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MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN ATTASH, RAMZI BINALSHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI</p>	<p>AE 616D (GOV)</p> <p>(S) Government Unclassified Notice Of Classified Filing</p> <p>22 January 2019</p>
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1. (S) In accordance with the Military Commission Trial Judiciary Rules, the Government 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 Clerk of Court and counsel of record.

2. (S) Attachment

a. (S) Certificate of Service, dated 22 January 2019.

_____/s/_____
Clay Trivett
Managing Trial Counsel
Office of the Chief Prosecutor
Office of Military Commissions



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(U) ATTACHMENT A

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<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>KHALID SHAIKH MOHAMMAD; WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH; RAMZI BINALSHIBH; ALI ABDUL AZIZ ALI; MUSTAFA AHMED ADAM AL HAWSAWI</p>	<p>AE 616D (GOV)</p> <p>(S) Government Response To Mr. Ali's Objection to Closure of Interpreter's Testimony</p> <p>22 January 2019</p>
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1. ~~(S)~~ **Timeliness**

~~(S)~~ The Prosecution timely files this Response pursuant AE 350SSS/AE 616, Order, Expedited Briefing Schedule.

2. ~~(S)~~ **Relief Sought**

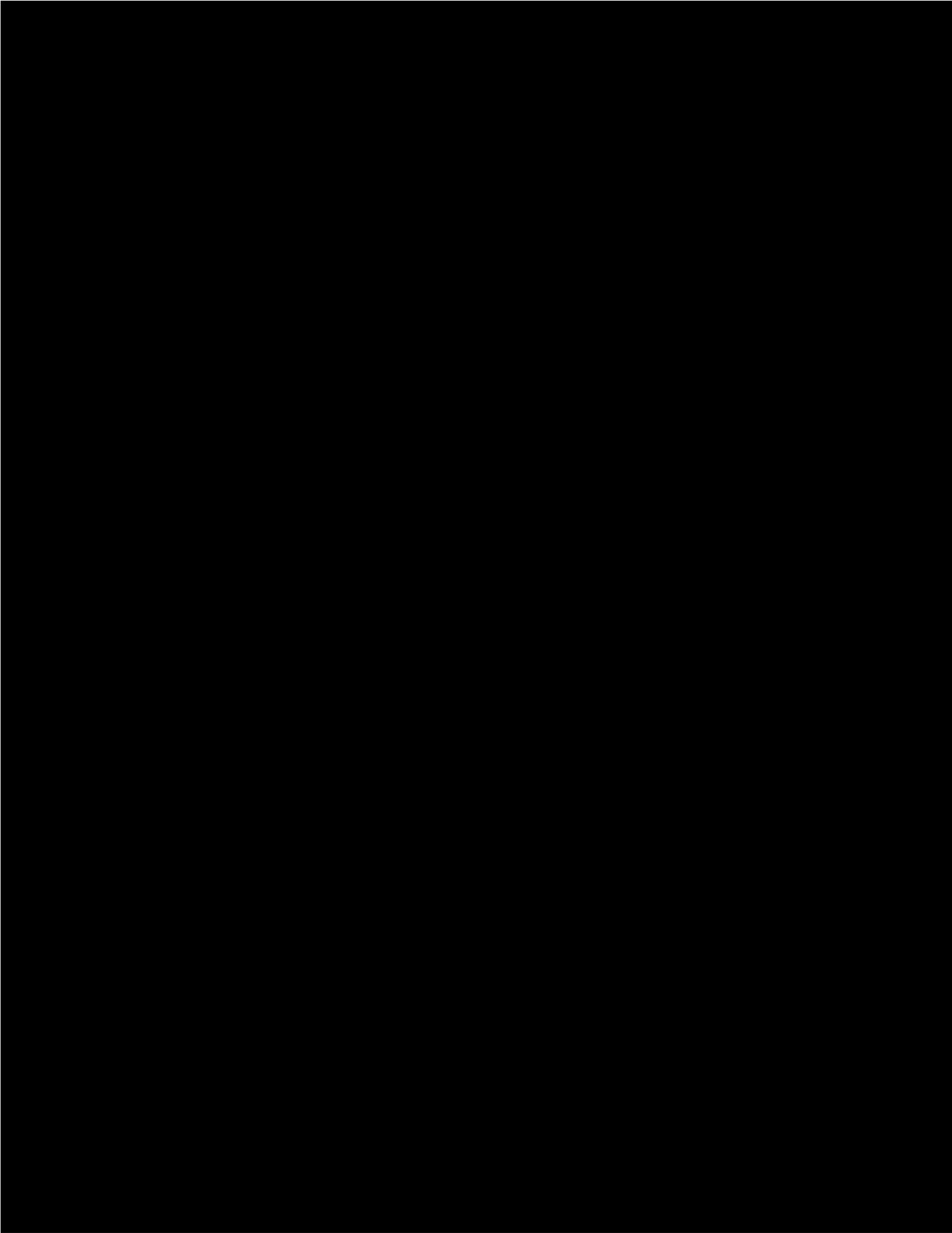
~~(S)~~ The Prosecution respectfully requests that the Commission overrule the Defense objection as set forth in AE 616A (AAA), Mr. Ali's Objection to Closure of Interpreter's Testimony, and maintain its order in AE 350RRR that any testimony provided by the Former CIA Interpreter Utilized by Mr. Binalshibh's Defense Team (hereinafter "the Former Interpreter") must occur in a closed hearing pursuant to Rule for Military Commission ("R.M.C.") 806.

3. ~~(S)~~ **Burden of Proof**

~~(S)~~ As the moving party, the Defense must demonstrate by a preponderance of the evidence that the requested relief is warranted. *See* R.M.C. 905(c)(1)-(2).

