged diapering
- [6.] Sleep deprivation (over 72 hours)
- [7.] Stress positions
 - on knees) body slanted forward or backward
 - leaning with forehead on wall

¹² IG Report, Appendix E, pg. 1.

- [8.] Walling
- [9.] Cramped confinement (Confinement boxes)
- [10.] Waterboard¹³

The IG Report further defines these authorized “EITs” or enhanced interrogation techniques:

Enhanced Interrogation Techniques

- [1. Attention Grasp] The attention grasp consists of grasping the detainee with both hands, with one hand on each side of the collar opening, in a controlled and quick motion. In the same motion as the grasp, the detainee is drawn toward the interrogator.
- [2. Walling] During the walling technique, the detainee is pulled forward and then quickly and firmly pushed into a flexible false wall so that his shoulder blades hit the wall. His head and neck are supported with a rolled towel to prevent whiplash.
- [3. Facial Hold] The facial hold is used to hold the detainee's head immobile. The interrogator places an open palm on either side of the detainee's face and the Interrogator's fingertips are kept well away from the detainee's eyes.
- [4. Facial Slap] With the facial or insult slap, the fingers are slightly spread apart. The interrogator's hand makes contact with the area between the tip of the detainee's chin and the bottom of the corresponding earlobe.
- [5. Cramped Confinement] In cramped confinement, the detainee is placed in a confined space, typically a small or large box, which is usually dark. Confinement in the smaller space lasts no more than two hours and in the larger space it can last up to 18 hours.
- [6. Use of Insects] Insects placed in a confinement box involve placing a harmless insect in the box with the detainee.
- [7. Prolonged Standing] During wall standing, the detainee may stand about 4 to 5 feet from a wall with his feet spread approximately to his shoulder width. His arms are stretched out in front of him and his fingers rest on the wall to support all of his body weight. The detainee is not allowed to reposition his hands or feet.
- [8. Forced Stress Positions] The application of stress positions may include having the detainee sit on file floor with his legs extended straight out in front of him with his arms raised above his head or kneeling on the floor while leaning back at a 45 degree angle.

¹³ IG Report, Appendix F.

[9. Sleep Deprivation] Sleep deprivation will not exceed 11 days at a time.

[10. Waterboarding] The application of the waterboard technique involves binding the detainee to a bench with his feet elevated above his head. The detainee's head is immobilized and an interrogator places a cloth over the detainee's mouth and nose while pouring water onto the cloth in a controlled manner. Airflow is restricted for 20 to 40 seconds and the technique produces the sensation of drowning and suffocation.¹⁴

The DoJ's Office of Professional Responsibility Report similar to the IG Report generally confirms that unspecified EITs were employed on Mr. Mohammad: "EITs were also used on Khalid Sheikh Muhammed (KSM), a high-ranking al Qaeda official who, according to media reports, was captured in Pakistan on March 1, 2003, [redacted] to a CIA black site [redacted]...The CIA OIG Report stated that KSM was taken to [redacted] facility for interrogation and that he was accomplished at resisting EITs."¹⁵ The IG Report further recounts some specific aspects of his treatment that consisted of "unauthorized or undocumented techniques:"

[Threats to Kill Children.] An experienced Agency interrogator reported that the [redacted] interrogators threatened Khalid Shaykh Muhammad [redacted]. According to this interrogator, the [redacted] interrogators said to Khalid Shaykh Muhammad that if anything else happens in the United States, "We're going to kill your children."¹⁶

[Waterboard Technique.] The Review determined that the interrogators used the waterboard on Khalid Shaykh Muhammad in a manner inconsistent with the SERE application of the waterboard and the description of the waterboard in the DoJ OLC opinion, in that the technique was used on Khalid Shaykh Muhammad a large number of times . . . Cables indicate that Agency interrogators [redacted] applied the waterboard technique to Khalid Shaykh Muhammad 183 times.¹⁷

¹⁴ IG Report, pg. 15.

¹⁵ See DoJ Office of Professional Report on the Investigation into the Office of the Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists, pg. 87, (July 29, 2009) available at <http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf> (last accessed 29 August 2013).

¹⁶ IG Report, pg. 43 ¶ 95.

¹⁷ IG Report, pgs. 44-45, ¶¶ 99-100. *See also*, ¶ 225 ("Khalid Shaykh Muhammad received 183 applications of the waterboard in March 2003.").

[Prolonged Sleep Deprivation.] One key Al-Qa'ida terrorist was subjected to the waterboard at least 183 times [redacted] and was denied sleep for a period of 180 hours.¹⁸

In declassified transcripts, both Mr. Mohammad and Mr. Majid Khan have stated that Mr. Mohammad's children were held, abused, and tortured by the government.

Mr. Mohammad: "They [the Americans] arrested my kids intentionally. They are kids. They been arrested for four months they had been abused."¹⁹

Majid Khan's Father: The Pakistani guards told my son [Majid Khan] that the boys were kept in a separate area upstairs and were denied food and water by other guards. They were also mentally tortured by having ants or other creatures put on their legs to scare them and get them to say where their father was hiding. The Americans also once stripped and beat two Arab boys . . . who were turned over by the Pakistani guards at the detention center.²⁰

Beyond those transcripts, the Convening Authority who referred the charges capitally and implemented the structure of these Commissions testified under oath before Congress and this Commission that waterboarding is torture: "The other thing that I would say is that I was already on the record at one of the [Congressional] hearings saying that water -- in my opinion waterboarding constituted torture, and I understand that it was in the public domain that certainly KSM had been waterboarded."²¹

The declassified references to his mistreatment – that Mr. Mohammad was subjected to EITs, the threats to kill his children, and the waterboarding – establish that Mr. Mohammad was tortured and otherwise subjected to cruel, inhuman, and degrading

¹⁸ IG Report, pg. 104, ¶ 261,

¹⁹ Declassified Verbatim Combatant Status Review Tribunal Transcript of Mr. Khalid Shaikh Mohammad, Encl. 3, pg. 24 (10 Mar. 2007) (available at http://www.defense.gov/news/transcript_isn10024.pdf (last accessed 29 August 2013)).

²⁰ Declassified Verbatim Combatant Status Review Tribunal Transcript of Mr. Majid Khan, Encl. 3, pg. 13 (15 Apr. 2007) available at http://www.aclu.org/files/pdfs/safefree/csrt_majidkhan.pdf (last accessed 29 August 2013).

²¹ Testimony of Mr. MacDonald, Convening Authority, *U.S. v. Mohammad, et al.* II, Trans., pg. 2877, line 610 (17 June 2013) available at www.mc.mil.

treatment. These declassified, heavily-redacted cruelties are only part of the horror. The full picture of his torture remains classified. The U.S. Government has shielded itself from scrutiny by invoking national security protections and the state secrets doctrine on the release of the information, strictly suppressing release of relevant documents, and silencing its victims, including Mr. Mohammad.

vi. *Physical Injuries Sustained from Torture:* Amended Protective Order # 1 would generally require Defense Counsel to handle information regarding his torture injuries as classified. The U.S. Government has, however, declassified certain portions of Mr. Nevin's declaration concerning his discussions with Mr. Mohammad. Mr. Nevin, in response to the Government's refusal to provide evidence to the defense concerning the mistreatment of Mr. Mohammad during and after his torture and forced disappearance, observed the following:

During my meetings with Mr. Mohammed, I have personally observed **scars on his ankles and wrists** consistent with his description of his treatment while in the custody of the United States. Additionally, although I am not a medical expert, it is my judgment based on my education, training and experience that his tone and affect in describing his prior treatment is consistent with a person who has been the victim of torture. Further, his descriptions to me of these matters have been consistent over time and at different interviews. **It is also consistent with public source reporting on the treatment of Mr. Mohammed and other high value detainees.**²²

The declassified and heavily-redacted OMS Guidelines on Medical and Psychological Support to Detainee Interrogations, dated September 4, 2003, establish the availability and presence of medical personnel during the application of EITs: "OMS is responsible for assessing and monitoring the health of all Agency detainees subject to 'enhanced'

²² Nevin Declaration, at pg. 8, ¶ 5 (Emphasis Added).

interrogation techniques.”²³ The unredacted portions of the OMS Guidelines report that on intake:

New detainees are to have a thorough initial medical assessment, with a complete, documented history and physical addressing in depth any chronic or previous medical problems. . . [redacted] [v]ital signs and weight should be recorded, and blood work drawn [redacted] . . . Documented subsequent medical rechecks should be performed on a regular basis, [redacted] . . . Although brief, the data should reflect what was checked and include negative findings.”²⁴

As for the employment of EITs, it does appear that medical personnel could have been present from the declassified information: “It is important that adequate medical care be provided to detainees, even those undergoing enhanced interrogation. Those requiring chronic medications should receive them, acute medical problems should be treated, adequate fluids and nutrition provided.”²⁵

The unredacted portions of the OMS Guidelines provide specific instructions to medical practitioners assisting in the employment of the following techniques: dietary manipulation, uncomfortably cool environments, white noise or loud music, shackling, sleep deprivation, cramped confinement, and waterboard.²⁶

On January 28, 2003, George Tenet, the Director of the CIA, ordered that appropriate medical and psychological personnel shall be [redacted] readily available for consultation and travel to the interrogation site during all detainee interrogations employing the Standard Techniques, and appropriate medical and psychological personnel must be on site during all detainee interrogations employing Enhanced Techniques.”²⁷ The

²³ IG Report, Appendix F, pg. 2.

