

~~UNCLASSIFIED//FOUO~~

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA

v.

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

~~(S)~~ AE524GGG (AAA)

~~(S)~~ Mr. al Baluchi's Reply to
Government Response to
Mr. al Baluchi's Supplement to AE524RR

~~(S)~~ 12 February 2019

1. ~~(S)~~ **Timeliness:** This Reply is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court (R.C.) 3.7.e.

2. ~~(S)~~ **Argument:**

~~(S)~~ On 30 April 2018, Mr. al Baluchi argued against the interview protocol that was eventually finalized in Protective Order #4. [REDACTED]

[REDACTED] Mr. al Baluchi noted that there are "six factors which explain the difference between what happens when we approach a witness and request an interview, and when a CIA and FBI officer approach. And they have nothing to do with the good or bad faith of the CIA and the FBI involved in the request. They have to do, instead, with human nature."² The

² ~~(S)~~ T. 4/30/2018 at 19313.

~~UNCLASSIFIED//FOUO~~

~~UNCLASSIFIED//FOUO~~

six factors are first impressions,³ showing identification,⁴ the rapport-building process,⁵ safety factors,⁶ social networks,⁷ and background knowledge.⁸ These six factors, counsel noted, are why any protective order restricting access to UFI witnesses on the sensitive issue of the RDI program, would fail.

~~(S)~~ Protective Order #4 has failed because of the government's circumvention of these factors, as anticipated by counsel for Mr. al Baluchi in April 2018. The government presents two

³ ~~(S)~~ T. 4/30/2018 at 19313: "[T]here's no opportunity for the person to form that human first impression of the actual person who would be asking the questions, the interviewer."

⁴ ~~(S)~~ T. 4/30/2018 at 19313-314: "When the FBI and the CIA approach somebody, all they can show is their own identification because they don't even know what actual interviewer would be speaking. And so they can't, for example, give them my business card. I have designed my business card to look friendly to witnesses . . . but it also -- it clearly identifies Military Commissions Defense Organization in the top line. So to satisfy all of the needs in getting a witness to talk to us within a normal human way."

⁵ ~~(S)~~ T. 4/30/2018 at 19314-315: "In the course of explaining who we are and in the course of explaining what we're there for and what we want to do, in that minute or two, there's a rapport built. [A]ll of the investigators in our office are professional investigators and almost all of them are professional law enforcement, both in the military and in civilian life. Those persons are trained how to build rapport in that close minute."

⁶ ~~(S)~~ T. 4/30/2018 at 19315 – 316: "When we approach a witness, we can offer them safety factors that the FBI and the CIA cannot. Like, if they have a question of 'I'm not sure that we should be having this discussion here,' we say, 'That's great. We'll make an arrangement.' Wherever we are, we'll find a secure space . . . [FBI and CIA] don't know what we have access to . . . what our actual clearances are, or the person or the interviewers' clearance."

⁷ ~~(S)~~ T. 4/30/2018 at 19316: "[T]he FBI and the CIA, when they go to that person, they have no idea who we know in their social network. We have no credibility from being able to refer to the other people that we've spoken to, the people who referred us to them in the first place."

⁸ ~~(S)~~ T. 4/30/2018 at 19317: "[W]hen the FBI and CIA approach a witness, they have no idea of the background knowledge of the investigator that we would send. They have no idea of, you know, has Mr. Connell been working on this case in one capacity or another since 2008? They have no idea of people who have spent 3 1/2 years full-time on this investigation who know -- have an extensive amount of background knowledge."

