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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**	**AE 876C (MAH)** **~~(U)~~ Mr. al Hawsawi's Reply to Government Response to Mr. Hawsawi's Motion for Pretrial Confinement Credit under *United States v. Allen*** **Filed: 9 December 2021**

1. ~~(U)~~ **Timeliness:** This Reply is timely filed by leave of the Commission.[1]

2. ~~(U)~~ **Overview:**

~~(U)~~ The current motion is ripe for determination. With the filing of this brief, the factual and legal records are complete, and it promotes judicial economy to consider this issue, rather than delay nearly indefinitely, until verdict and sentencing, as the prosecution suggests.

~~(U)~~ The Government suggests that Mr. al Hawsawi should not receive pretrial confinement credit because he is a "Law of War" detainee—i.e., a security detainee. The Government is wrong. Security detainees may be held only if they represent a continuing threat to the United States. No such finding has ever been made with respect to Mr. al Hawsawi; he

[redacted]

[1] ~~(U)~~ *See* AE 876-2 (MAH)(RUL), Mr. al Hawsawi's Motion for Leave to File Out of Time Reply to AE 876A (GOV), Government Response to Mr. Hawsawi's Motion for Pretrial Confinement Credit under *United States v. Allen*, 18 Nov. 2021.

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has been detained because of his alleged role in the 9/11 attacks, and he has been denied the opportunity to challenge his detention on Law of War grounds because he has been these facing criminal charges. The term "unprivileged"—on which the Government relies so heavily—has no meaning in this context, and does not change the relevant standards. Mr. al Hawsawi's detention always has been, and still is, based on his alleged role in the 9/11 attacks, and the Government's desire to prosecute him. As such, he is entitled to credit for the time spent in pretrial confinement.

~~(CUI)~~ The Government always intended to prosecute Mr. al Hawsawi (and any other 9/11 suspects it could catch) long before it arrested him; its agents were ready to indict him shortly after 9/11 and it listed him as a co-conspirator in its first 9/11 prosecution, more than a year before his arrest. From the beginning of his captivity, the Central Intelligence Agency (CIA) was questioning Mr. al Hawsawi about 9/11, and planning to use a commissions system in which his CIA statements would have been admissible. Since late 2004, even the CIA was pushing to move Mr. al Hawsawi into Department of Defense (DOD) custody for trial, and the delays in doing so had more to do with Government in-fighting than with any doubt as to whether he would be prosecuted. Factually and substantively, Mr. al Hawsawi's detention has never been anything but pretrial, and thus he is entitled to pretrial confinement credit. The Government must not be allowed to escape the substance of what it has done by an act of labelling.

~~(U)~~ The Tenth Circuit case of *Al-Marri v. Davis*, to the extent it is relevant, does not support the Government's position. In that case, a district court reduced the defendant's maximum sentence by 80 months, in part to reflect time he spent as a Law of War detainee, and in part to grant relief for the harsh conditions of his security detention. In other words, Mr. al-

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Marri received the same relief that Mr. al Hawsawi is asking for, and no appellate court disturbed that decision. The question before the Tenth Circuit was whether Mr. al Marri was entitled to additional statutorily-based credit against his sentence for pretrial time served, and whether a district court, as opposed to the Bureau of Prisons, had authority to grant such time. These questions turned on the interpretation of a federal statute which does not apply in these military commissions.

~~(U)~~ Mr. al Hawsawi's right to *Allen* credit, unlike Mr. al-Marri's rights in the civilian system, is based on military procedures incorporated by Common Article 3 to the Geneva Conventions of 1949. In a civilian court, the Government might well be able to deny Mr. al Hawsawi some of his rights under the Law of War. The Government, however, chose to proceed with a dubious war crimes prosecution in a Law of War military commission. The Government is therefore subject to the Law of War. It may not evade its obligations by pretending to be in civilian court whenever Law of War rights are raised, only to return to military (or sub-military) standards when Constitutional rights are raised.

3. ~~(U)~~ **Supplemental Facts:**

a. ~~(U)~~ On 11 September 2001, the President announced his intention to bring the persons deemed responsible for 9/11 "to justice" using "the full resources of our intelligence and law enforcement communities."[2]

b. ~~(U)~~ Sometime before 6 November 2001, the President sought advice from his Office of Legal Counsel as to "whether terrorists captured in connection with the attacks of September

[2] ~~(U)~~ President George W. Bush, *Address to the Nation on the September 11 Attacks* (11 Sep. 2001).