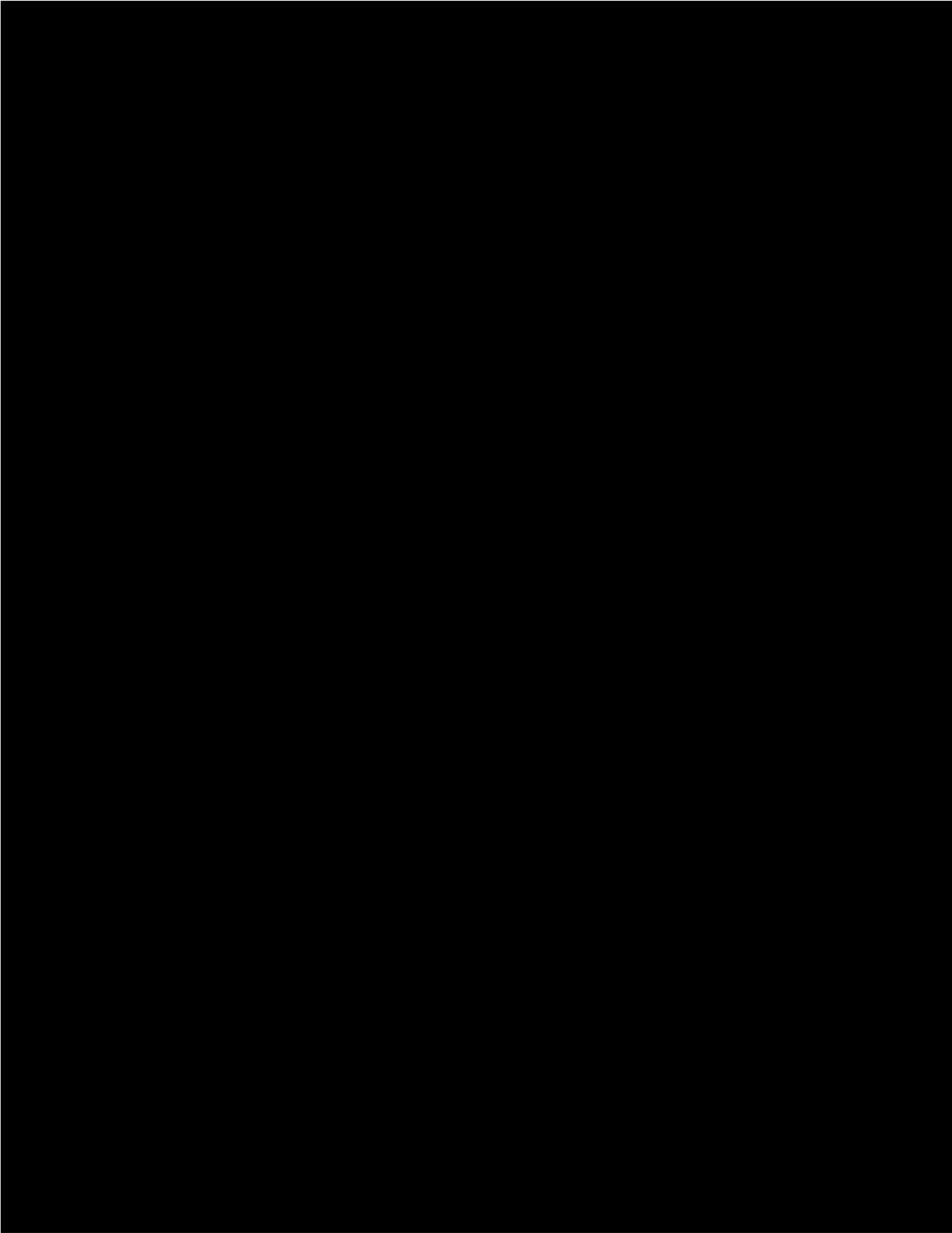
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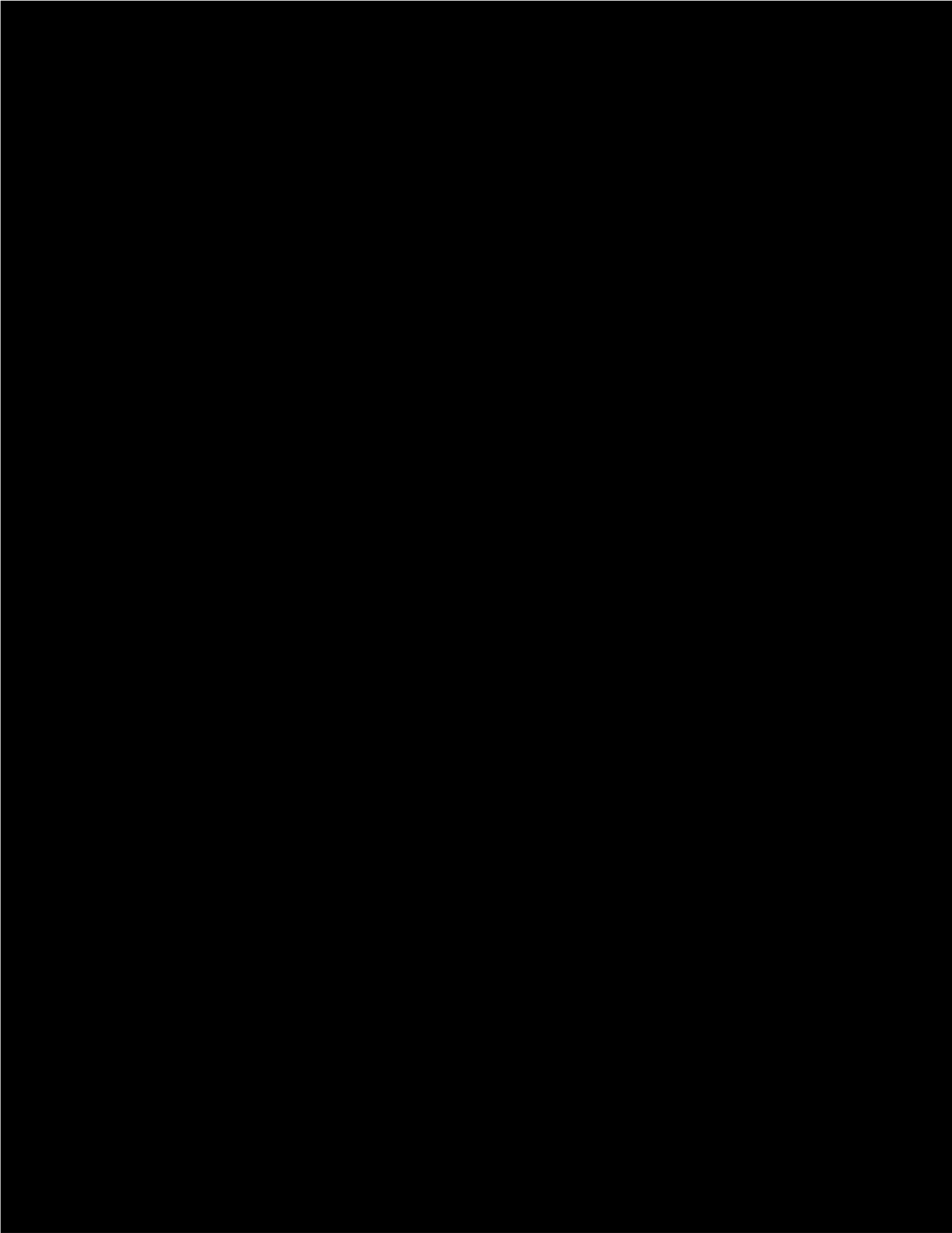
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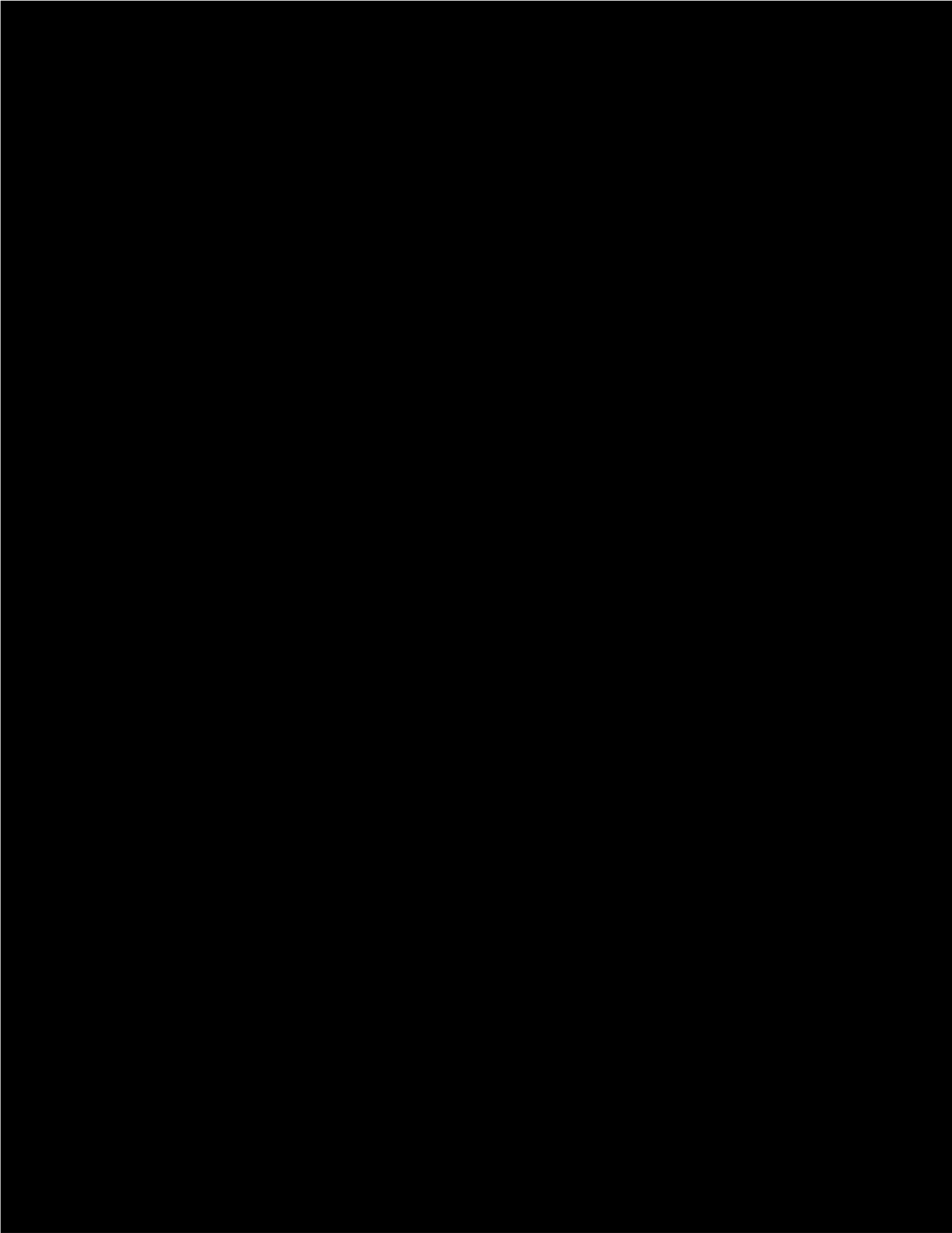
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5. ~~(S)~~ Law and Argument