²⁴ IG Report, Appendix F, pg. 3.

²⁵ IG Report, Appendix F, pg. 3.

²⁶ IG Report, Appendix F, pg. 3-10.


²⁷ IG Report, Appendix E, pg. 2.

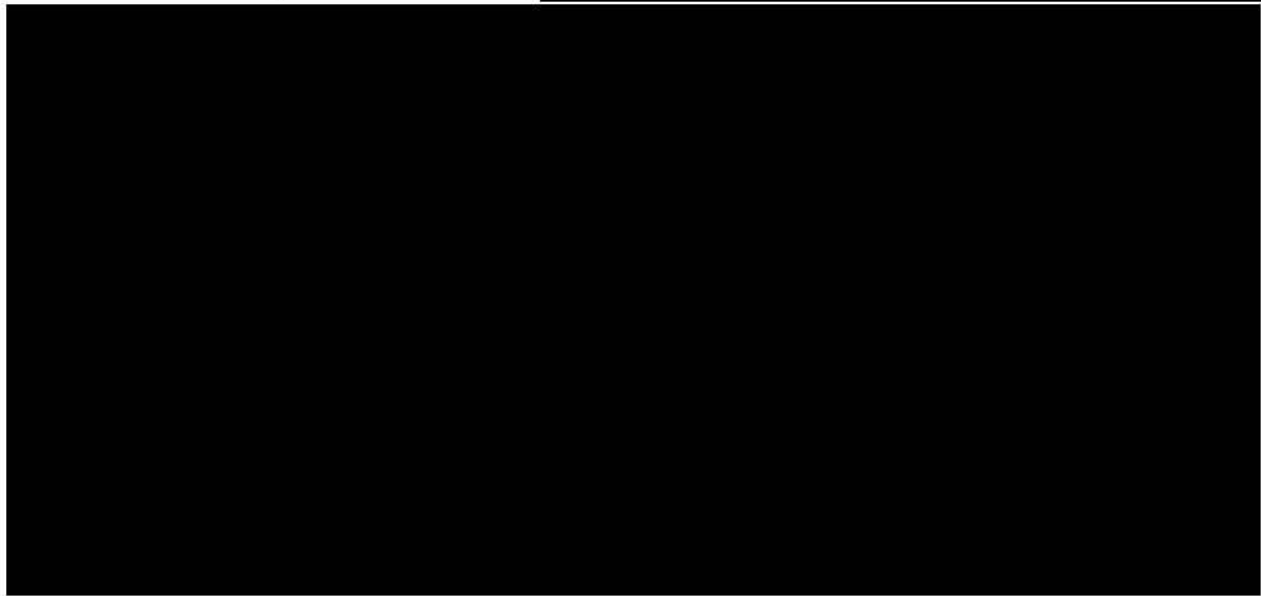
IG Report documents that Mr. Tenet ordered medical practitioners to suspend the EITs if the following circumstance arose:

In each case, the medical and psychological personnel shall suspend the interrogation if they determine that significant and prolonged physical or mental injury, pain, or suffering is likely to result if the interrogation is not suspended. In any such instance, the interrogation team shall immediately report the facts to Headquarters for management and legal review to determine whether the interrogation may be resumed.²⁸

It is not clear from the redacted IG Report whether and how the state actors monitored a detainee's progress towards psychological dislocation. However, Mr. Tenet did direct that there be detailed record keeping by the monitoring medical and psychological staff:

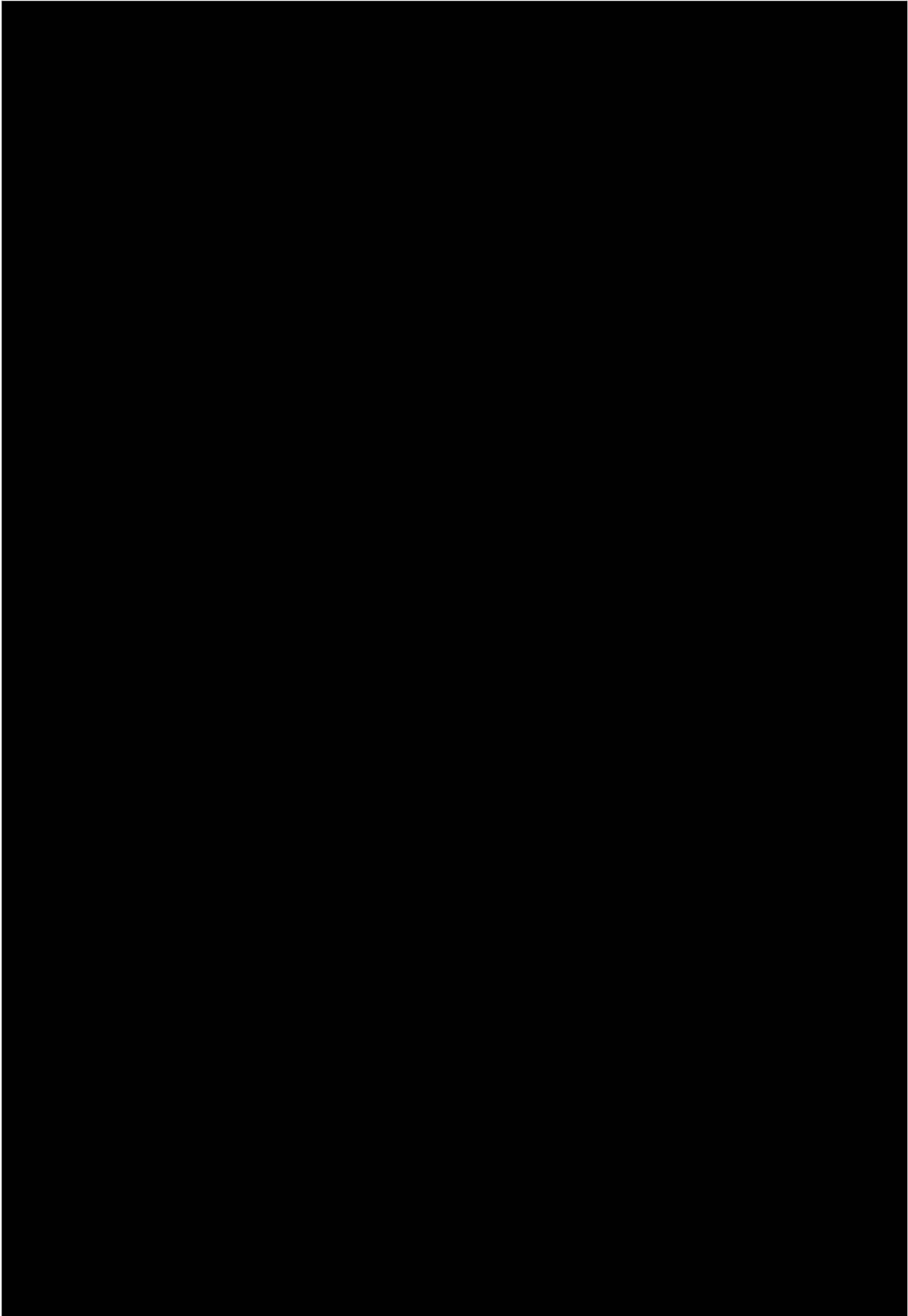
In each interrogation session in which an Enhanced Technique is employed, a contemporaneous record shall be created setting-forth the nature and duration of each such technique employed, the identities of those present, and a citation to the required Headquarters approval cable. This information, which may be in the form of a cable, shall be provided to Headquarters.²⁹