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11 or in connection with ongoing U.S. operations in response to those attacks could be subject to trial before a military court."[3]

c. ~~(U)~~ On 11 November 2001, the President issued a military order authorizing military tribunals to try members of al Qaeda and persons who have "engaged in, aided or abetted, or conspired to commit" acts of terrorism against the United States.[4]

[redacted]

[3] ~~(U)~~ *Legality of the Use of Military Commissions to Try Suspected Terrorists*, 25 Op. OLC 238 (6 Nov 2001).
[4] ~~(U)~~ *Military Order—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57833 (13 Nov 2001).
[5] ~~(U)~~ Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency's Rendition, Detention, and Interrogation Program* 188 n.1106 (2014) [hereinafter "SSCI Report"]. The Government has already agreed to stipulate to the facts contained in this report. AE 397B, 5 Feb.2016, at 9; *see also* AE 397G, Sep. 2016, at 9.
[6] ~~(U)~~ SSCI Report, at 432 n.2423.

[redacted]

[redacted]

g. (U) Beginning in late 2004, the CIA sought to transfer the 9/11 suspects to DOD custody so that they could be tried by military commission.[14]

h. (U) Security detainees held at GTMO have their continued detention reviewed by Periodic Review Boards, which determine whether a detainee represents a "continuing significant threat" to the United States, and recommend release or continued detention on that basis. Persons facing criminal charges before military commissions, however, are not eligible for review before PRBs.[15] Therefore, Mr. al Hawsawi has never received a hearing before a PRB.

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[9] (U) KSM II, Tr. 17811 (7 Dec 2017) (testimony of SA James Fitzgerald).
[10] (U) KSM II, Tr. 17576-77 (6 Dec 2017), 17924 (7 Dec 2017) (SA Perkins testifies that the U.S. attorney in Boston was ready to indict him shortly after 9/11).

[redacted]

[14] (U) Att. C. The parties have agreed in principle that this extract from a book by the late John Rizzo may be considered as evidence on pretrial motions. AE 729, Government Response to Defense Motion to Treat Attachment B to AE 729C as a Stipulation of Expected Testimony for Purposes of Pretrial Litigation, at 2-3, 26 Oct 2021.
[15] (U) Exec. Order 13567 §§ 3, 8(b) (7 Mar. 2011); *see also* Exec. Order 13823 § 2(e) (30 Jan 2018) (confirming the procedures of E.O. 13567 for detainees not facing charges at military commission); U.S. Department of Defense Periodic Review Secretariat, https://www.prs mil/ (last visited 15 Nov 2021)

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~~(U)~~ The Defense requests judicial notice of the following facts, previously raised in the AE 729 series:

i. ~~(U)~~ Over 94% of GTMO security detainees have been released on the basis that they no longer represent a continuing significant threat to the United States.[16] These include alleged bomb makers, bodyguards of Osama bin Laden, and (most recently) an al Qaeda fighter and weapons trainer.[17]

4. ~~(U)~~ **Argument:**

I. ~~(U)~~ This motion is ripe for determination.

~~(U)~~ The Constitutional doctrine of ripeness, cited by the Government, does not apply to pretrial matters in a criminal case; it is a jurisdictional doctrine applicable to civil cases.[18] Insofar as military criminal courts use a version of ripeness for "prudential" reasons,[19] this motion is ripe for determination, at least when it is considered in combination with other Defense motions.

~~(U)~~ This Defense's motion here implicates other litigation currently before the Commission that addresses what sentence may be imposed in this case. The simple fact that the death penalty lurks as a potential sentence does not obtrude entirely the Commission's ability to grant relief that would open the door to a different sentence. Mr. al Hawsawi has a number of

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(noting that the periodic review process exists to determine "whether continued detention of particular individuals held at Guantanamo remains necessary to protect against a continuing significant threat to the security of the United States").

[16] ~~(U)~~ AE 729, at 29-30 & atts. N though Q.

[17] ~~(U)~~ AE 729 (MAH Sup), p. 10 & atts. B through D.

[18] ~~(U)~~ *See* AE 876A (GOV) Response to Mr. al Hawsawi's Motion for Pretrial Confinement Credit under *United States v. Allen*, at 2 & n.3. The Government cites *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967) and *Reno v. Catholic Soc. Services, Inc.*, 509 U.S. 43, 57 n.18 (1993) for the proposition that the "ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." Both cases are civil cases in the Article III courts; both are concerned with whether the issue at hand represented a "case or controversy" as required by Article III.

[19] ~~(U)~~ AE 876A (GOV), at 2, *citing United States v. Chisholm*, 59 M.J. 151, 152 (C.A.A.F. 2003).

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motions pending that would impact the potential sentence.[20] Relief on these motions could result in Mr. al Hawsawi having served his sentence with the imprisonment and mistreatment he has already experienced. In essence, resolution of this and these other pending motions affecting sentence could conserve resources by also resolving significant aspects of the litigation as to him. Waiting until a full trial verdict, and sentencing, in order to address the instant matter therefore would be a waste of judicial resources. This motion deserves early consideration.[21]

II. ~~(U)~~ Mr. al Hawsawi has always been held in connection with the current accusations against him.

~~(U)~~ The Government continues to assert, without evidence, that Mr. al Hawsawi is a security detainee of some sort and that the charges against him are "incidental" to this detention.[22] The Government misstates the law and ignores the facts.