I. ~~(S)~~ Applicable Legal Standards

A. ~~(S)~~ The M.C.A. Protects Classified Information from Disclosure

~~(S)~~ The Military Commissions Act of 2009 (hereinafter “M.C.A.”) protects classified information from disclosure, stating “[c]lassified information shall be protected and is privileged from disclosure if disclosure would be detrimental to national security.” 10 U.S.C. § 949p-1(a); M.C.R.E. 505(a). Sections 949d(c) and 949a of the M.C.A., as well as duly promulgated rules, require open proceedings. In order to close a portion of the proceedings to the public, a Military Judge must make specific findings that closure is necessary to protect information the disclosure of which would harm national security or to ensure the physical safety of individuals. 10 U.S.C. § 949d(c)(1)–(2). The exception for protecting national security information includes the

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protection of “intelligence or law enforcement sources, methods, or activities” 10 U.S.C. § 949d(c)(2)(A); *see also generally* R.M.C. 806. In 2011, the Secretary of Defense prescribed the Regulation for Trial by Military Commission, which *inter alia*, provides guidance to trial participants on the handling of classified information and public access to military commission documents including classified and unclassified filings and trial transcripts. *See generally* Department of Defense, Regulation for Trial by Military Commission (2011).

B. (S) The Determination Whether to Classify Information Is Committed Solely to the Executive Branch

(S) As the Prosecution has argued on several occasions, while the Military Judge has ample authority as the presiding officer to ensure the fairness of the proceedings, the determination whether to classify information, and the proper classification thereof, is a matter solely committed to the Executive Branch. *See Dep’t. of Navy v. Egan*, 484 U.S. 518, 527 (1988) and M.C.R.E. 505(f), Discussion (stating the military judge should not conduct a *de novo* review of the classification; rather, the military judge should determine “that the material in question has been classified by the proper authorities in accordance with appropriate regulations.”). Courts consistently have recognized the principle that neither an accused nor the courts can challenge the classification of information. *See United States v. Smith*, 750 F.2d 1215, 1217 (4th Cir. 1984).