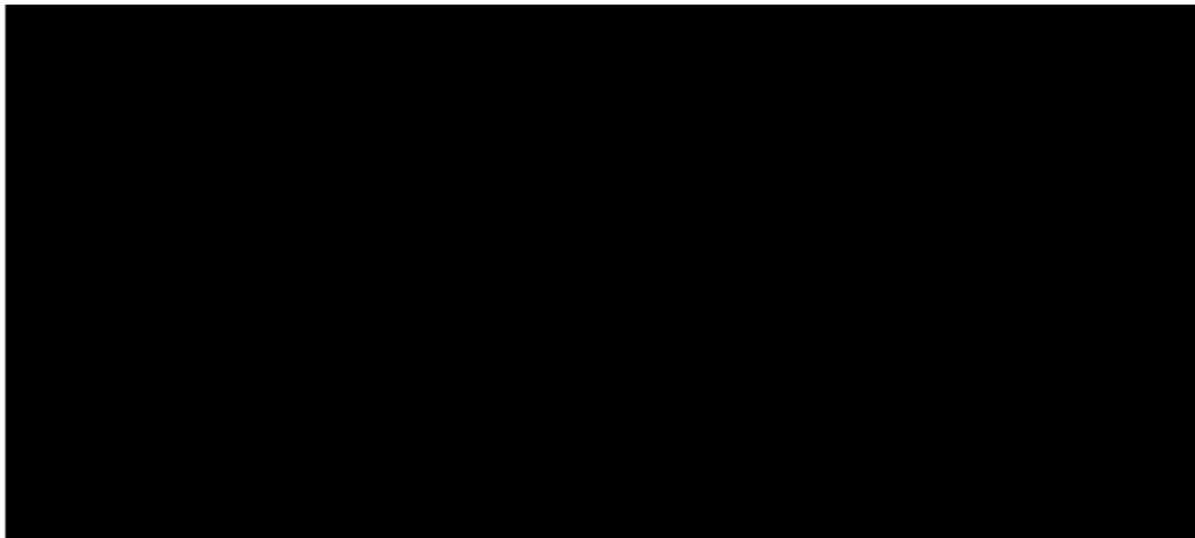
~~UNCLASSIFIED//FOUO~~

~~UNCLASSIFIED//FOUO~~

well-trodden arguments in AE524FFF. The first is that the defense should ignore contrary statements from UFI witnesses and accept the representations of the CIA Office of General Counsel, the FBI, and the prosecution team, all of whom have litigation interests before the military commission. The second is that the defense has somehow been able to conduct successful UFI interviews. Both of these arguments are contradicted by the government's own representations.

- a. ~~(S)~~ **The government's assertion that the military commissions should accept representations without further inquiry is undermined by two important admissions.**

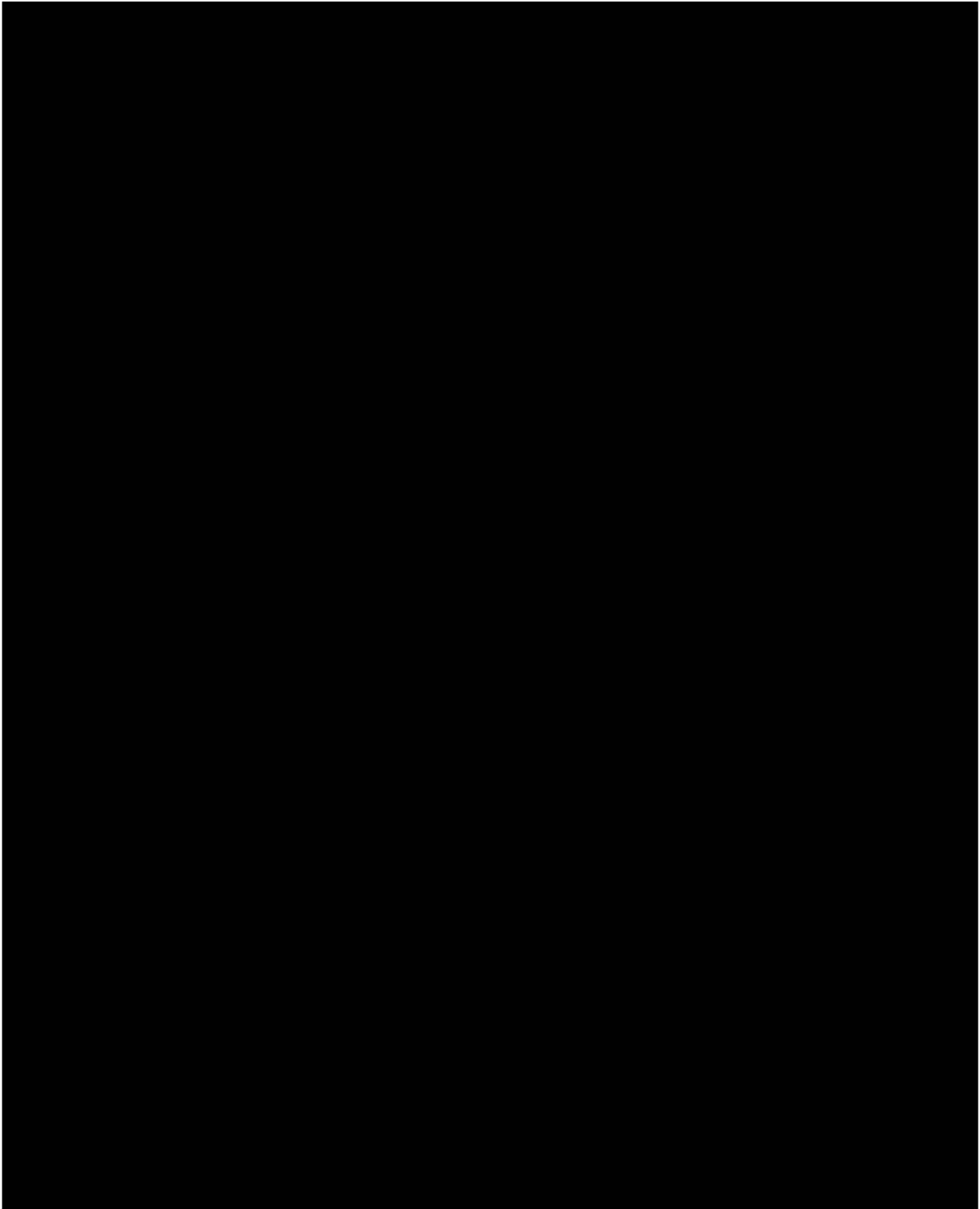
~~(S)~~ Counsel for Mr. al Baluchi previously argued that “[In the protective order, the government has] set up the system so that if there's rapport built, it is with the FBI and the CIA. If there's identification shown, it's the identification of the FBI and CIA as opposed to the defense investigators.”⁹ There is simply no room for objectivity in the total control exercised by the government under Protective Order #4. The government concedes this argument in AE524FFF.