~~(U)~~ Security detention is allowable under the Law of War and under domestic law, but it is not based on whether a person is an "alien unprivileged enemy belligerent." Even U.S. citizens may be detained in connection with armed conflict if the Government meets the right standards.[23] The standard recognized by the United States is that the person being detained in

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[20] ~~(U)~~ In AE 852 (MAH), Mr. al Hawsawi has requested relief for the Government's five-year failure to inform him of the charges against him by seeking either dismissal, or a specified reduced. *See* AE 852, Motion to Dismiss Charges or Grant Other Relief Because the Government Failed to Inform Mr. al Hawsawi "Without Delay" of the Charges Against Him, at 1, 18, 18 Oct 2021. In another pleading, Mr. al Hawsawi is seeking sentencing relief for pretrial punishment. *See* AE 874, Defense Motion to Remove the Death Penalty and Grant Sentencing Credit for Pretrial Punishment, at 1-2 & *passim*, 31 Oct 2021 (requesting sentence relief for pretrial punishment).

[21] ~~(U)~~ In this context, the Defense notes that under R.M.C. 908, the Government has no right to appeal orders granting sentence relief. Thus, sufficient sentence relief might resolve the whole case *faster* than dismissal, because it will obviate the need for time-consuming and futile appeals.

[22] ~~(U)~~ AE 876A (GOV), at 3-4.

[23] ~~(U)~~ In *Korematsu v. United States*, the Supreme Court upheld an extreme form of security detention, where citizens of Japanese descent were interned for security purposes to prevent espionage and sabotage in wartime. *Korematsu v. United States*, 323 U.S. 214, 217-18 (1944). In *Trump v. Hawaii*, the Court abrogated *Korematsu* on the grounds that "[t]he forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority." *Trump v. Hawaii*, 138 S.Ct. 2392, 2423 (2018). The Court did not abrogate the underlying idea that wartime security detention is valid against citizens as well as noncitizens; it only denied that race could be the sole basis for such detention.

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connection with armed conflict must represent a "continuing significant threat" to the United States, or else he must be released.[24] To determine whether someone represents such a threat, the Government holds Periodic Review Boards (PRBs) and releases detainees no longer considered to be threats.[25] Roughly 95% of Guantanamo detainees have been released because they represented no further threat.[26] Mr. al Hawsawi has not been considered for release precisely because of the criminal charges against him[27]—he is therefore, unquestionably, a pretrial detainee. He always has been.

~~(CUI)~~ The uncontroverted facts show that the Government intended to prosecute Mr. al Hawsawi (and all other 9/11 suspects it could catch) long before his actual arrest [redacted] Its intelligence (CIA) agents began to question him about 9/11 as soon as it captured him; [redacted], so that the CIA could extract the answers from Mr. al Hawsawi [redacted]. The CIA interrogations would have been usable as evidence against Mr. al Hawsawi under the Government's original Military Commissions Order, and when the Supreme Court

[24] ~~(U)~~ *See Barhoumi v. Obama*, 234 F.Supp.3d 84, 86 (D.D.C. 2017); Exec. Order 13567, "Periodic Review of Individuals Detained at Guantanamo Bay Naval Station Pursuant to the Authorization for Use of Military Force," §§ 3, 8(b) (7 Mar 2011); see also Exec. Order 13823 § 2(e) (30 Jan 2018) (confirming the procedures of E.O. 13567 for detainees not facing charges at military commission).

[25] ~~(U)~~ U.S. Department of Defense Periodic Review Secretariat, https://www.prs mil/ (last visited 15 Nov 2021) (noting that the periodic review process exists to determine "whether continued detention of particular individuals held at Guantanamo remains necessary to protect against a continuing significant threat to the security of the United States").

[26] ~~(U)~~ AE 729, at 29-30.

[27] ~~(U)~~ *See* Executive Order 13567, § 1(a) ("Scope and Purpose") (specifying that detainees against whom charges are pending are not subject to the detainee review process); Dept. of Defense Directive-Type Memorandum (DTM) 12-005, "Implementing Guidelines for Periodic Review of Detainees Held at Guantanamo Bay per Executive Order 13567, 9 May 2012, para. 3(b)(4) (listing the likelihood that a detainee will be charged in a military commission as information constituting a "baseline threat" warranting detention under applicable regulations.)