(S) The Government has a “‘compelling interest’ in withholding national security information from unauthorized persons in the course of executive business.” *Egan*, 484 U.S. at 527. The Supreme Court has repeatedly stressed that courts should be “especially reluctant to intrude upon the authority of the Executive in . . . national security affairs.” *Egan*, 484 U.S. at 530; *see also, CIA v. Sims*, 471 U.S. 159, 168-69 (1985) (the Director of Central Intelligence has

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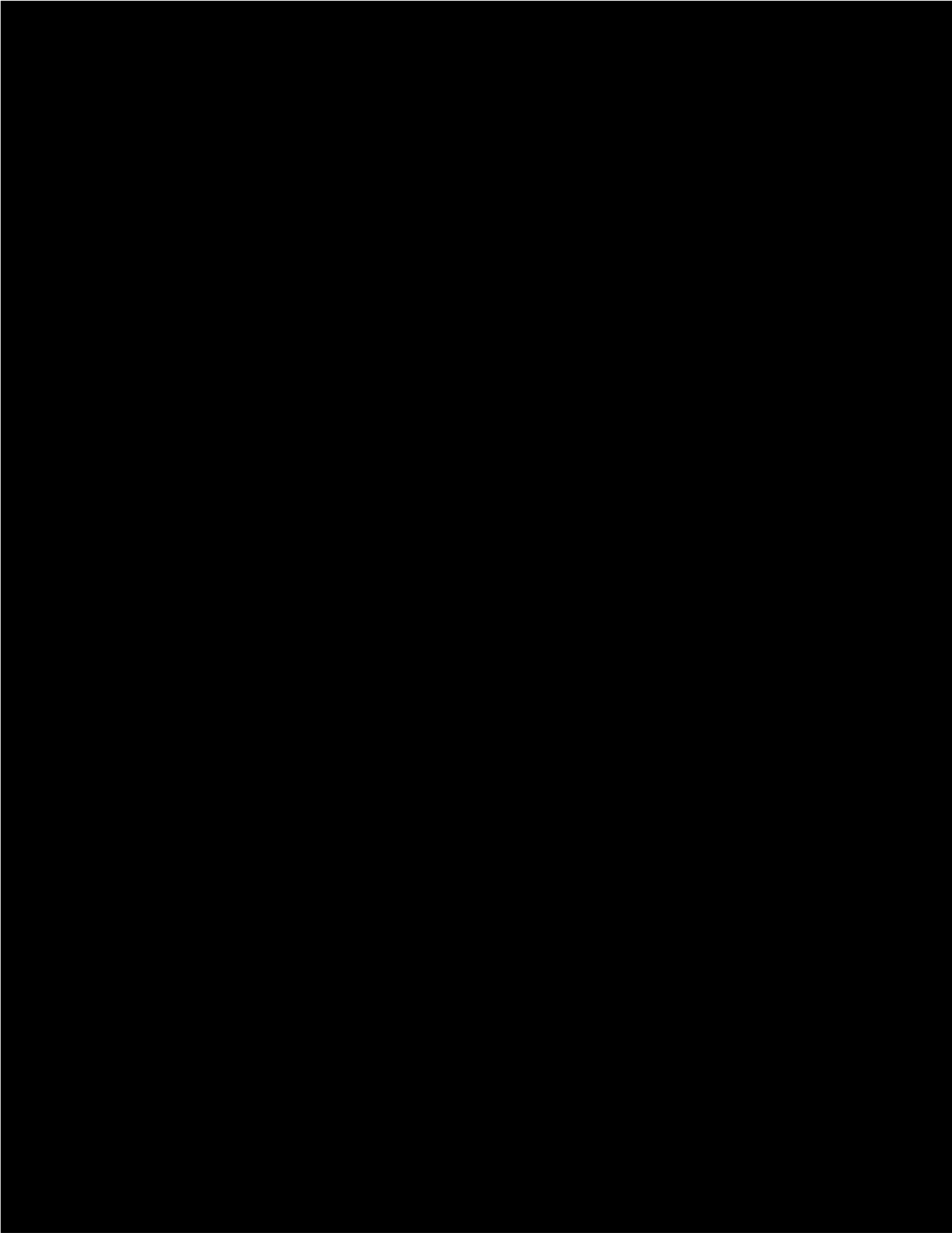
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broad authority to protect all sources of information from disclosure); *Haig v. Agee*, 453 U.S. 280, 307 (1981) (protecting the secrecy of the U.S. Government's foreign intelligence operations is a compelling interest).