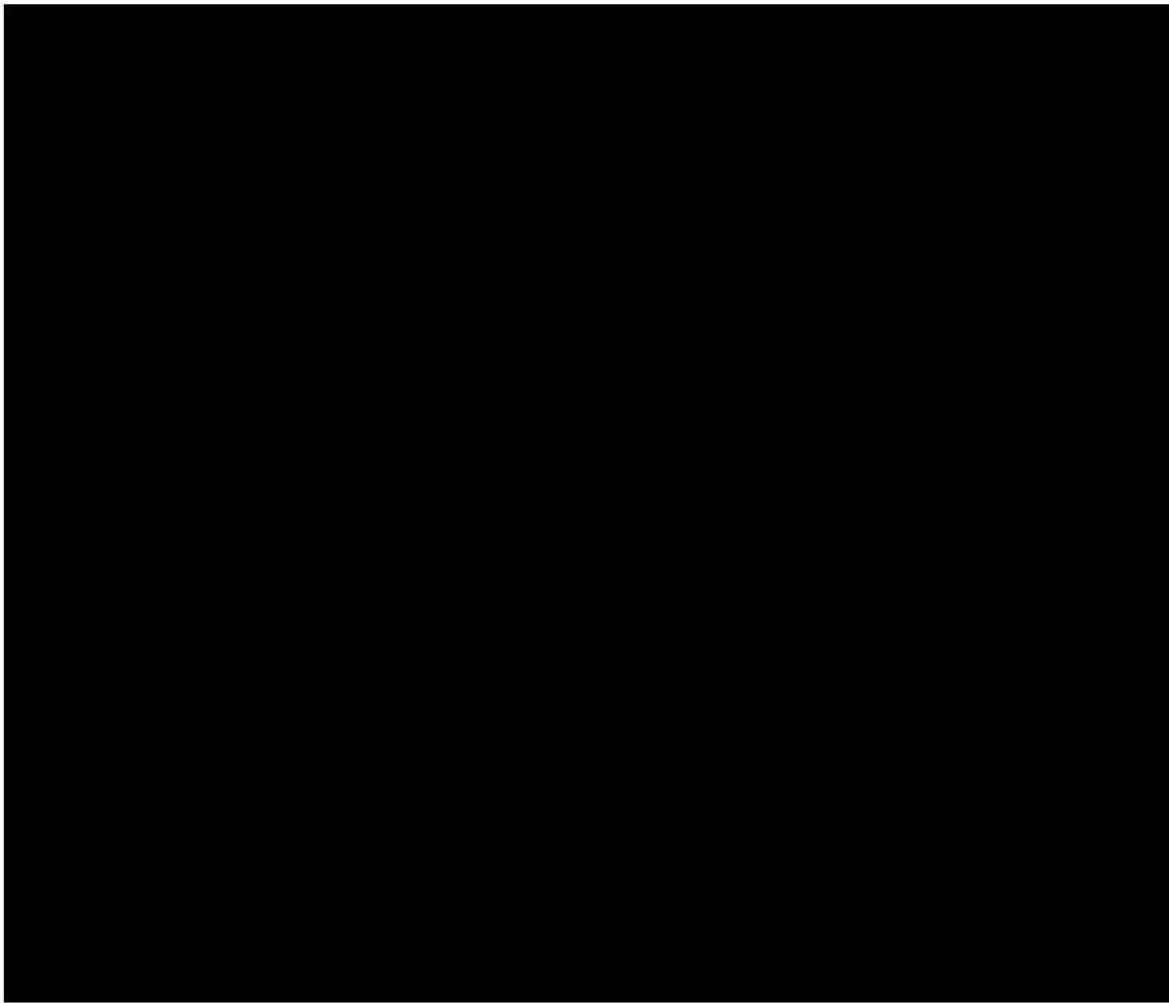
Although Defense counsel for Mr. Mohammad do not have any classified medical records concerning Mr. Mohammad, 



²⁸ IG Report, Appendix E, pg. 2.

²⁹ IG Report, Appendix E, pg. 3.





4. Supplemental Argument

a. **Mr. Mohammad has a non-derogable right to complain to the U.S. and to any potentially-complicit State Party to the Convention.**

The declassified evidence concerning Mr. Mohammad's treatment undeniably establishes that the U.S. government tortured him after his capture and unlawful rendition at the hands of the CIA. The U.S. government, however, is not the only State to have been complicit in his mistreatment. The IG Report itself confirms that he was abused at "sites abroad" at "an overseas detention and interrogation site" . . . at "these foreign locations."³¹

³⁰ See generally, Attachment B, Consolidated JTF-GTMO Medical Records.

³¹ IG Report, pg. 1-2 ¶ 2 ("In November 2002, the Deputy Director for Operations (DDO) informed the Office of Inspector General (OIG) that the Agency had established a program in the

In other words, the U.S. has confirmed that other foreign governments were involved. These potentially complicit States Party to the Convention likewise, at a minimum, conspired to commit torture in violation of international law. Mr. Mohammad has a right under international law to complain to appropriate authorities in both the U.S. Government and any other potentially complicit State Party to the Convention against Torture who protected these black sites.

To supplement AE 200, Mr. Mohammad offers further legal support to give effect to the meaning of the right to complain under Article 13 of the Convention. The right to complain of torture is part of U.S. domestic law as a result of the United States Senate's ratification of the Torture Convention. The right to complain has been enshrined as well in the United Nations *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, and while the European Convention on Human Rights, the American Convention on Human Rights, and the African Charter on Human and Peoples' Rights do not expressly contain language mandating a right to complain, their regional tribunals have determined that such a right also exists as a matter of customary international law.³²

Counterterrorist Center to detain and interrogate terrorists at sites abroad ("the CTC Program") . . . Separately, OIG received information that some employees were concerned that certain covert Agency activities at an overseas detention and interrogation site might involve violations of human rights", pg. 107 ¶ 256 ("At these foreign locations, Agency personnel . . . followed guidance and procedures and documented their activities well.") (last accessed 29 August 2013 (Hereinafter the "IG Report").

³² GA Res. 43/173, 9 Dec. 1988, Principle 33(1): "A detained or imprisoned person or his counsel shall have the right to make a request or complain regarding his treatment, in particular case of torture or other cruel, inhuman or degrading treatment, to the authorities responsible for the administration of the place of detention and to higher authorities and, when necessary, to appropriate authorities vested with reviewing or remedial powers."

b. Amended Protective Order # 1 violates Mr. Mohammad's non-derogable right to complain.

Article 13 of the Convention against Torture does not require that a formal complaint be lodged. It is sufficient for the victim simply to bring the facts to the attention of a competent authority for the latter to be obliged to consider that act as a tacit, but unequivocal expression of the victim's wish that the facts be promptly and impartially investigated.³³

The Amended Protective Order # 1, which operates to classify evidence of crimes committed by the CIA and potentially complicit State Parties, violates Article 13 of the Convention against Torture. Mr. Mohammad is unable to avail himself of potential avenues of mitigation – to write to potentially complicit State Parties and demand an investigation and responsive records regarding his mistreatment. Mr. Mohammad's Defense Counsel are likewise unable to assist him because Amended Protective Order # 1 treats his complaint(s) to any potentially-complicit State Party, his words regarding his torture, as classified. Mr. Mohammad's mere wish that this be done, that either he or his Defense Counsel provide an unequivocal expression of his wish to pursue a claim in another country would be classified because the locations of the black site(s) and the details of his torture are deemed classified by Amended Protective Order # 1.

In this regard, our country is no better than Albania, Togo or Turkey in denying counsel the opportunity to assert a complaint: “[i]n those countries where detainees may be denied access to lawyers, such as in Albania, Togo and Turkey, and/or where there are no independent visiting bodies, the lodging of complaints is dependent on the co-operation of police and prison officials.”³⁴ Or Egypt for that matter: “[a]ccess to relatives, lawyers, independent doctors and external visiting mechanisms provides safeguards against torture

³³ Attachment C, The Redress Trust, “Taking Complaints of Torture Seriously, Rights of Victims and Responsibilities of Authorities, Sep. 2004, pg. 11.

³⁴ *Id.* pg. 39.

and makes it easier for steps to be taken by or on behalf of victims. The lack of timely outside access has been a particular concern in Egypt, where detainees can often be questioned for prolonged periods without being charged.”³⁵ By torturing our victims and then constructing an elaborate scheme of incommunicado detention and "classification" designed to silence them forever, the United States has joined the world's worst human rights abusers: “This is also a serious issue with regard to persons held under recent ‘antiterrorism’ legislation enacted, for example by the United States.”³⁶

Similar to a judicial body interpreting a statute, States will establish a treaty-committee within a treaty to serve as the interpretative body for the treaty. The Committee against Torture, a treaty-based body pursuant to the Convention against Torture, serves as the interpretative body for the Convention and has addressed this very issue. In General Comment No. 3, the Committee provides that “under no circumstances may arguments of national security be used to deny redress for victims.”³⁷ Moreover the Committee writes, “[s]pecific obstacles that impede the enjoyment of the right to redress . . . include State secrecy laws, evidential burdens and procedural requirements that interfere with the right to redress.”³⁸ Although the Committee refers to the subsequent right to redress in Article 14 of the CaT, this guidance readily applies to the right to complain as it is the condition precedent to the right to redress. In other words, there must be a complaint before there is redress for the complaint.

c. The Commission must end this disgrace.