⁹ ~~(S)~~ T. 4/30/2018 at 19318.

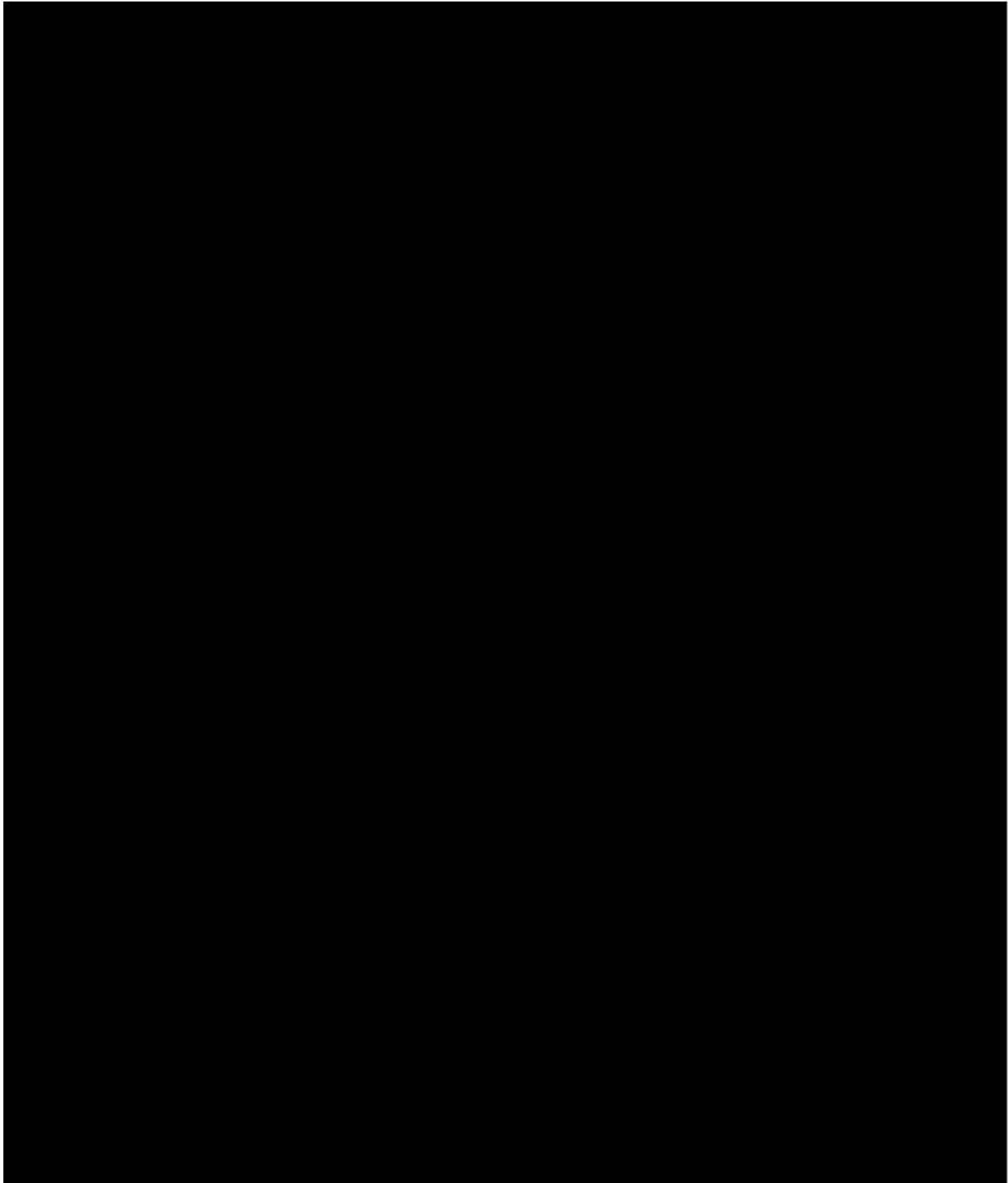
~~UNCLASSIFIED//FOUO~~

~~UNCLASSIFIED//FOUO~~



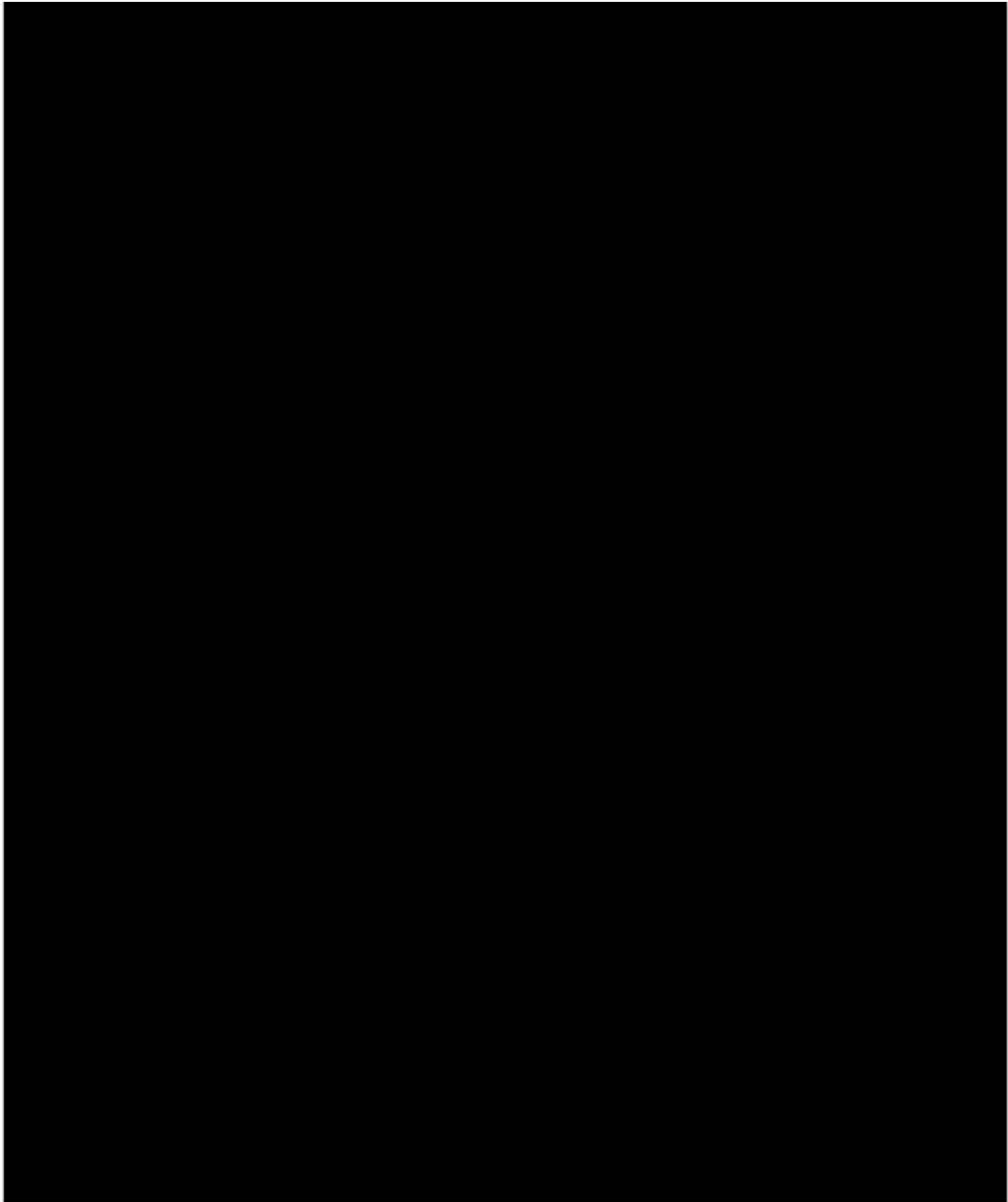
~~UNCLASSIFIED//FOUO~~

~~UNCLASSIFIED//FOUO~~



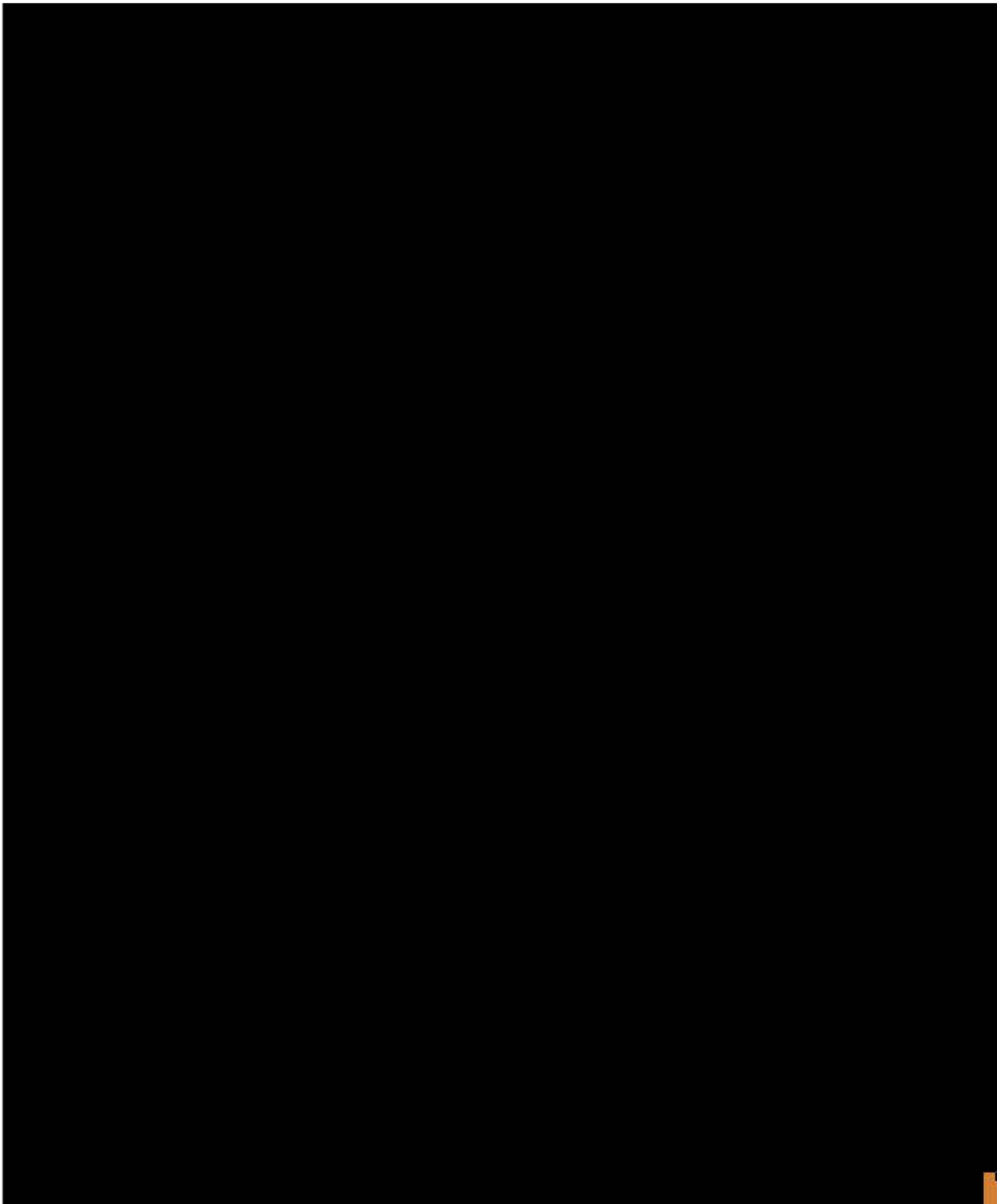
~~UNCLASSIFIED//FOUO~~