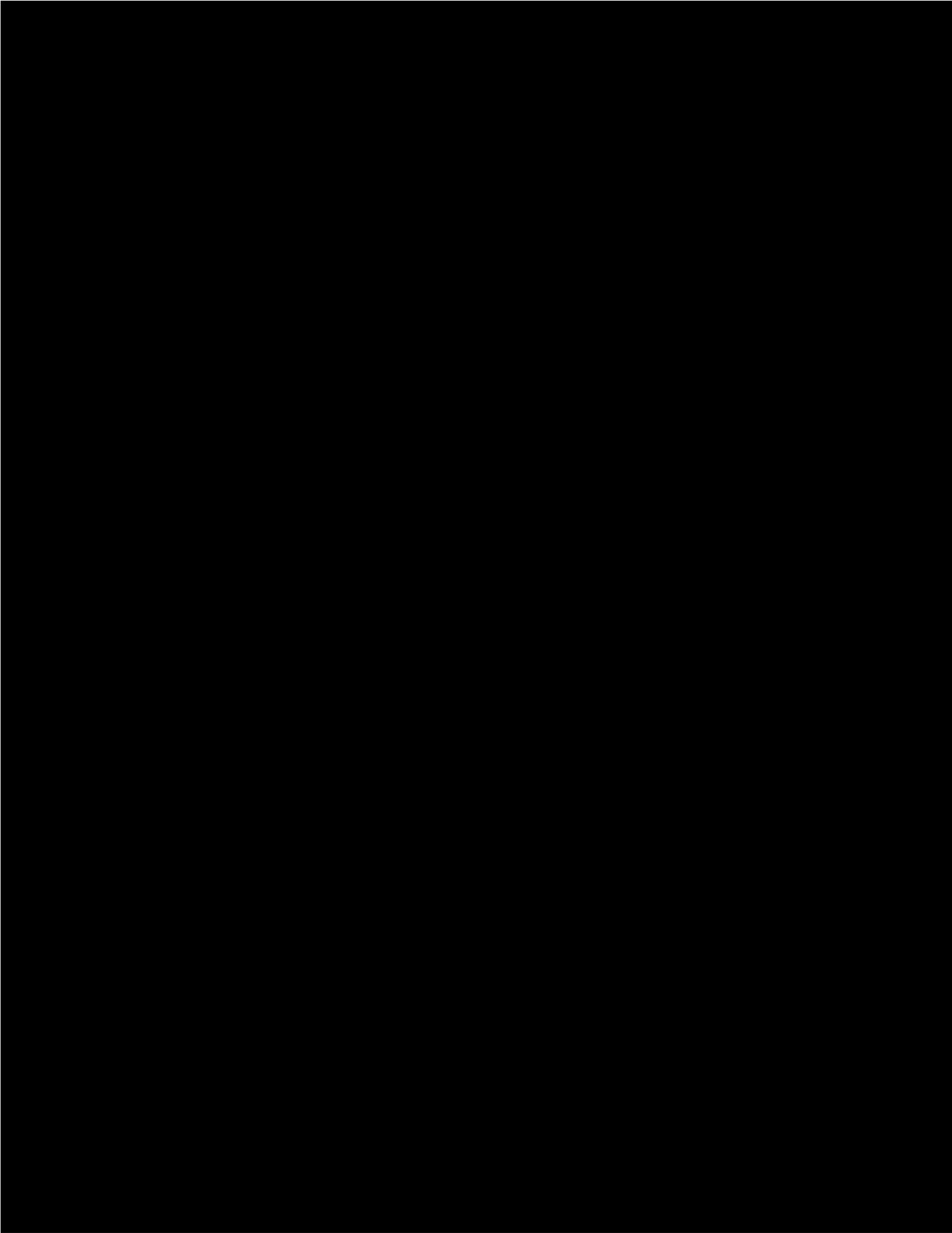
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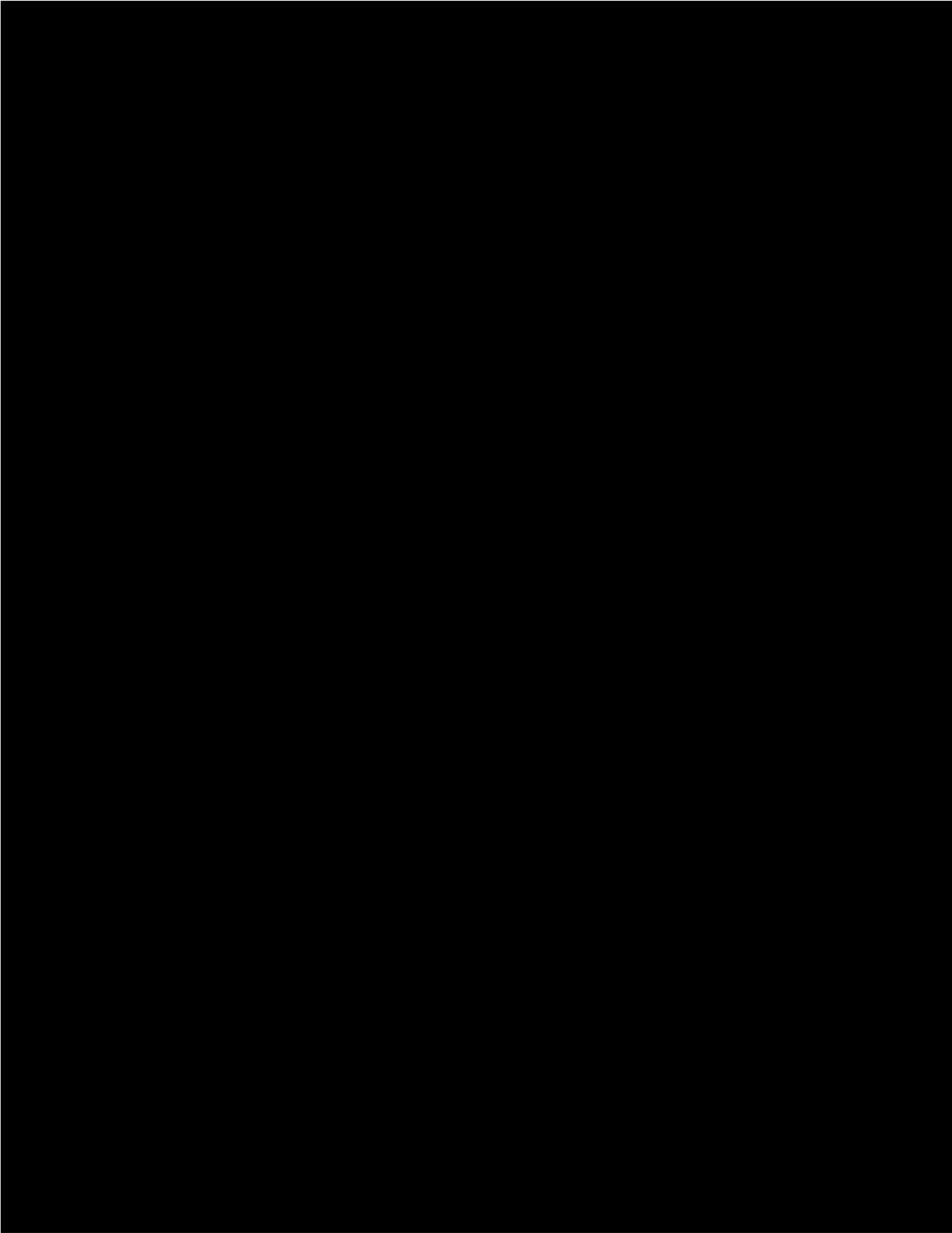
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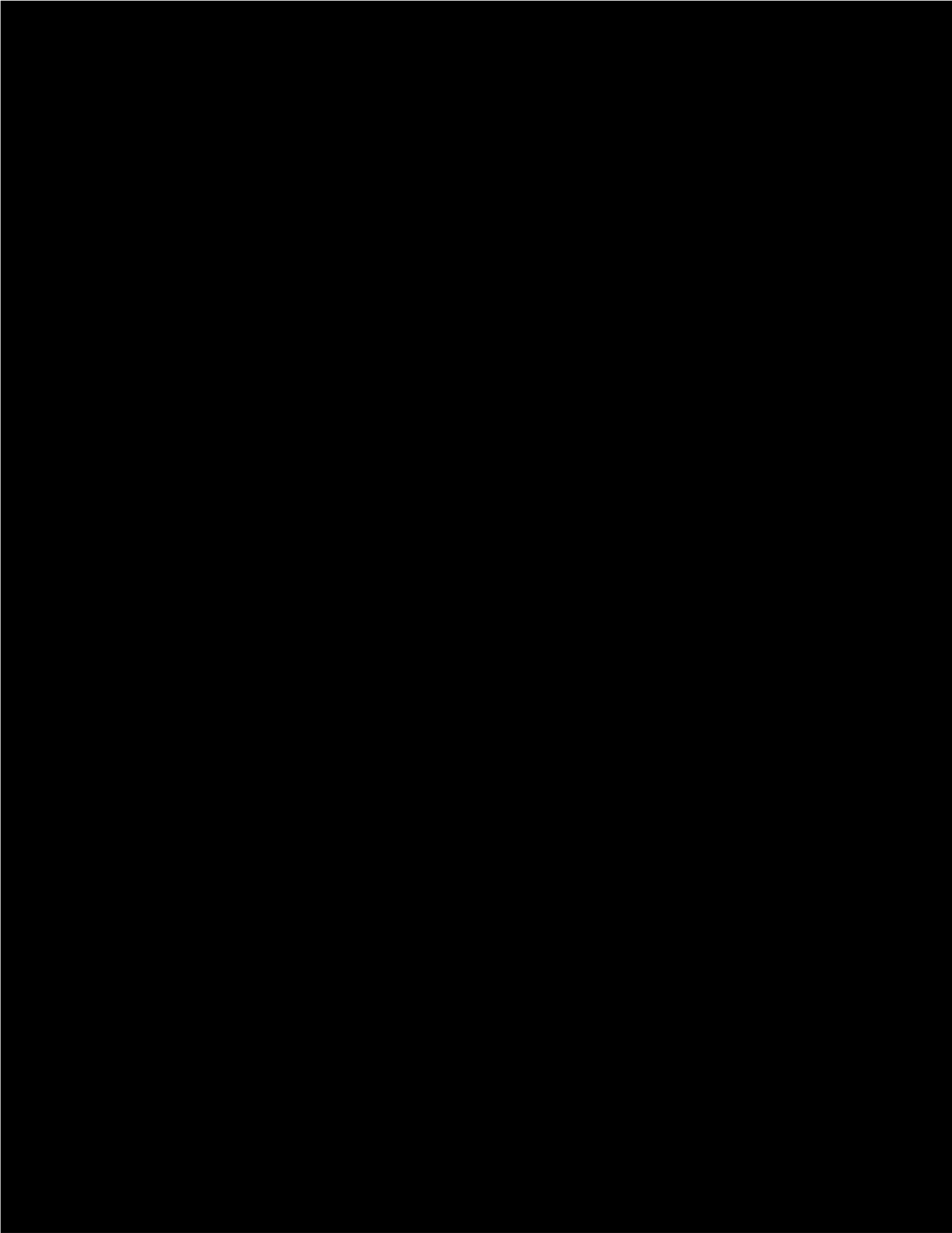