The CIA and Department of Justice, acting on orders at the highest level of our government, have disgraced the United States of America. To prevent such a shame from

³⁵ *Id.* at 40.

³⁶ *Id.* at 40.

³⁷ Attachment D, Comm. against Torture, General Comment No. 3, Para. 42, pg. 9.

³⁸ *Id.* at para. 38

ever defining America, on 14 September 1775, General George Washington directed his troops, the Northern Expeditionary Force, not to torture prisoners:

“Should any American soldier be so base and infamous as to injure any [prisoner]. . . I do most earnestly enjoin you to bring him to such severe and exemplary punishment as the enormity of the crime may require. Should it extend to death itself, it will not be disproportional to its guilt at such a time and in such a cause... for by such conduct they bring shame, disgrace and ruin to themselves and their country.”

With this current so-called war on terror, the shame, disgrace and ruin to the country predicted by General Washington has indeed occurred. We can now infer that the CIA, recently revealed as an original classification authority who has some control over these proceedings, has likely instructed the trial counsel that paragraph 2(g)(3) through 2(g)(5) is necessary to “protect national security.”³⁹ In reality, however, these classification restrictions on Mr. Mohammad’s treatment operate to hide from public scrutiny evidence of war crimes, war crimes that have been widely reported around the world. Yet, the torture victim and their attorneys dare not speak these words.

The CIA/OCA has extended their over-reaching into this very protective order by asking this independent Military Commission to do the same – dishonor this country, violate intentional law, and be a co-conspirator in hiding evidence of war crimes committed by the U.S. and other potentially-complicit States Party to the Convention. This Commission has the power to do otherwise, and can demonstrate to the world that it understands and respects U.S. obligations under the Convention against Torture. The Commission can either dismiss the charges or strike the violative provisions in Amended Protective Order # 1.

³⁹ On the CIA being an original classification authority, please see AE 13XX (AAA) “Open Source Guide for Central Intelligence Memo” dated 22 August 2013. Also, see Unofficial Transcript, 20 August 2013, pg. 4535: “MJ: Basically, this document [AE 133XX (AAA)] you have been presented – well, it says, on the face of it, from the CIA, it is their policy. LDC [Mr. Connell]: Right. It has been represented to me that it is CIA policy.”

Finally, the Commission must understand what it is asking of Defense Counsel – requiring counsel to either (a) sign the MOU, participate in a violation of the Convention against Torture, and curtail a known avenue of mitigation to pursue claims in the U.S., claims before the Committee against Torture, and claims in potentially-complicit States Party to the Convention, (b) sign the MOU over their legal and ethical objections and potentially be deemed ineffective by an appellate court, or (c) not sign the MOU and bear the potential of Commission-directed removal.

Less than three weeks ago, on 12 August 2013, the United States once again reaffirmed its commitment to the Convention against Torture and expounded on its understanding of the non-derogable right to complain:

The United States continues to address and deal with any violations of the Convention primarily pursuant to operation of its own domestic legal system. As the United States explained in its previous treaty reports (including the CCD) and in response to questions in this submission, the U.S. legal system affords numerous opportunities for individuals to complain of abuse and to seek remedies for alleged violations.⁴⁰

Moreover, the U.S. agrees that “various forms of psychological forms of torture and ill-treatment, such as mock executions” constitute torture.⁴¹ Waterboarding, an EIT applied to Mr. Mohammad, is a mock execution and clearly amounts to torture. Mr. Mohammad has a right to complain to not just the U.S., but to any other potentially-complicit State Party as a matter of international law and to pursue potentially viable avenues of mitigation development for this capital case.

Amended Protective Order # 1 denies Mr. Mohammad the right to complain under the Convention against Torture, and for this, this Commission must fashion an appropriate

⁴⁰ Attachment E, Periodic Report of the United States of America to the Committee Against Torture Convention, para. 253 (12 August 2013).

⁴¹ *Id.* at para. 12.

remedy – dismiss the charges or strike the violative provisions in Amended Protective Order # 1.

5. **Request for Witnesses:** The Defense reserves the right to request that the Government produce relevant and necessary witnesses for the purposes of this Motion and will notify the Commission as expeditiously as possible for scheduling concerns.

6. **Request for Oral Argument:** Oral argument is requested.

7. **Certificate of Conference.** On 3 September 2013, Defense Counsel conferenced the requested relief in this instant pleading as it varies with the underlying relief requested in AE 200. At the time of this filing, the Government has not responded.

8. **Additional Information:** None.

9. **Attachments:**

- A. Certificate of Service
- B. Consolidated JTF-GTMO Medical Records
- C. The Redress Trust, “Taking Complaints of Torture Seriously, Rights of Victims and Responsibilities of Authorities, Sep. 2004
- D. Committee against Torture, General Comment No. 3, CAT/C/GC/3, 13 December 2012
- E. Periodic Report of the United States of America to the United Nations Committee Against Torture Convention, 12 August 2013