~~UNCLASSIFIED//FOUO~~



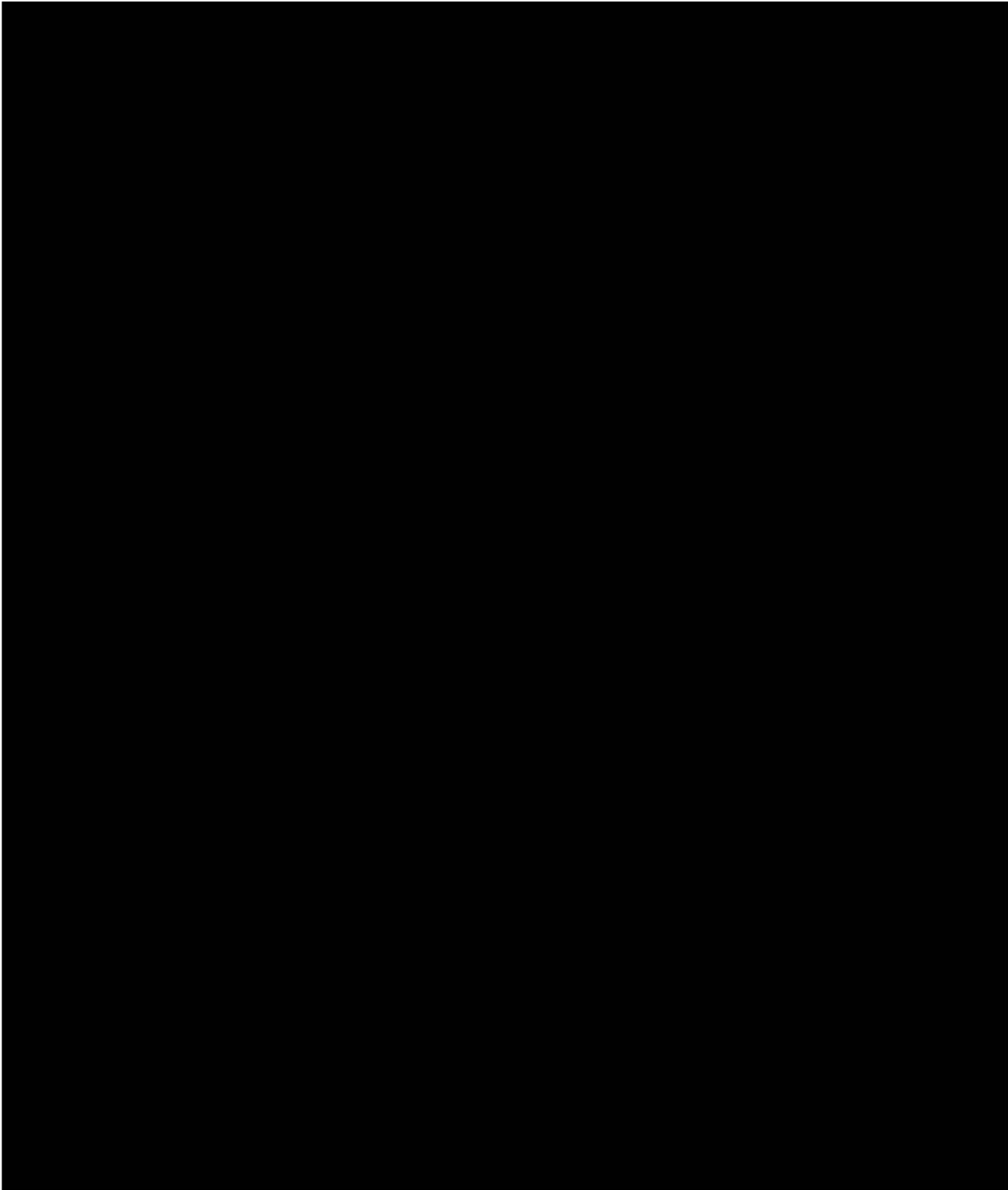
~~UNCLASSIFIED//FOUO~~

~~UNCLASSIFIED//FOUO~~



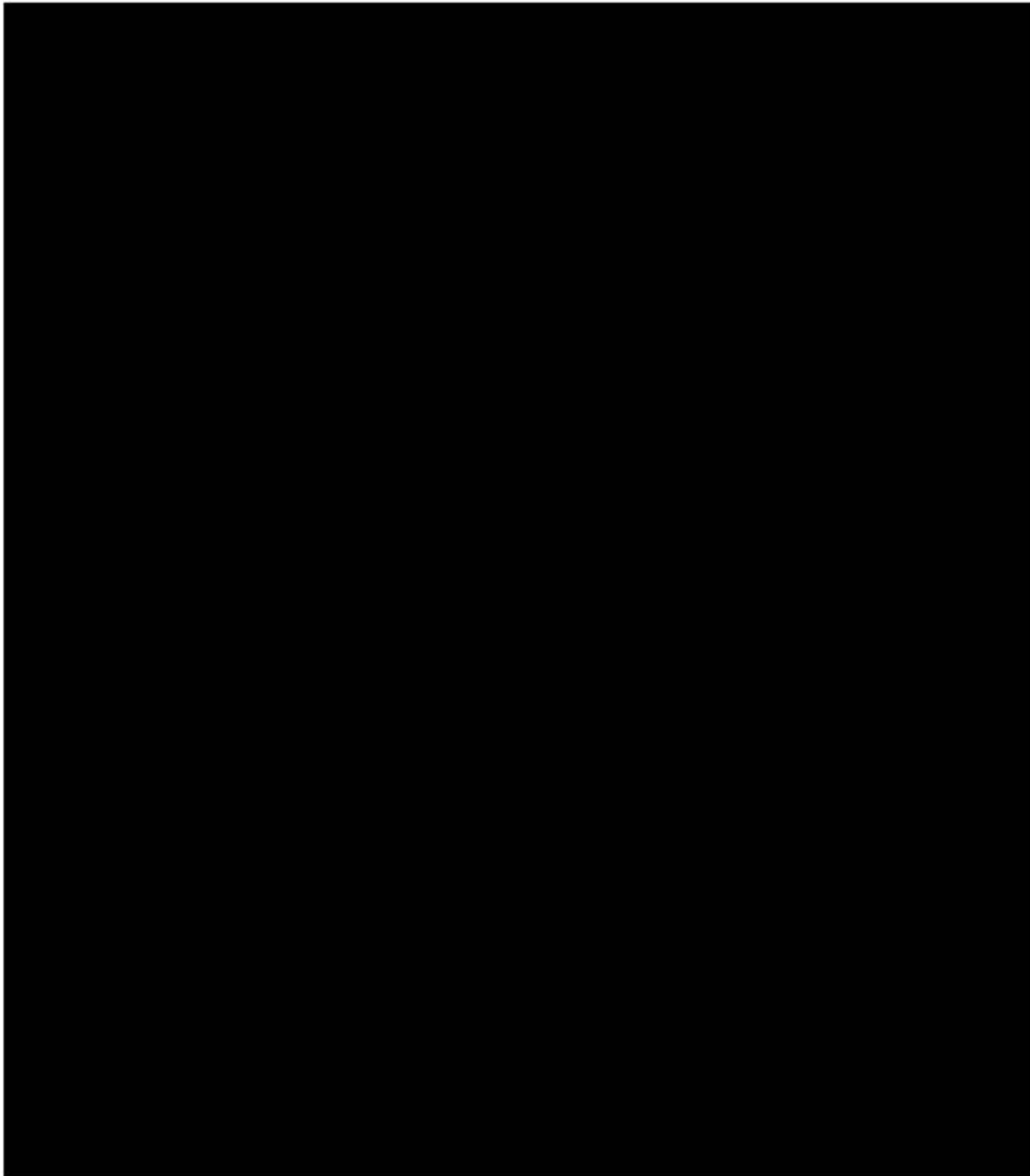
~~UNCLASSIFIED//FOUO~~

~~UNCLASSIFIED//FOUO~~



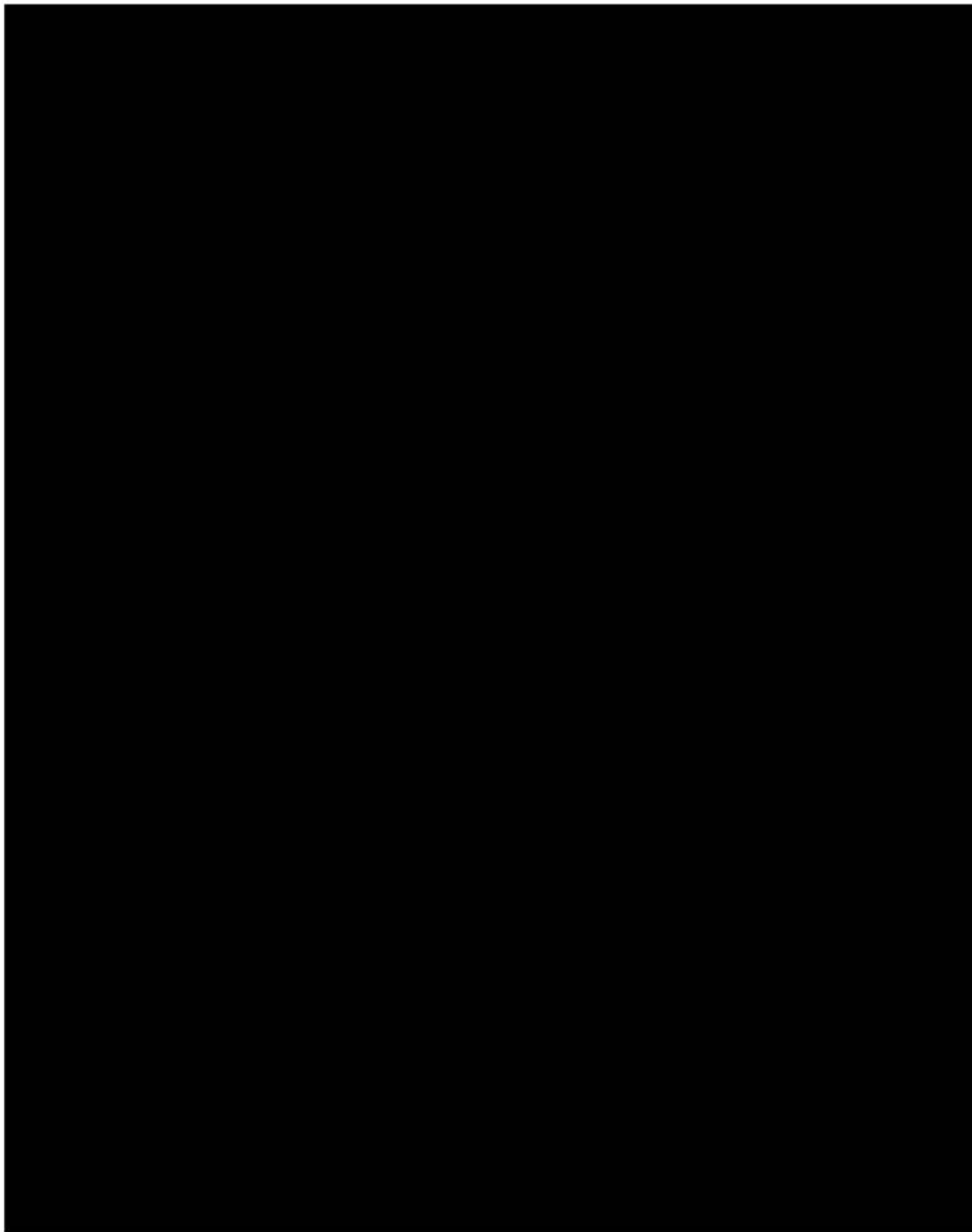
~~UNCLASSIFIED//FOUO~~