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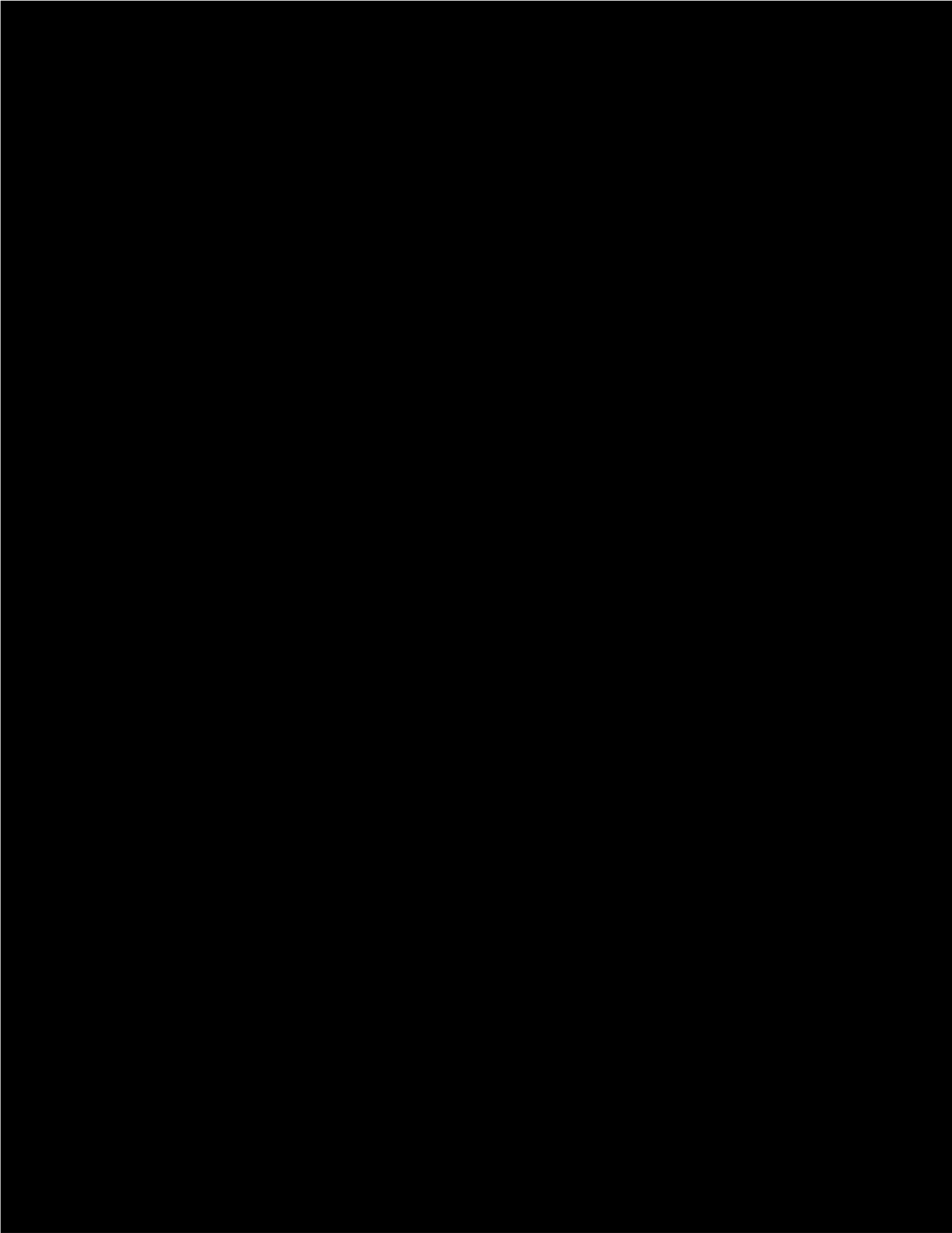
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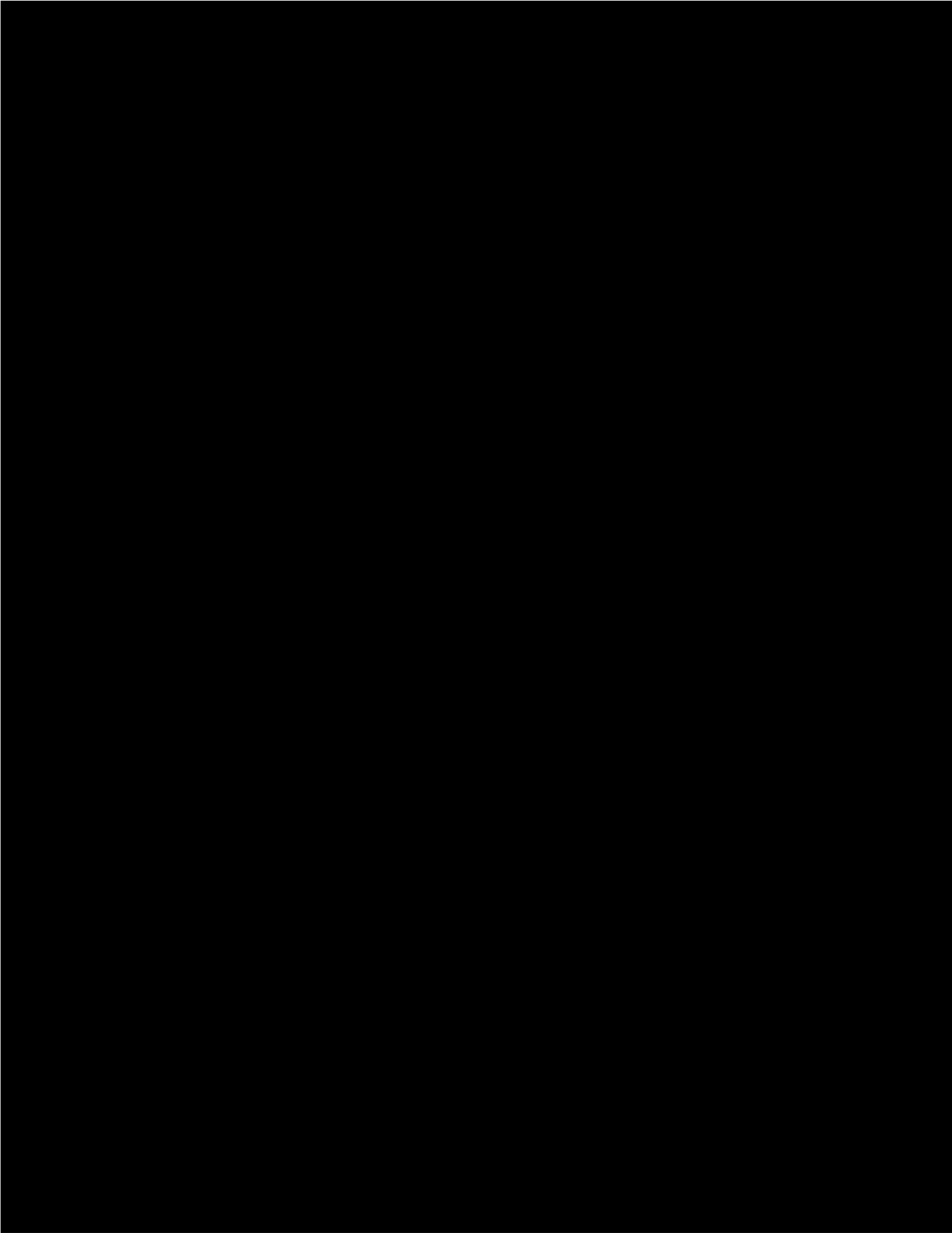
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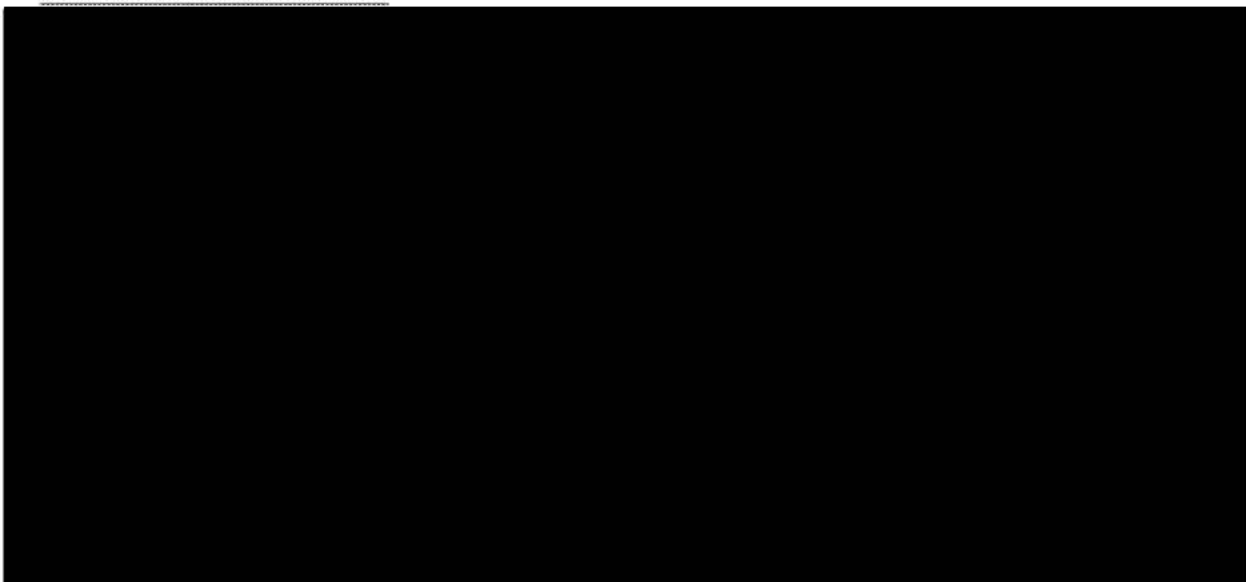


