

[REDACTED]

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA
UNITED STATES OF AMERICA

v.

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

[REDACTED] E600C (AAA Amend)

UNCLASSIFIED NOTICE

[REDACTED] Mr. al Baluchi's Reply to the
Government's Response to Mr. al Baluchi's
Motion to Compel Discovery Requested in DR-
280-AAA

[REDACTED] 14 February 2019

[REDACTED] In accordance with the Military Commission Trial Judiciary Rules, the defense
provides this unclassified notice that it has filed a classified version of the above captioned motion.
The classified version has been filed by hand delivery to the Trial Judiciary and to the parties.

[REDACTED] Attachment:

[REDACTED] A: Certificate of Service

[REDACTED] Very respectfully,

[REDACTED] /s/
JAMES G. CONNELL, III
Learned Counsel

[REDACTED] /s/
STERLING B. THOMAS
Lt Col, USAF
Defense Counsel

[REDACTED] /s/
AIKA PRADHAN
Defense Counsel

[REDACTED] /s/
BENJAMIN R. FARLEY
Defense Counsel

[REDACTED] /s/
MARK E. ANDREU
Capt, USAF
Defense Counsel

Counsel for Mr. al Baluchi

[REDACTED]

[REDACTED]

[REDACTED]

~~(C)~~ Attachment A

[REDACTED]

[REDACTED]

CERTIFICATE OF SERVICE

I certify that on the 14th day of February, 2019, I hand delivered the foregoing document to be filed with the Clerk of the Court and served on all counsel of record.

/s/
JAMES G. CONNELL, III
Learned Counsel

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MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA

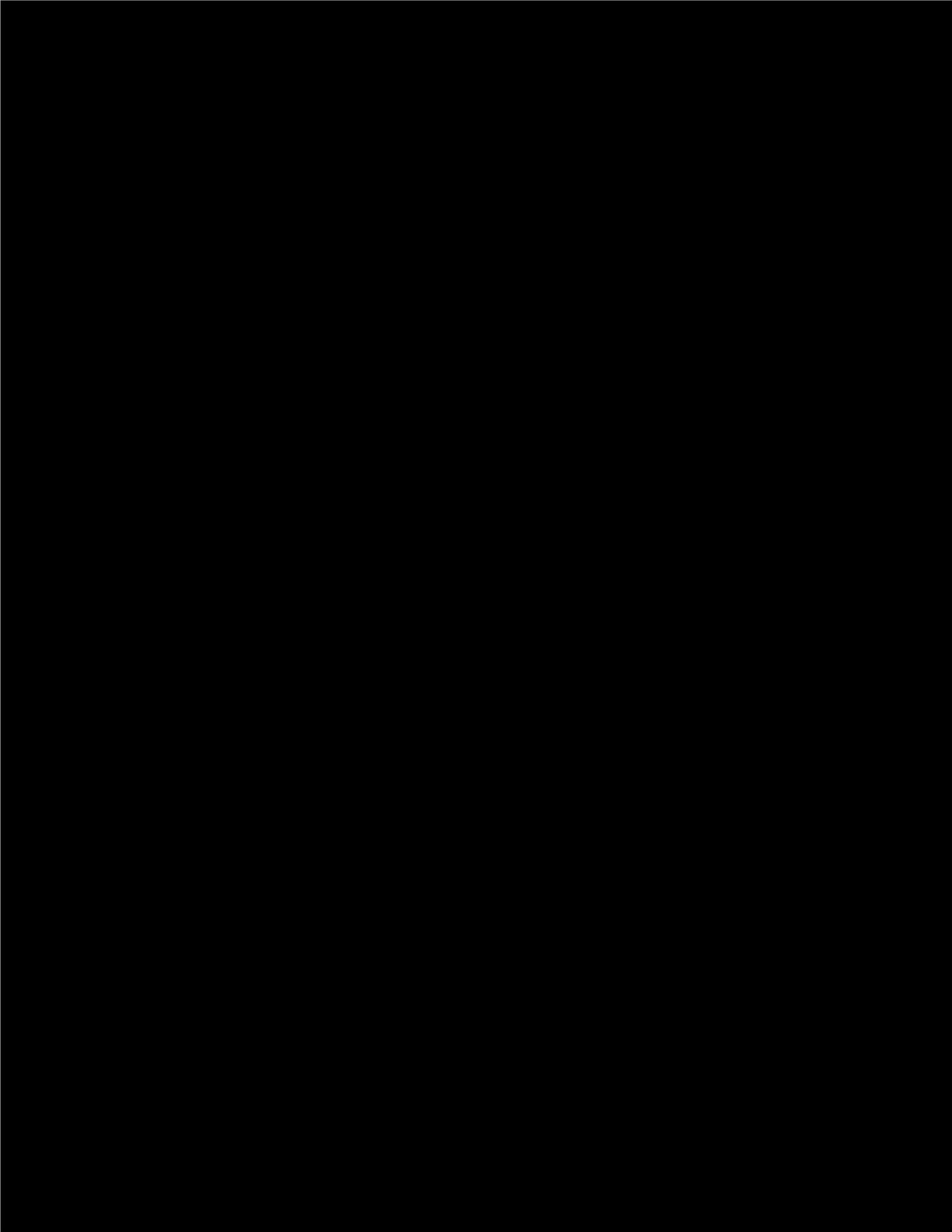
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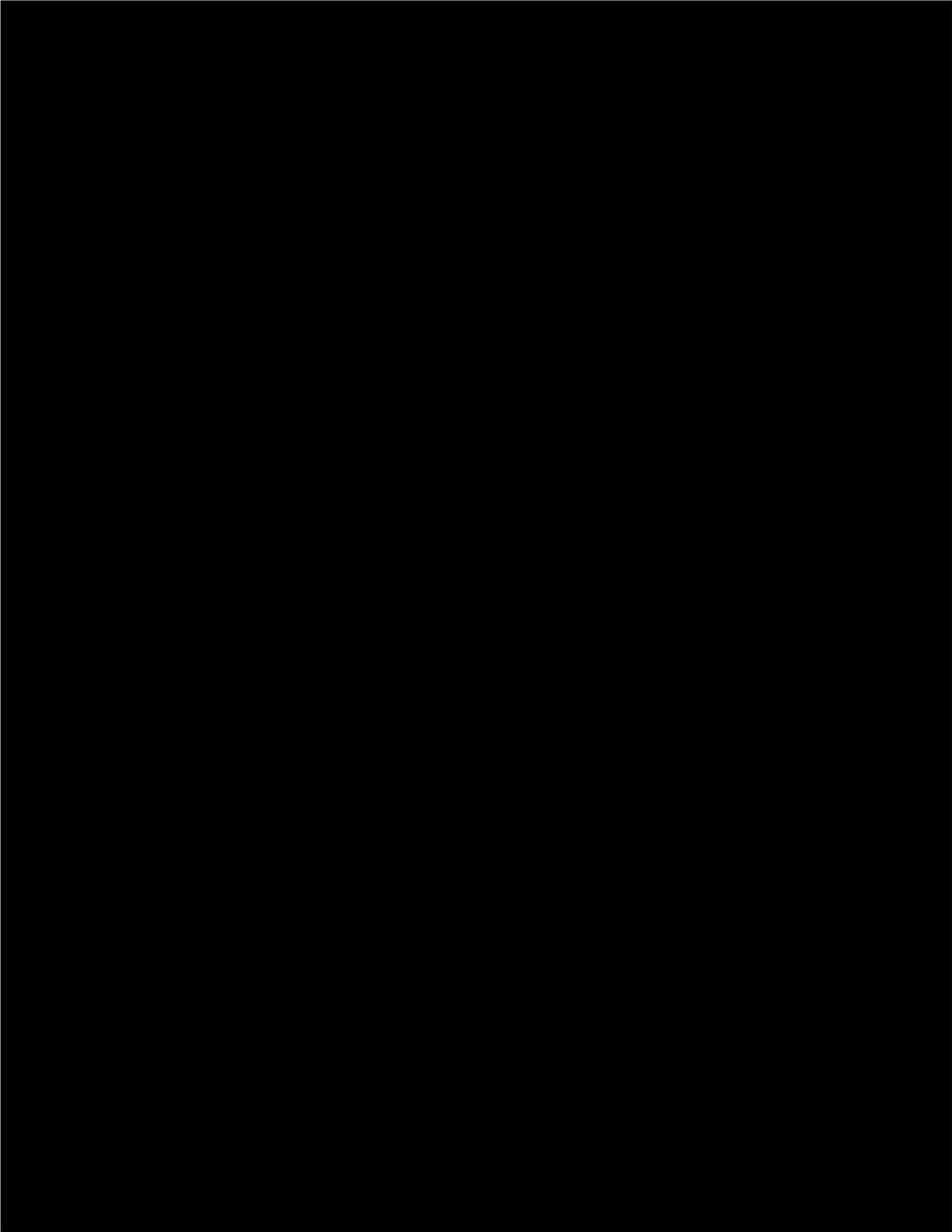