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invalidated the procedures under that order,[28] [redacted] The Government exploited every part of Mr. al Hawsawi's captivity to help build its criminal case against him. There is no doubt that Mr. al Hawsawi was and is now "in custody as a result of the criminal charge[s]" he now faces.[29] He is entitled to credit for this detention.

III. ~~(U)~~ The civilian case of *Al-Marri v. Davis*, insofar as it is relevant, does not support the Government's position.

~~(U)~~ The Government argues that the Tenth Circuit civilian case of *Al-Marri v. Davis*[30] controls the decision on this issue. The Government is incorrect and misreads the case.

~~(U)~~ In *Al-Marri*, the defendant pleaded guilty in a federal district court.[31] Before his indictment he had been held for 3 months as a material witness and for 71 months as an "enemy combatant," including over five years at the U.S. Naval Brig in Charleston.[32] The District Court chose to grant him credit against his ultimately sentence, for the 71 months he spent in custody before his trial. "Taking into account the BOP's indication that it would deny Mr. al-Marri credit for the 71 months, the sentencing court explained that it would reduce the maximum period of confinement (180 months) 'by 71 months to reflect the periods of time for which he will not be credited by the [BOP].'[33] . . . The court further reduced the sentence by nine months 'to reflect the very severe conditions of part of his confinement at the Naval Brig.'"[34] Thus,

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[28] ~~(U)~~ *Hamdan v. Rumsfeld*, 548 U.S. 557, 631-34 (2006).
[29] ~~(U)~~ *See* AE 867A (GOV), at 4, *citing Allen*, 17 M.J. at 178 and ABA Standards, Sentencing Alternatives and Procedures, § 18-4.7(a) (1979).
[30] ~~(U)~~ 714 F.3d 1183 (10th Cir. 2013).
[31] ~~(U)~~ *Id.*, at 1185 (10th Cir. 2013).
[32] ~~(U)~~ *Id.*
[33] ~~(U)~~ Mr. Al-Marri had been detained as a material witness for 71 months, before his criminal case proceeded.
[34] ~~(U)~~ *Al-Marri*, 714 F.3d at 1186.

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what the Government glosses over is that Mr. al-Marri received the same kind of substantive relief Mr. al Hawsawi is asking for, both in this motion and in his pretrial punishment motion.[35] Neither the Tenth Circuit nor any other court disturbed this decision.

~~(U)~~ Mr. al Marri subsequently filed a habeas petition seeking additional, statutorily based "good time" credit against his sentence.[36] The resulting Circuit opinion, which that the Government relies on,[37] thus involves the application of the federal statute governing good time credit (which awards a limited sentence reduction to detainees showing good behavior in pretrial detention[38]). The Circuit deferred to the BOP's interpretation of the federal statute, which excluded Mr. al-Marri's security detention from his good time calculation. The Circuit determined that the federal statute granted authority for applying good time credit to the Attorney General or the BOP, not to the district court.[39] None of this has anything to do with Mr. al Hawsawi's case, as that opinion relates to the federal good time credit statute and Mr. al Hawsawi is not in the custody of the BOP. In fact, Mr. al Hawsawi is asking for the kind of relief Mr. al-Marri was *granted* at sentencing—namely, a judicial reduction of his sentence.

~~(U)~~ When the Government brings charges against an alleged terrorist in civilian court, as it did with Mr. al-Marri or Mr. Moussaoui or the al Qaeda embassy bombings suspects, it subjects itself to the unquestioned authority of the Constitution. When it brings war crimes charges in a Law of War military commission, it subjects itself at minimum to the authority of

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[35] ~~(U)~~ *See* AE 874, Defense Motion to Remove the Death Penalty and Grant Sentencing Credit for Pretrial Punishment, at 1-2 & *passim*, 31 Oct 2021.
[36] ~~(U)~~ *See Al-Marri*, 714 F.3d at 1186.
[37] ~~(U)~~ AE 867A, at 5, citing *Al-Marri*, 714 F.3d at 1186.
[38] ~~(U)~~ *See* 18 U.S.C. § 3624(b) (federal "good time credit" reduces a sentence by one day for every 30 days served in pretrial custody).
[39] ~~(U)~~ *Id.*, at 1186-87.

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the Law of War, and specifically Common Article 3 to the Geneva Conventions of 1949. In no prosecution can the Government evade both, as it is seeking to do here.

5. **Attachments:**

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

B. [redacted]

C. ~~(U)~~ Extract from John Rizzo, *Company Man*, pages 223-224 and 247-248 showing that the CIA's campaign to move Mr. al Hawsawi and his co-accused from CIA to DOD custody for trial began in late 2004 and ended in 2006.

//s//
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(U) CERTIFICATE OF SERVICE

(U) I certify that on 9 December 2021, I electronically filed **AE 876C (MAH), Mr. al Hawsawi's Reply to Government Response to Mr. Hawsawi's Motion for Pretrial Confinement Credit under United States v. Allen,** with the Clerk of the Court and all the counsel of record.