Respectfully submitted,

//s//
DAVID Z. NEVIN
Learned Counsel

//s//
DEREK A. POTEET
Maj, USMC
Defense Counsel

//s//
JASON WRIGHT
MAJ, JA, USA
Defense Counsel

//s//
GARY SOWARDS
Defense Counsel

Counsel for Mr. Mohammad

ATTACHMENT A

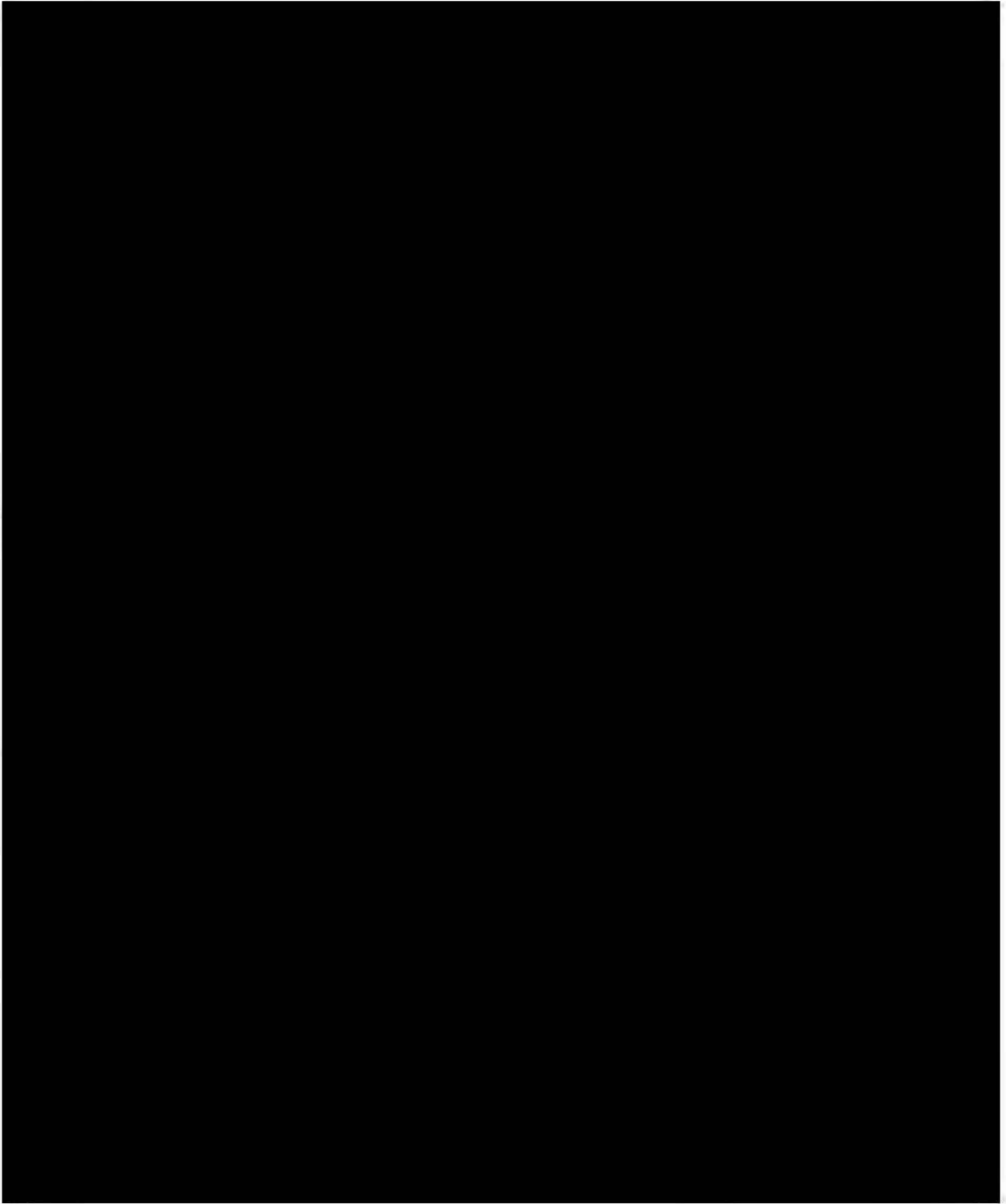