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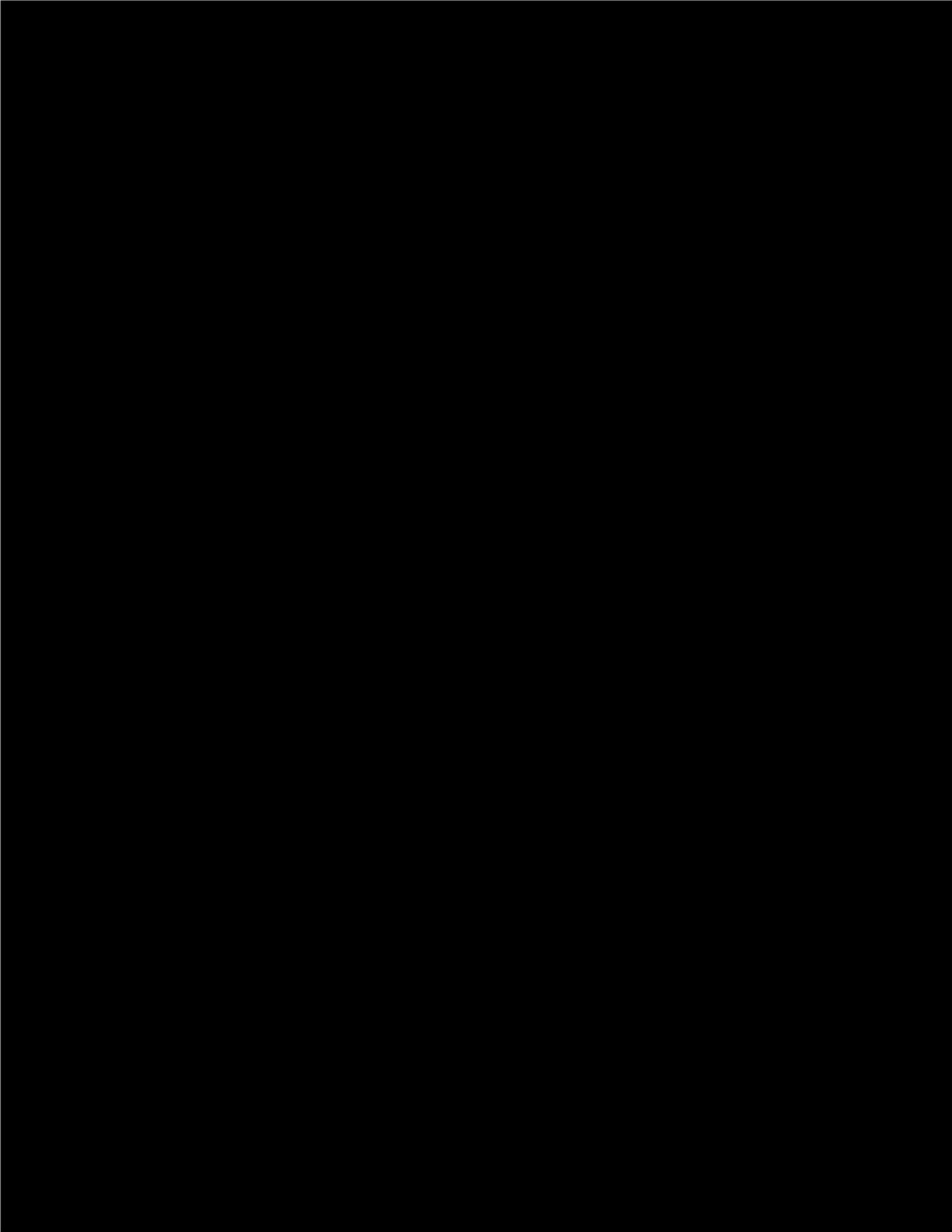
~~(U)~~ AE600C (AAA Amend)*