//s//
WALTER B. RUIZ
Learned Counsel for
Mr. Hawsawi

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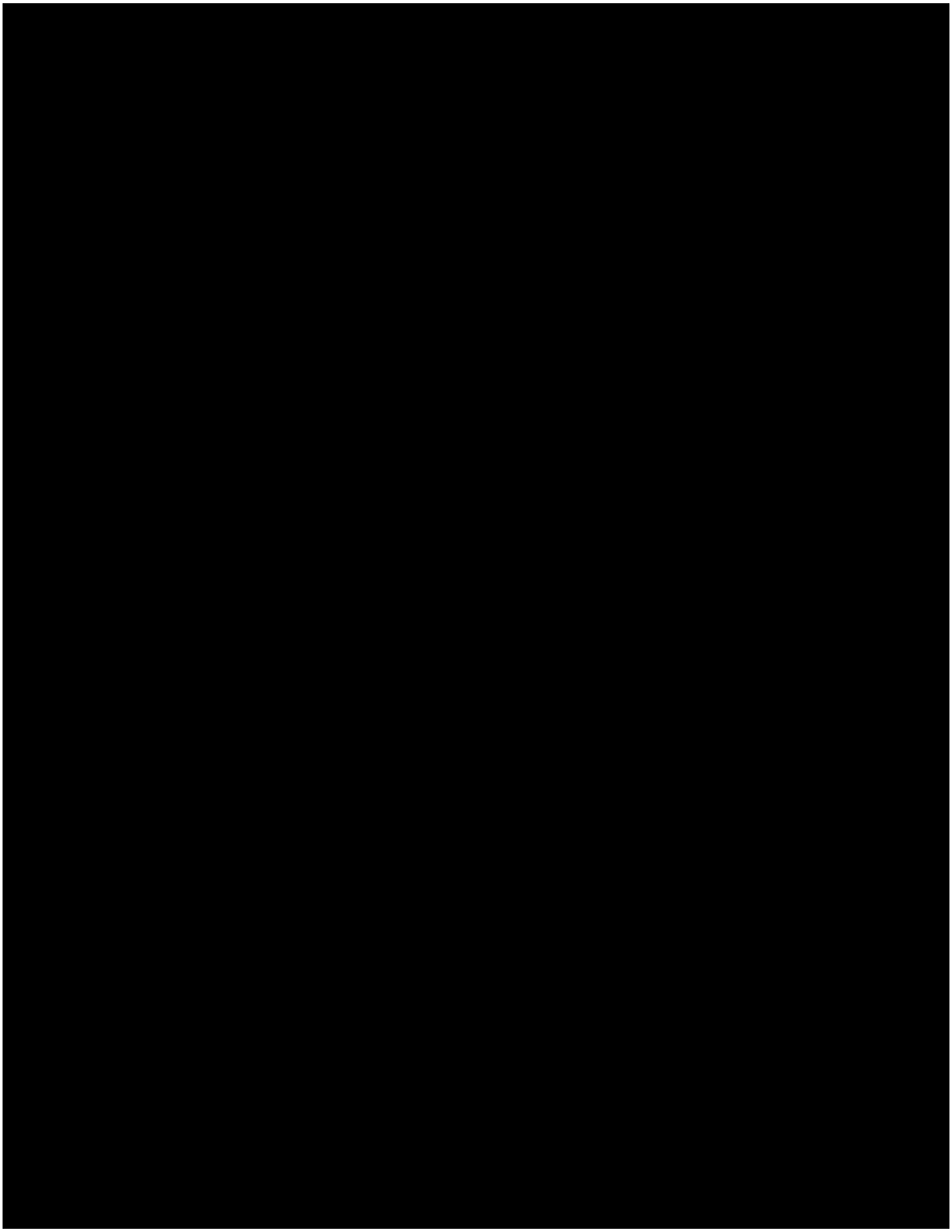