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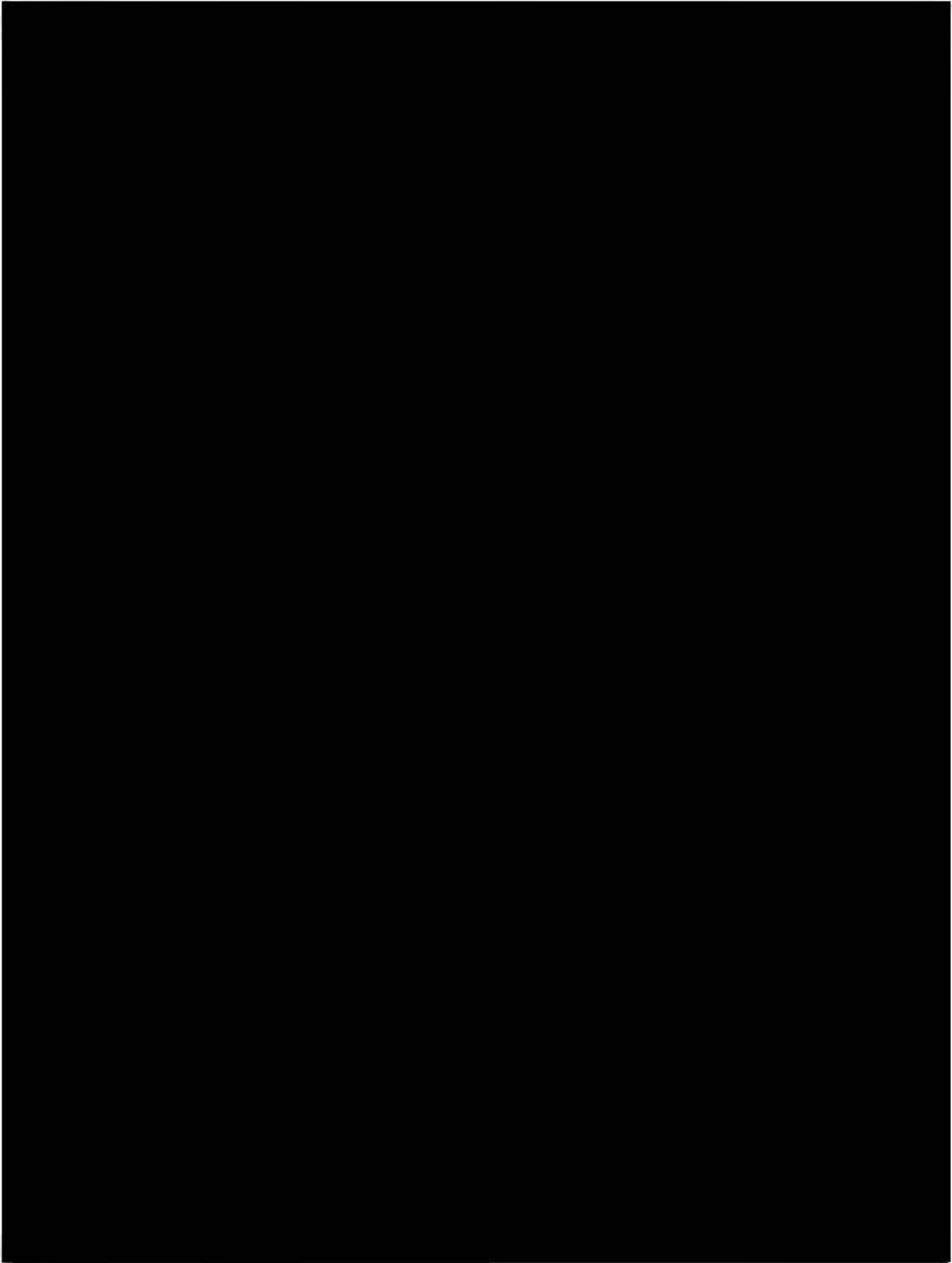
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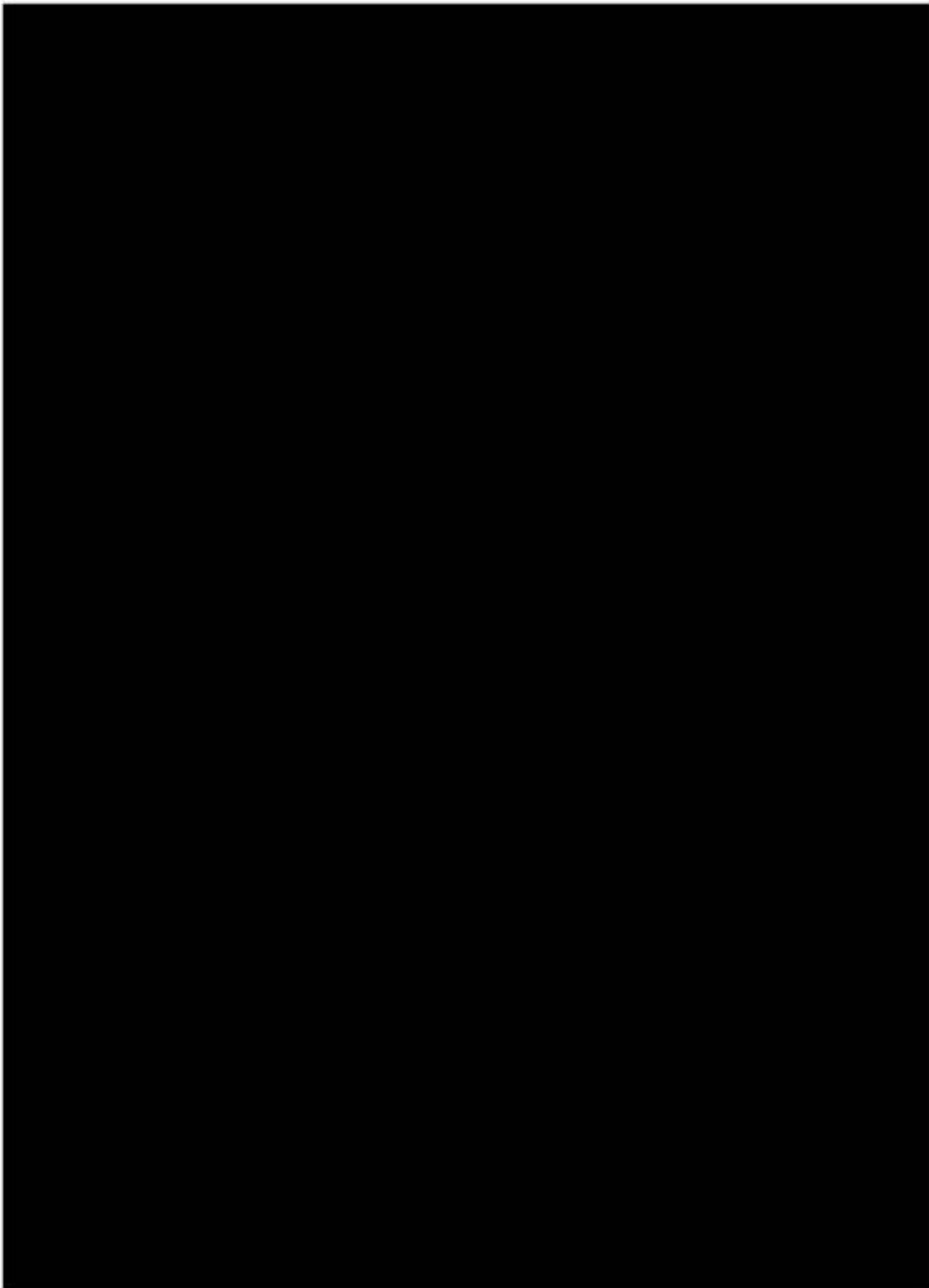
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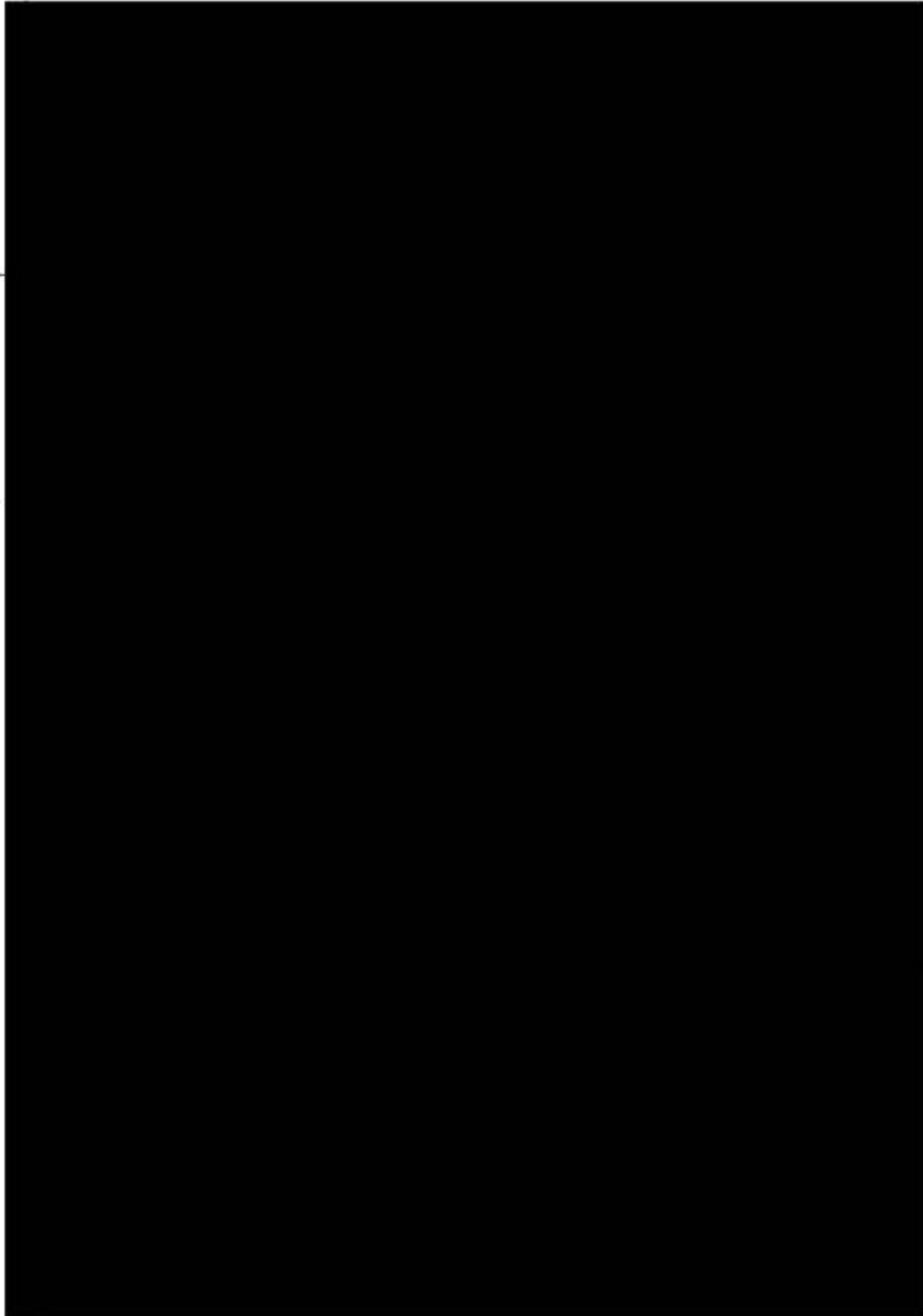
JASON WRIGHT
MAJ, JA, USA
Defense Counsel