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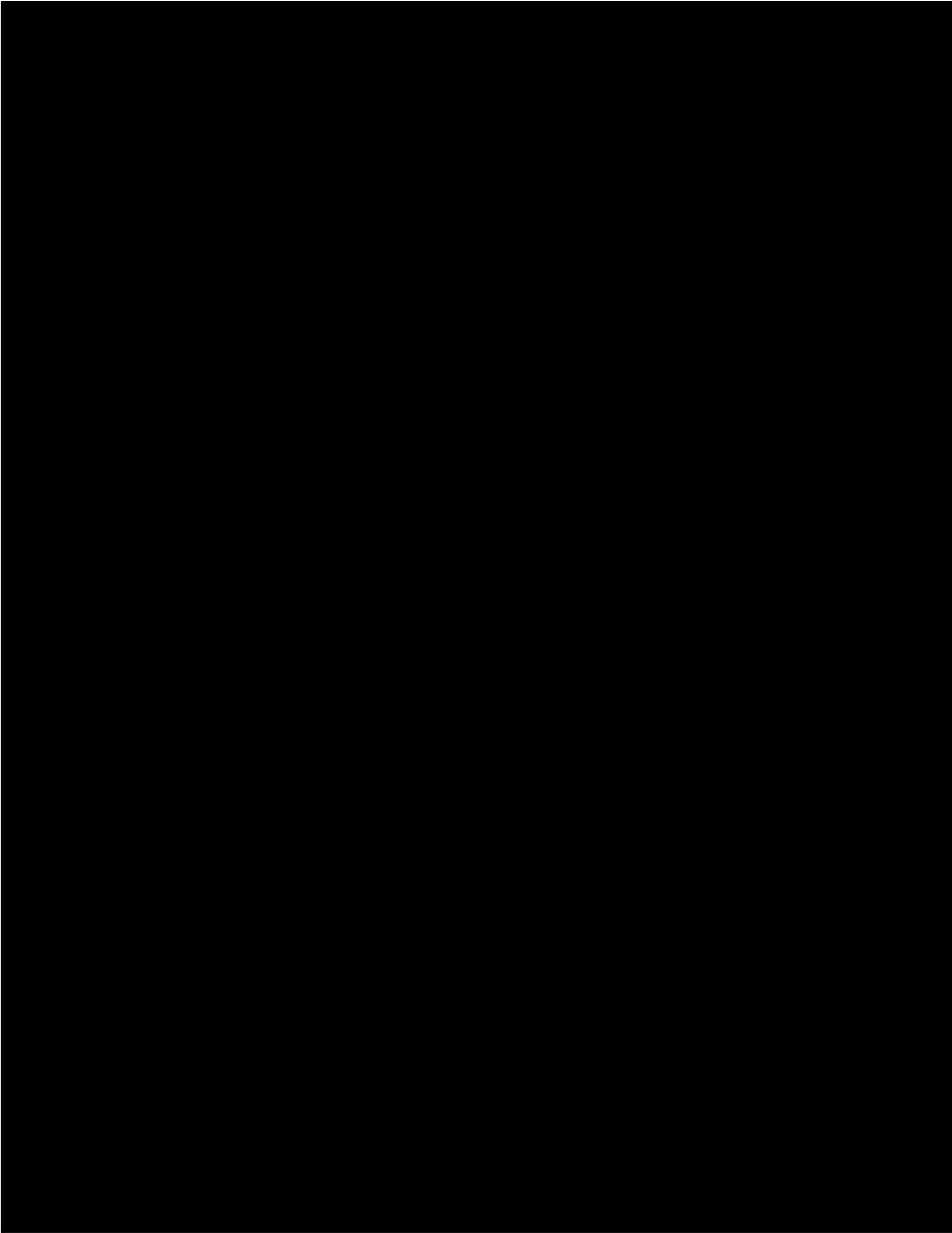
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pursuant to R.M.C. 806, it would simply fail in its duty to protect classified information⁶ if it permitted such examination in open court, when this individual's name and likeness has already been disclosed to the public. Though *consideration* by a military judge of bifurcated proceedings is a sound public trial practice consistent with R.M.C. 806, there is certainly no *requirement* that every closed session have a counterpart open session, and the adoption of an automatic bifurcation rule would be error in light of the national security interests every military commission must protect. In certain situations, bifurcation cannot effectively protect classified information. This is one of those.