~~(U)~~ Mr. al Baluchi's Reply to the
Government's Response to Mr. al Baluchi's
Motion to Compel Discovery Requested in DR-
280-AAA

~~(U)~~ 14 February 2019







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~~(U)~~ In its reply, the government articulates a novel standard for providing Mr. al Baluchi discovery. After citing cases that stand for the proposition that exculpatory evidence is evidence that tends to negate or reduce guilt or punishment for the charges a defendant faces, the government suggests that it must only produce “*per se* exculpatory” evidence to Mr. al Baluchi. It implies that its “*per se* exculpatory” standard demands only production of evidence that would absolutely exonerate Mr. al Baluchi—a sort of silver bullet of innocence like that found in DNA evidence. Whatever the government means by this standard, it is not the standard applicable to Mr. al Baluchi’s trial before this military commission.

~~(U)~~ Under R.M.C. 701(e), exculpatory evidence that must be produced to Mr. al Baluchi includes any evidence which “reasonably tends to (A) [n]egate the guilt of the accused of an offense charged; (B) [r]educe the degree of guilt of the accused with respect to an offense charged; or (C) [r]educe the punishment.” The same is true under controlling Supreme Court precedent.⁹

⁹~~(U)~~ *Brady v. Maryland*, 373 U.S. 83, 88 (1963) (“A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant.”). See also *Abdulmalik v. Obama*, 802 F. Supp. 2d 1, 1 (D.D.C. 2011) (defining exculpatory evidence as “all reasonably available evidence in the Government’s possession or any evidence that *tends to materially undermine the evidence* that the Government intends to rely on in its case-in-chief, including any evidence or information that undercuts the reliability and/or credibility of the Government’s evidence (i.e., such as evidence that casts doubt on a speaker’s credibility, evidence that undermines the reliability of a witness’s identification of [the defendant], or evidence that indicates a statement is unreliable because it is the product of abuse, torture, or mental or physical incapacity, as well as any material inconsistencies or statement”); *In re Kline*, 113 A.3d 202, 208 (D.C. 2015) (“The standard adopts

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In this case, the discovery Mr. al Baluchi seeks reasonably tends to negate or reduce his guilt, first by helping him demonstrate the minimal role he had in the 9/11 conspiracy—if he had any role at all—and, second, by helping him demonstrate the absence of hostilities between the United States and al Qaeda prior to the 11 September 2001 attacks. Additionally, by demonstrating the minimal role that Mr. al Baluchi could have played in the 9/11 conspiracy, the discovery Mr. al Baluchi seeks tends to reduce the punishment which Mr. al Baluchi would be subject to if he were convicted.¹⁰ Consequently, the government must produce the discovery Mr. al Baluchi seeks through DR-280-AAA and DR-280A-AAA.

B. ~~(U)~~ Mr. al Baluchi is under no obligation to choose an alternative source of evidence to ease the government's burden.

~~(U)~~ In its reply, the government also argues that Mr. al Baluchi must choose some alternative and less onerous means of mounting his defense in lieu of receiving the discovery to which he is entitled. But the government does not get to dictate to Mr. al Baluchi the defense that Mr. al Baluchi desires to mount.¹¹ Instead, the government must produce material or exculpatory

the definition of exculpatory material contained the Supreme Court's decision in *Brady v. Maryland*, that is, material that tends to negate guilt or reduce punishment.”).