Attachment B

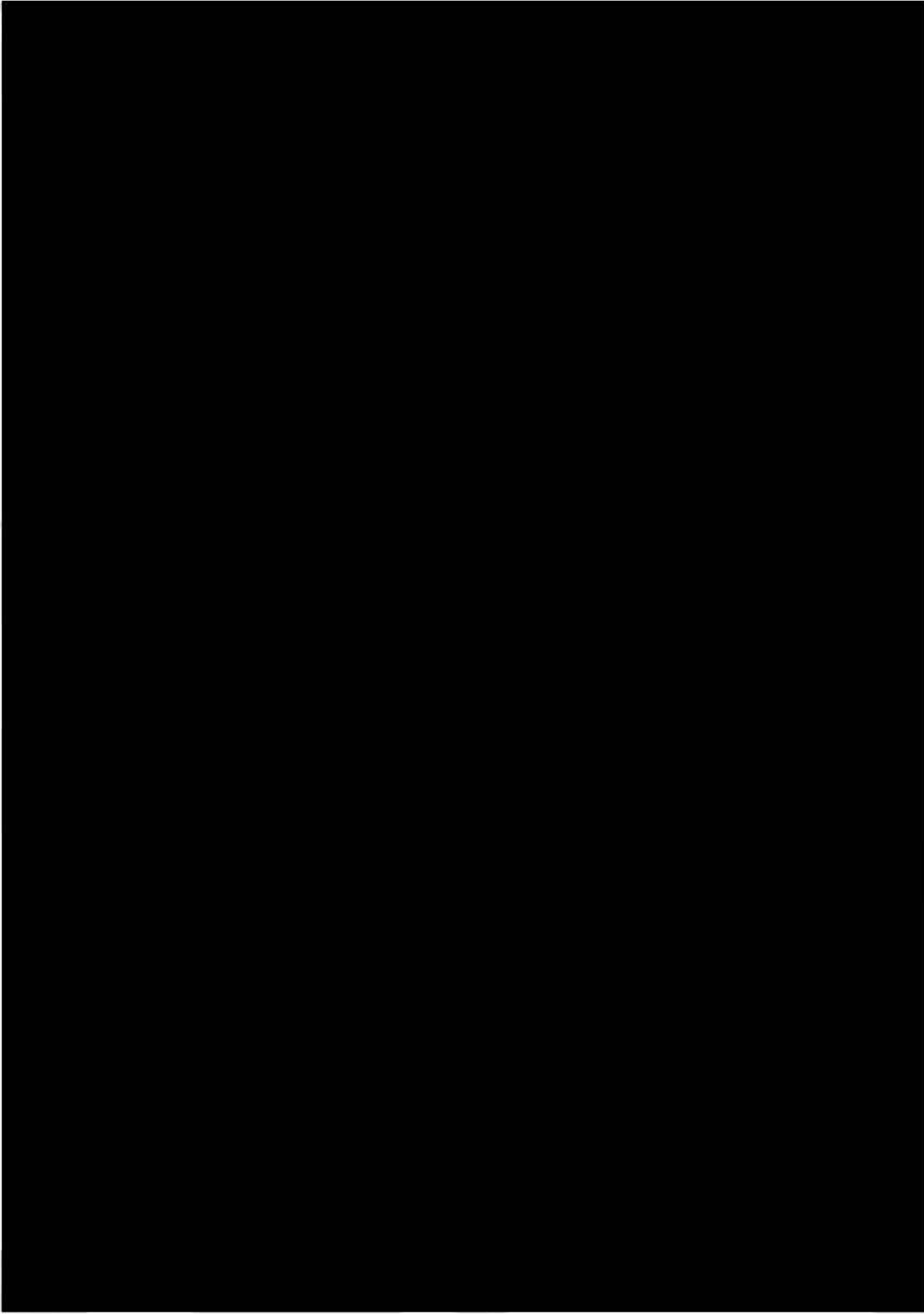




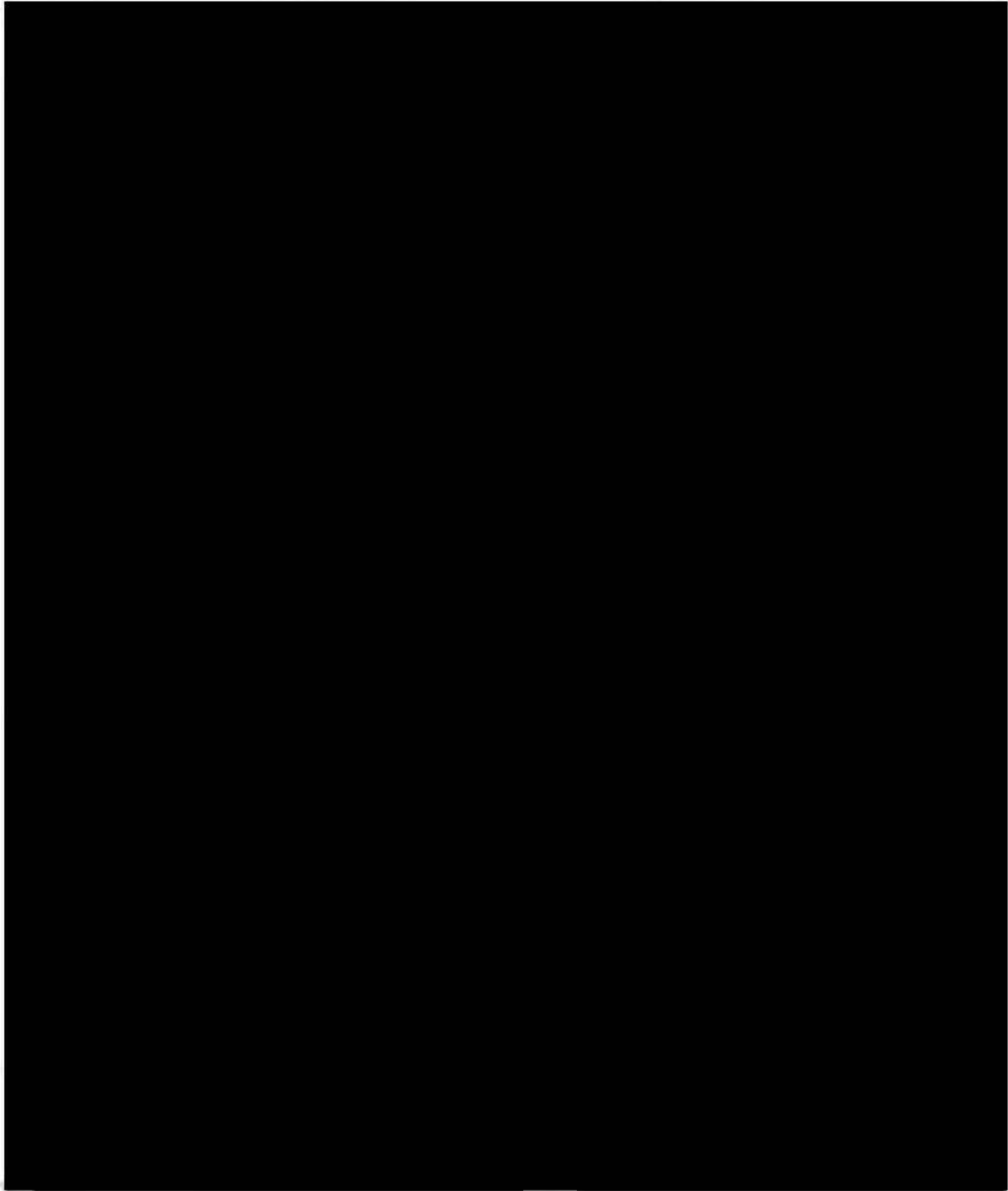








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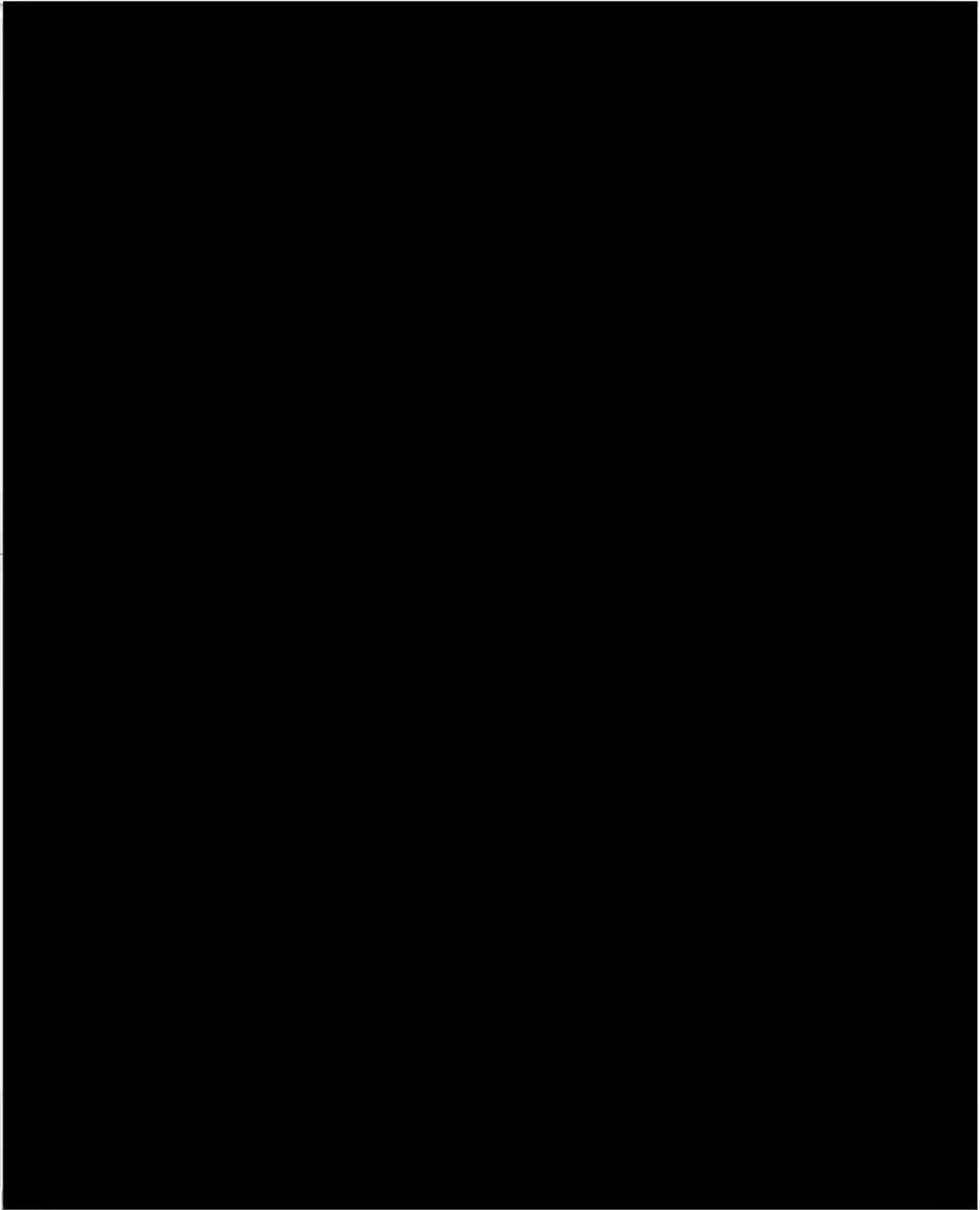
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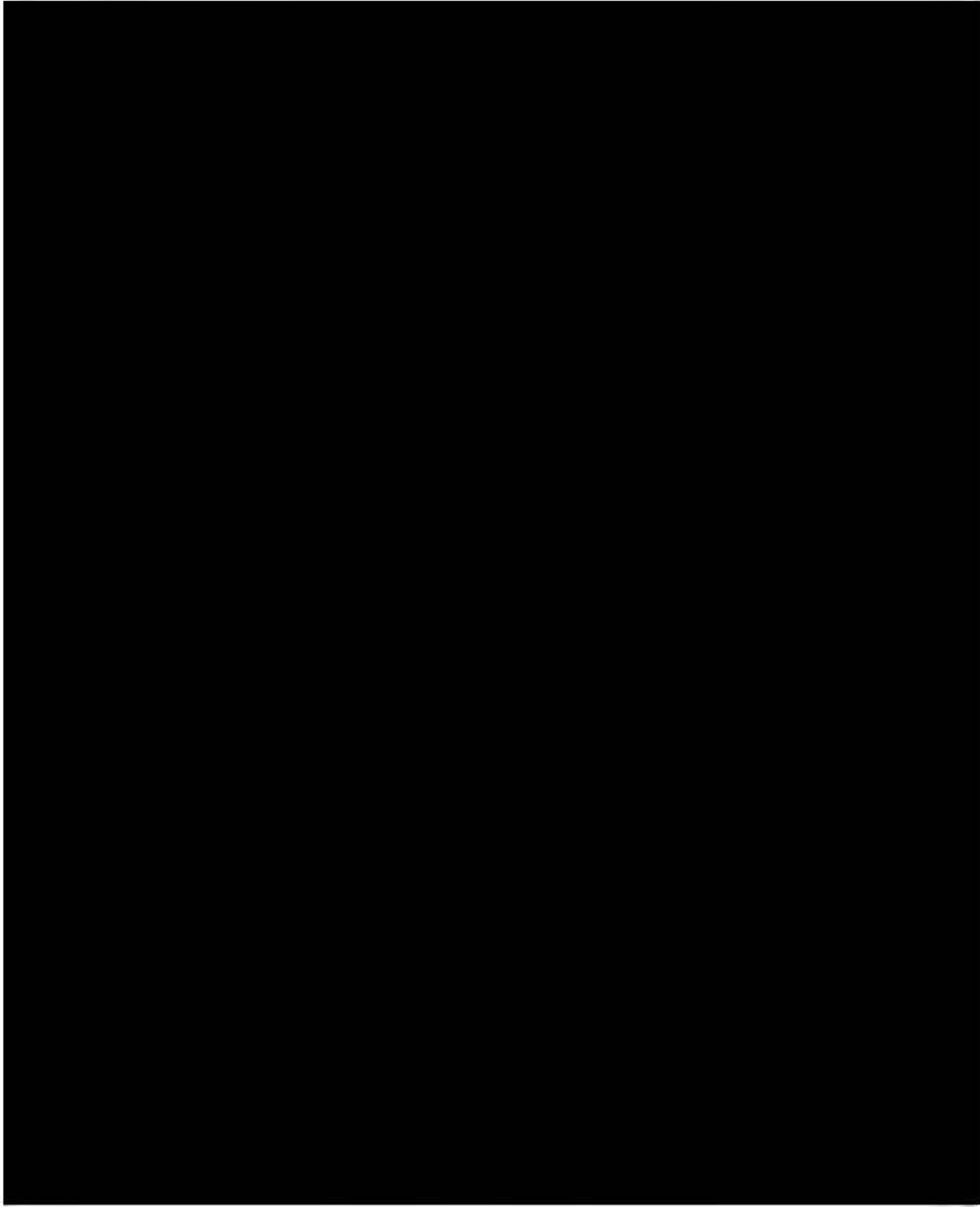