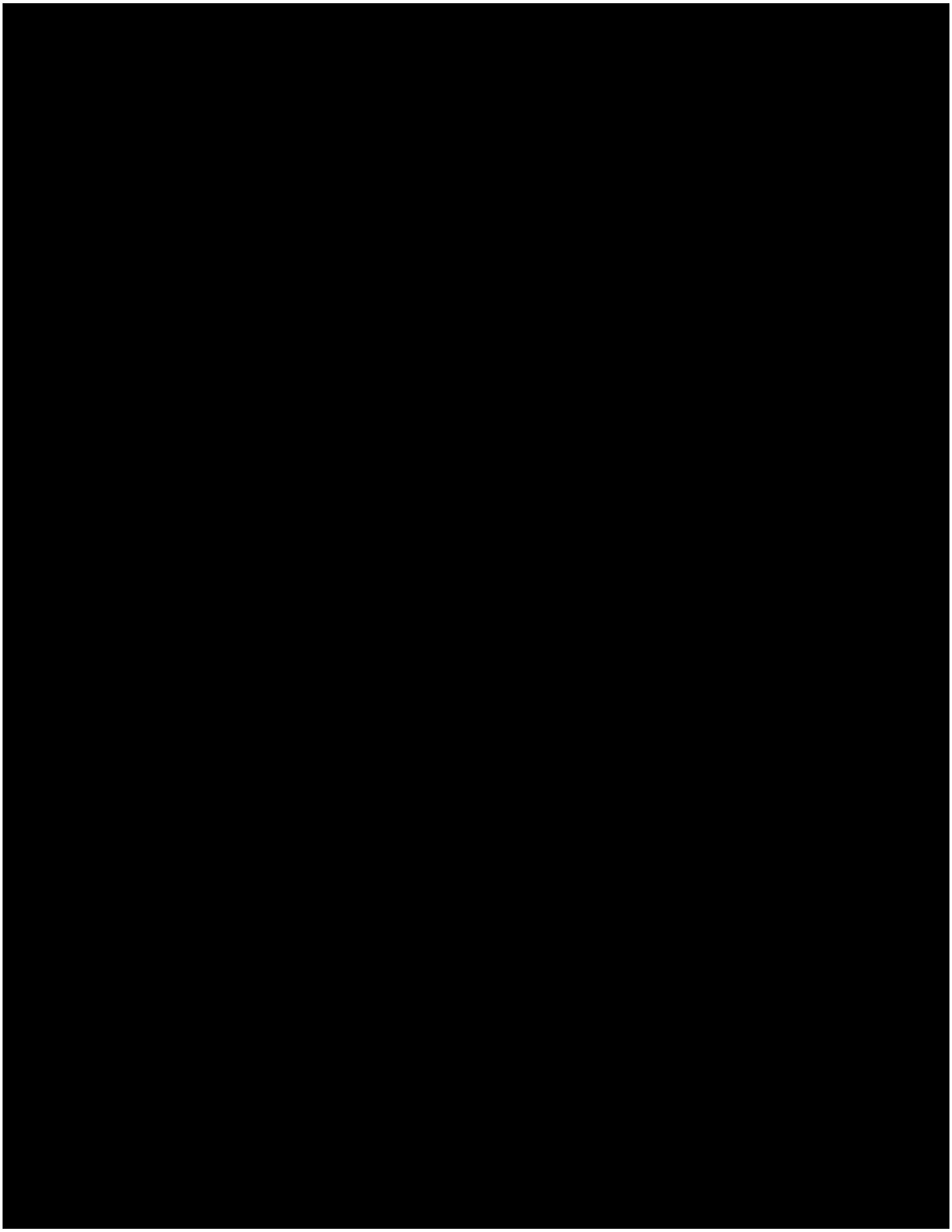