~~UNCLASSIFIED//FOUO~~



~~UNCLASSIFIED//FOUO~~

~~UNCLASSIFIED//FOUO~~



~~UNCLASSIFIED//FOUO~~

~~UNCLASSIFIED//FOUO~~

lengthy interactions with government personnel while incommunicado. Engagement with these witnesses must be handled, from beginning to end, by the defense for the defense. The military commission must revoke Protective Order #4 or dismiss the charges against Mr. al Baluchi.

3. ~~(U)~~ **Attachments:**

A. ~~(U)~~ Certificate of Service

~~(U)~~ Very respectfully,

//s//
JAMES G. CONNELL, III
Learned Counsel

//s//
STERLING R. THOMAS
Lt Col, USAF
Defense Counsel

//s//
ALKA PRADHAN
Defense Counsel

//s//
BENJAMIN R. FARLEY
Defense Counsel

//s//
MARK E. ANDREU
Defense Counsel

Counsel for Mr. al Baluchi

~~UNCLASSIFIED//FOUO~~

~~UNCLASSIFIED~~

~~(U)~~ Attachment A

~~UNCLASSIFIED~~

~~UNCLASSIFIED~~

~~(S)~~ CERTIFICATE OF SERVICE

~~(S)~~ I certify that on the 12th day of February, 2019, I electronically filed the foregoing document with the Clerk of the Court and served the foregoing on all counsel of record by email.

~~(S)~~ //s//

JAMES G. CONNELL, III
Learned Counsel

~~UNCLASSIFIED~~