~~(TS//OC/NF)~~ The Prosecution further asserts that the evidence will show that Mr. Binalshibh intentionally orchestrated this entire set-up in order to publicly identify the Former Interpreter to the public and media; including by making a by-name special request for Mr. [REDACTED] to attend the February 2015 hearing after he had already voluntarily resigned from his position on the Defense team. Mr. Binalshibh succeeded in doing so, and this individual's

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7. ~~(S)~~ Oral Argument

~~(S)~~ The Prosecution does not request oral argument. Further, the Prosecution strongly posits that this Commission should dispense with oral argument as the facts and legal contentions are adequately presented in the material now before the Commission and argument would not add to the decisional process. However, if the Military Commission decides to grant oral argument to the Defense, the Prosecution requests an opportunity to respond.

8. ~~(S)~~ Witnesses and Evidence

~~(S)~~ The Prosecution will not rely on any witnesses or additional evidence in support of this motion.

9. ~~(S)~~ Additional Information

~~(S)~~ The Prosecution has no additional information.

10. ~~(S)~~ Attachments

A. ~~(S)~~ Certificate of Service, dated 22 January 2019

~~(S)~~ Respectfully submitted,

//s//

Clay Trivett
Managing Trial Counsel

Christopher Dykstra
Major, USAF
Assistant Trial Counsel

Mark Martins
Chief Prosecutor
Military Commissions

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~~(S)~~ CERTIFICATE OF SERVICE

~~(S)~~ I certify that on the 22nd day of January 2019, I filed AE 616D (GOV), Government Response To Mr. Ali's Objection to Closure of Interpreter's Testimony, with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

//s//

Christopher Dykstra
Major, USAF
Assistant Trial Counsel

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