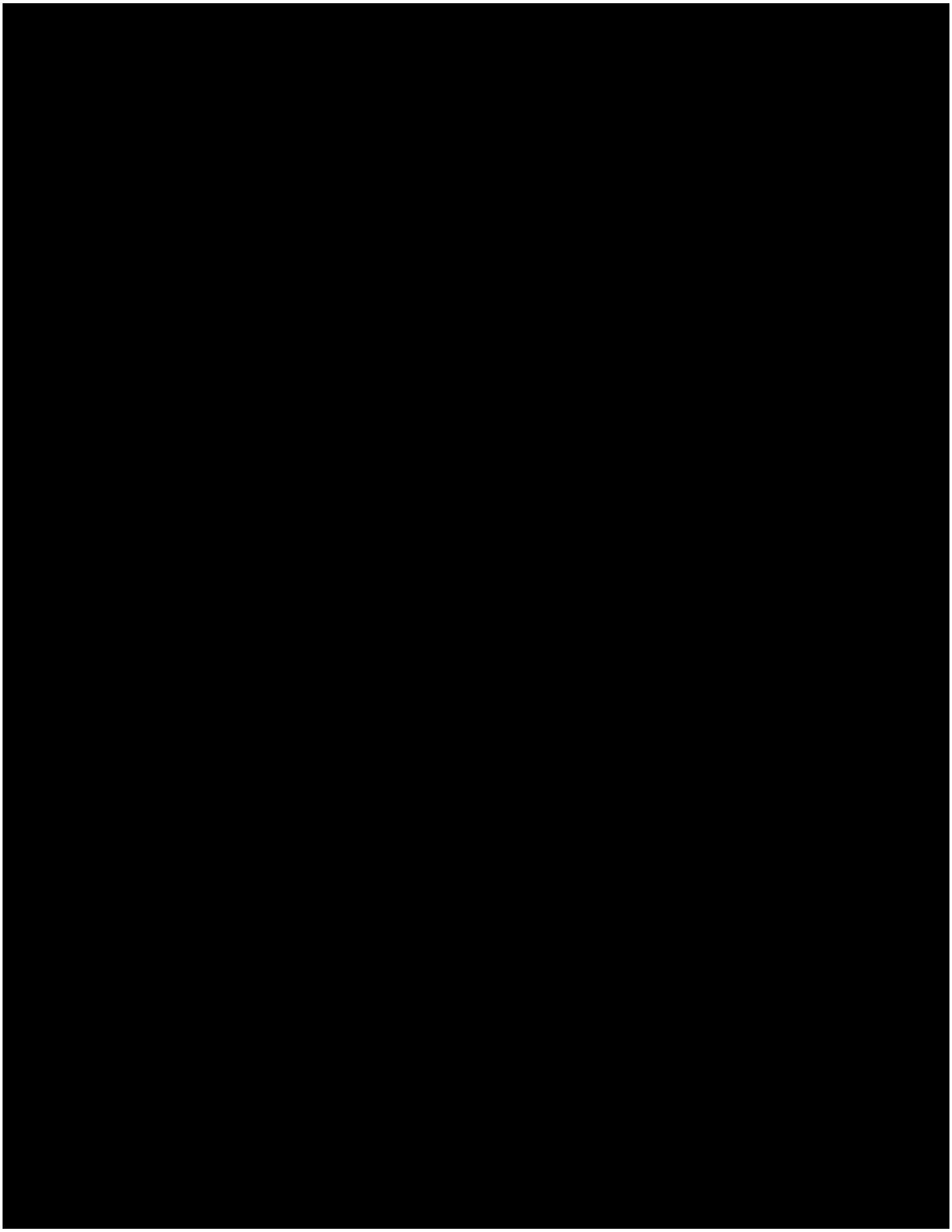

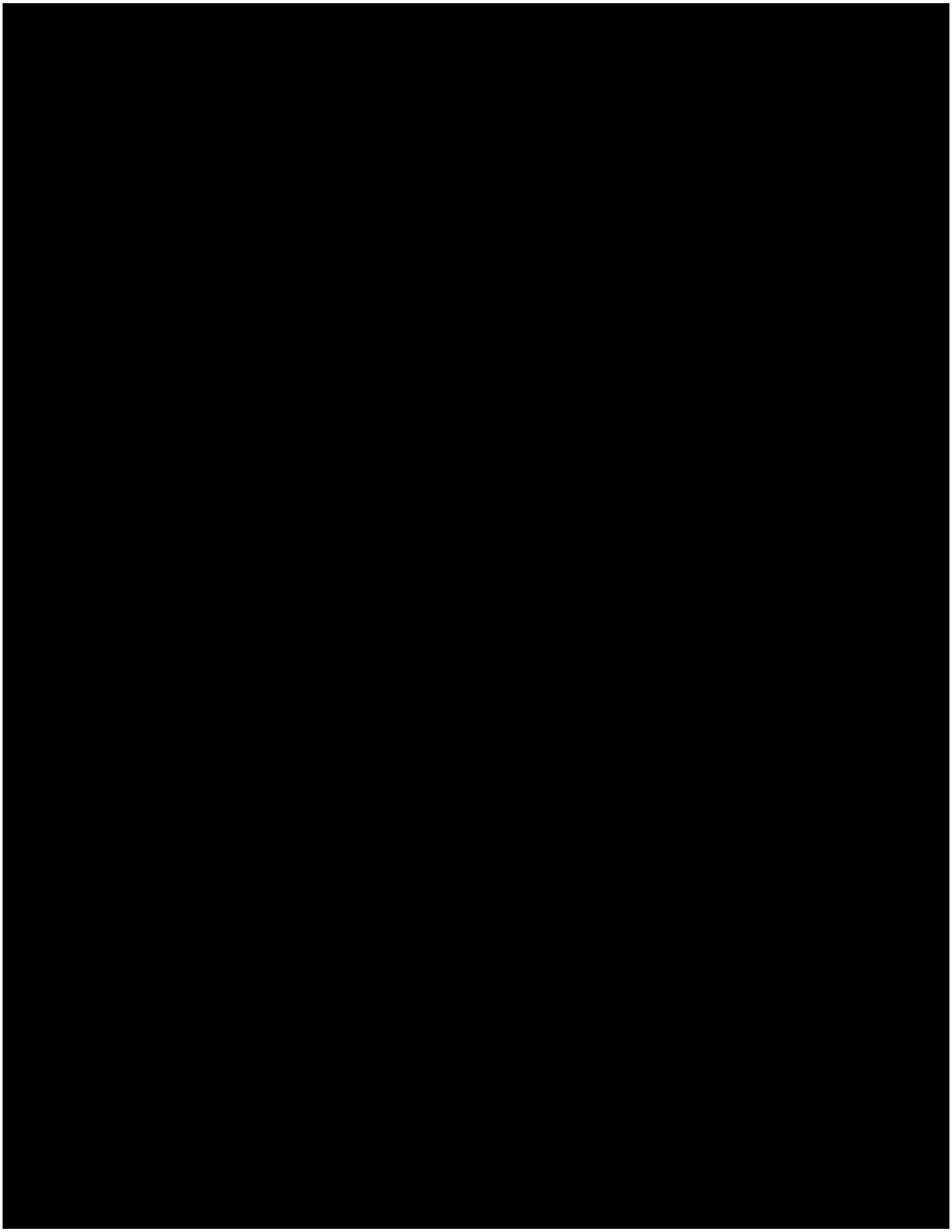