¹⁰ ~~(U)~~ See *Burrage*, 571 U.S. at 21; *Tison*, 481 U.S. at 158; *Enmond*, 458 U.S. at 797.

¹¹ ~~(U)~~ See *Old Chief v. United States*, 519 U.S. 172, 186-189 (1997) (“Unlike an abstract premise [found in a stipulation], whose force depends on going precisely to a particular step in a course of reasoning, a piece of evidence may address any number of separate elements, striking hard just because it shows so much at once Evidence thus has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict.”).

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evidence to Mr. al Baluchi or assert some privilege over the evidence his discovery requests reach. Whether Mr. al Baluchi uses a stipulation at trial to demonstrate that his role in the 9/11 conspiracy was minimal or non-existent is a choice left to Mr. al Baluchi and one that he need not make until he has received, reviewed, and analyzed all the discovery to which he is entitled.

~~(U)~~ The single district court case that the government cites in support of its view that Mr. al Baluchi must choose a less onerous alternative to rebutting the government's case than the discovery to which he is entitled, *United States v. Apodaca*,¹² does not actually stand for this proposition. Instead, the *Apodaca* court determined that the discovery sought by the defendants was immaterial under FED. R. EVID. 16. The *Apodaca* defendants requested discovery that they only hoped would prove material and in order to verify that the government complied with its own minimization procedures—a quintessential fishing expedition. The court did not refuse the *Apodaca* defendants the discovery they sought because it was too onerous. Rather, the court found that they were simply not entitled to the discovery under FED. R. EVID. 16.

~~(U)~~ In contrast to the *Apodaca* defendants, Mr. al Baluchi seeks evidence that is both exculpatory and material to his defense. Each of these two independent grounds for discovery require the government produce the information he seeks. As Mr. al Baluchi has already shown, the discovery he requests is exculpatory and material to his case because it “refut[es] . . . the

¹² ~~(U)~~ 287 F. Supp. 3d 21 (D.D.C. 2017).

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government's case in chief."¹³ It does so by assisting Mr. al Baluchi in demonstrating the minimal nature of any role he may have had in the 9/11 conspiracy. And it does so by assisting Mr. al Baluchi in demonstrating the absence of hostilities between the United States and al Qaeda prior to the 11 September 2001 attacks. Both of these effects are exculpatory.



(C) Mr. al Baluchi is entitled to the discovery he seeks through DR-280-AAA and DR-280A-AAA because it is material and because it is exculpatory. The government's refusal to produce it to him is unjustified and the military commission must compel it to do so.

¹³ (C) *Apodaca*, 287 F. Supp. 3d at 39 (quotations omitted) (quoting the D.C. Circuit's standard for materiality under FED. R. EVID. 16 and citing *United States v. Rashed*, 234 F.3d 1280, 1285 (D.C. Cir. 2000)).

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3. ~~(U)~~ Attachments:

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

~~(U)~~ Very respectfully,

~~(U)~~ //s//
JAMES G. CONNELL, III
Learned Counsel

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STERLING R. THOMAS
Lt Col, USAF
Defense Counsel

~~(U)~~ //s//
ALKA PRADHAN
Defense Counsel

~~(U)~~ //s//
BENJAMIN R. FARLEY
Defense Counsel

~~(U)~~ //s//
MARK E. ANDREU
Capt, USAF
Defense Counsel

~~(U)~~ Counsel for Mr. al Baluchi

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~~XXXX-XXXX-XXXX~~ [REDACTED]

~~(U)~~ Attachment A

[REDACTED]

~~XXXX-XXXX-XXXX~~ [REDACTED]

~~FOR ORIGINALLY~~ [REDACTED]

~~(U)~~ CERTIFICATE OF SERVICE

~~(U)~~ I certify that on the 14th day of February, 2019, I hand delivered the foregoing document to be filed with the Clerk of the Court and served on all counsel of record.

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JAMES G. CONNELL, III
Learned Counsel

~~FOR ORIGINALLY~~ [REDACTED]