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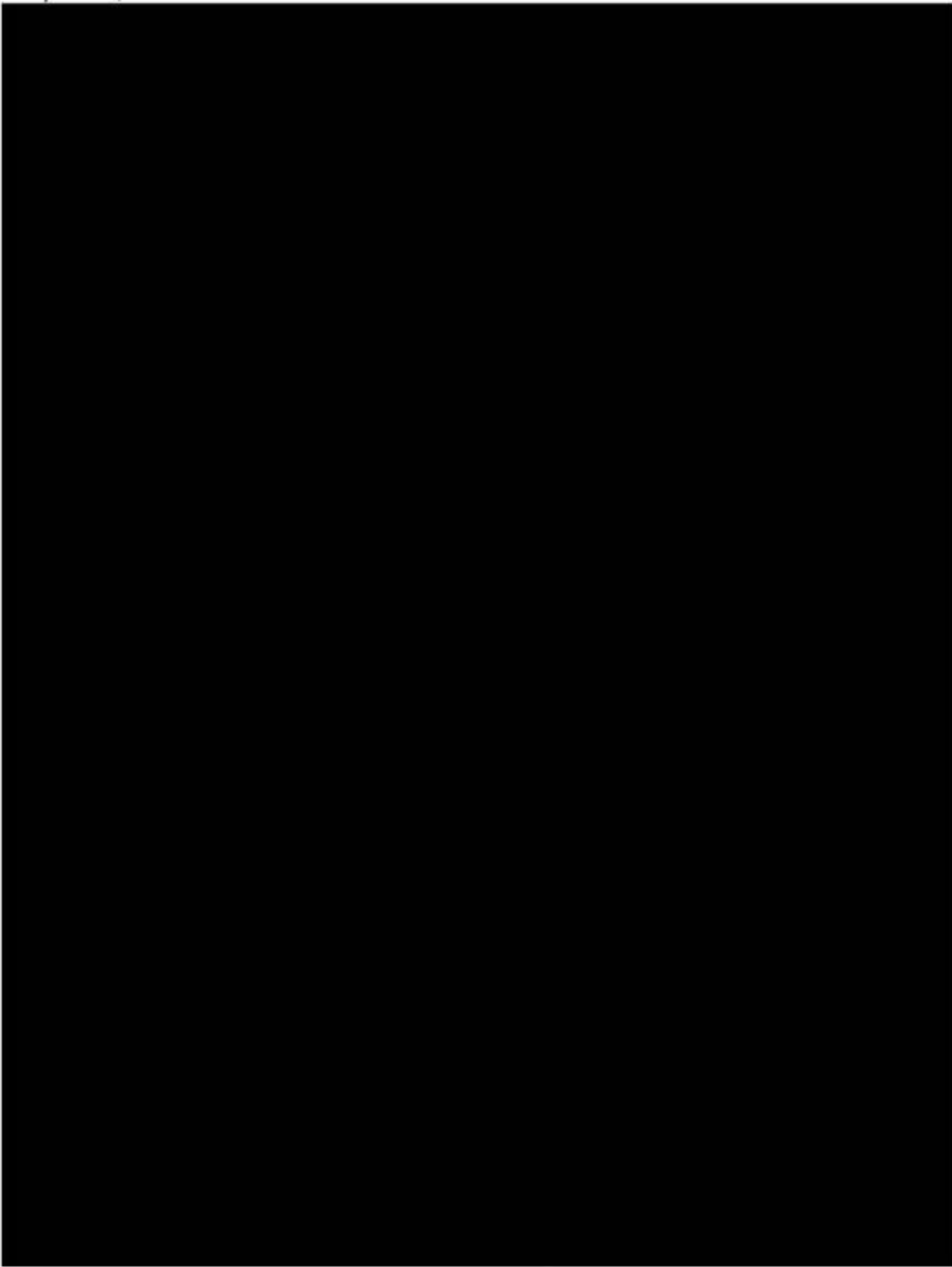
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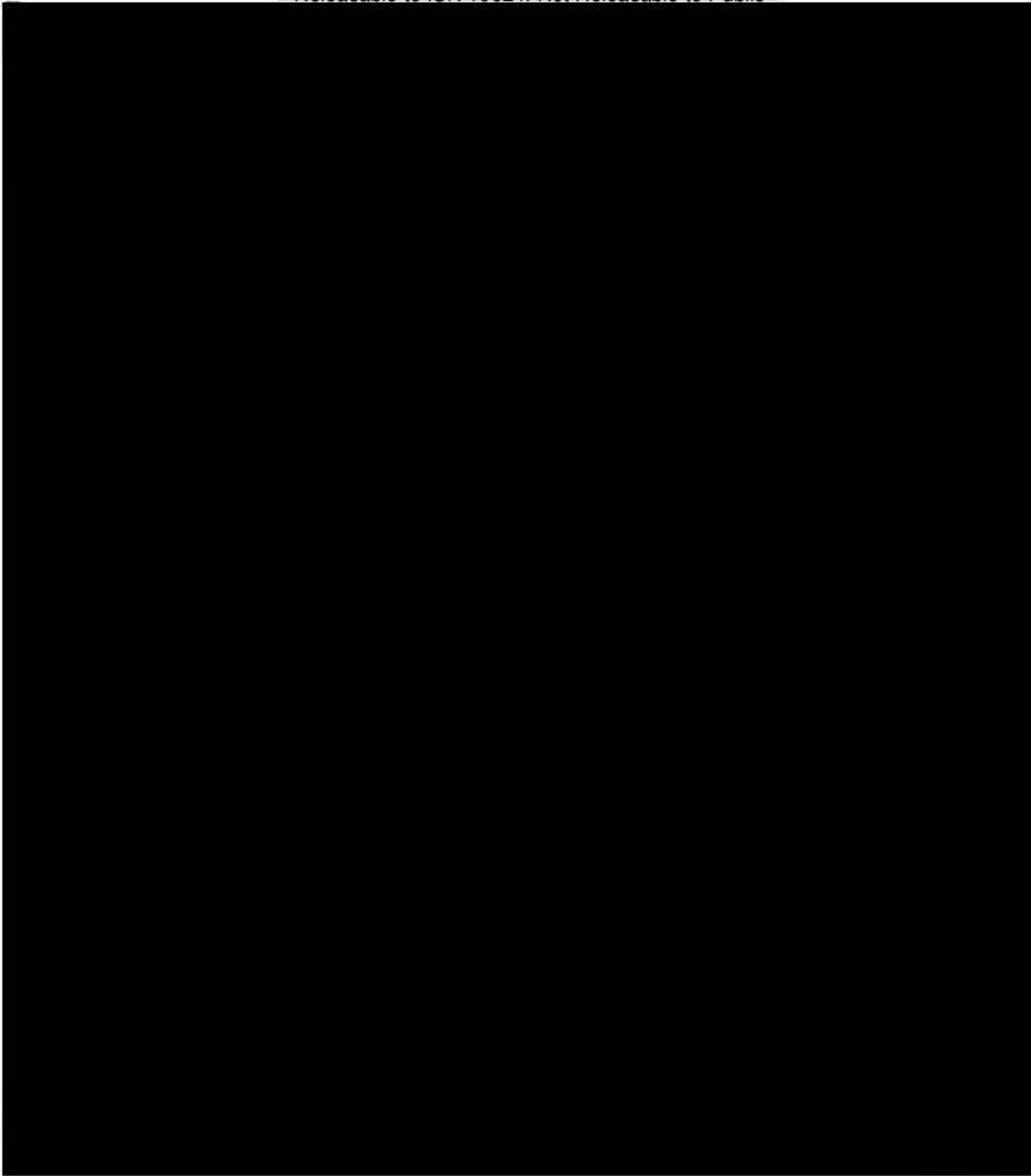
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