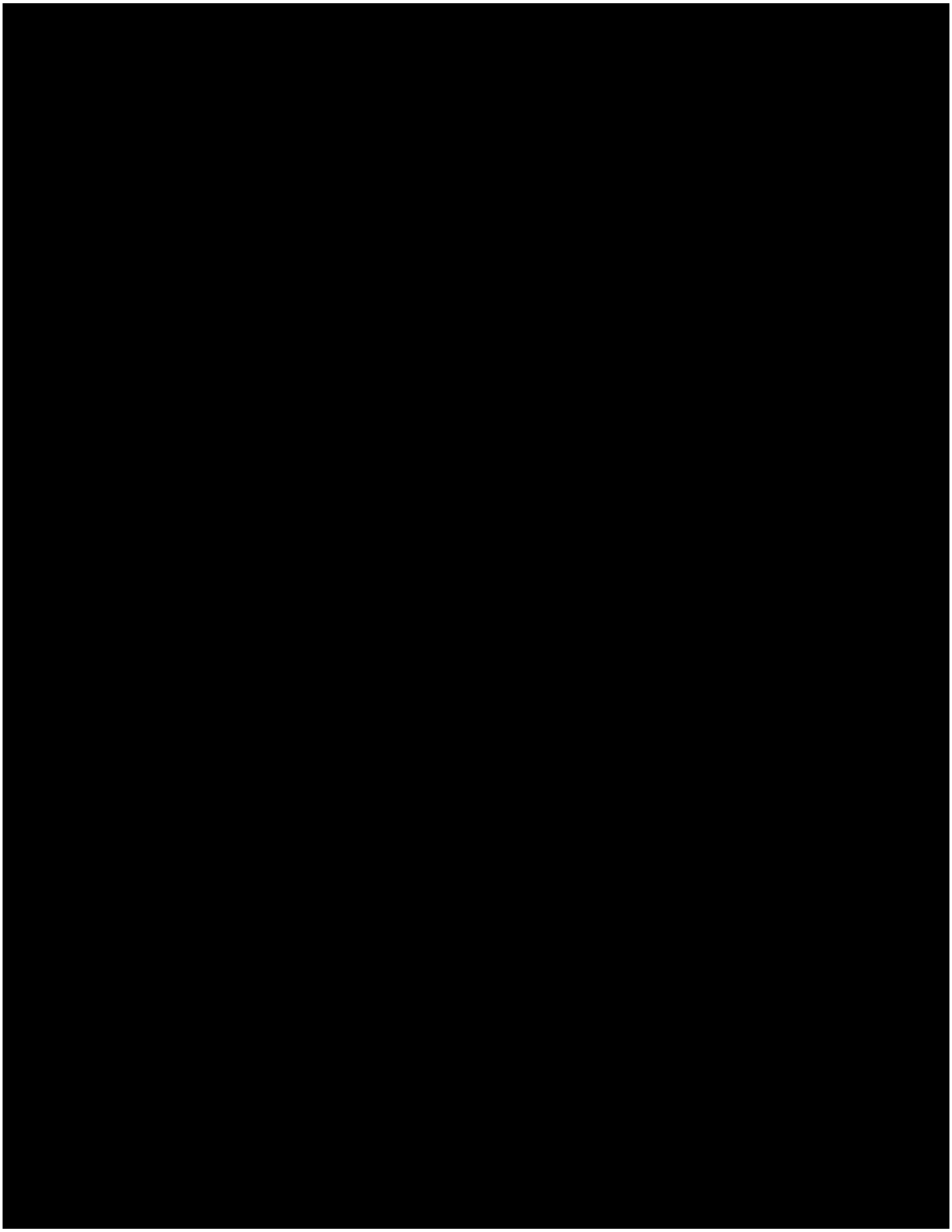

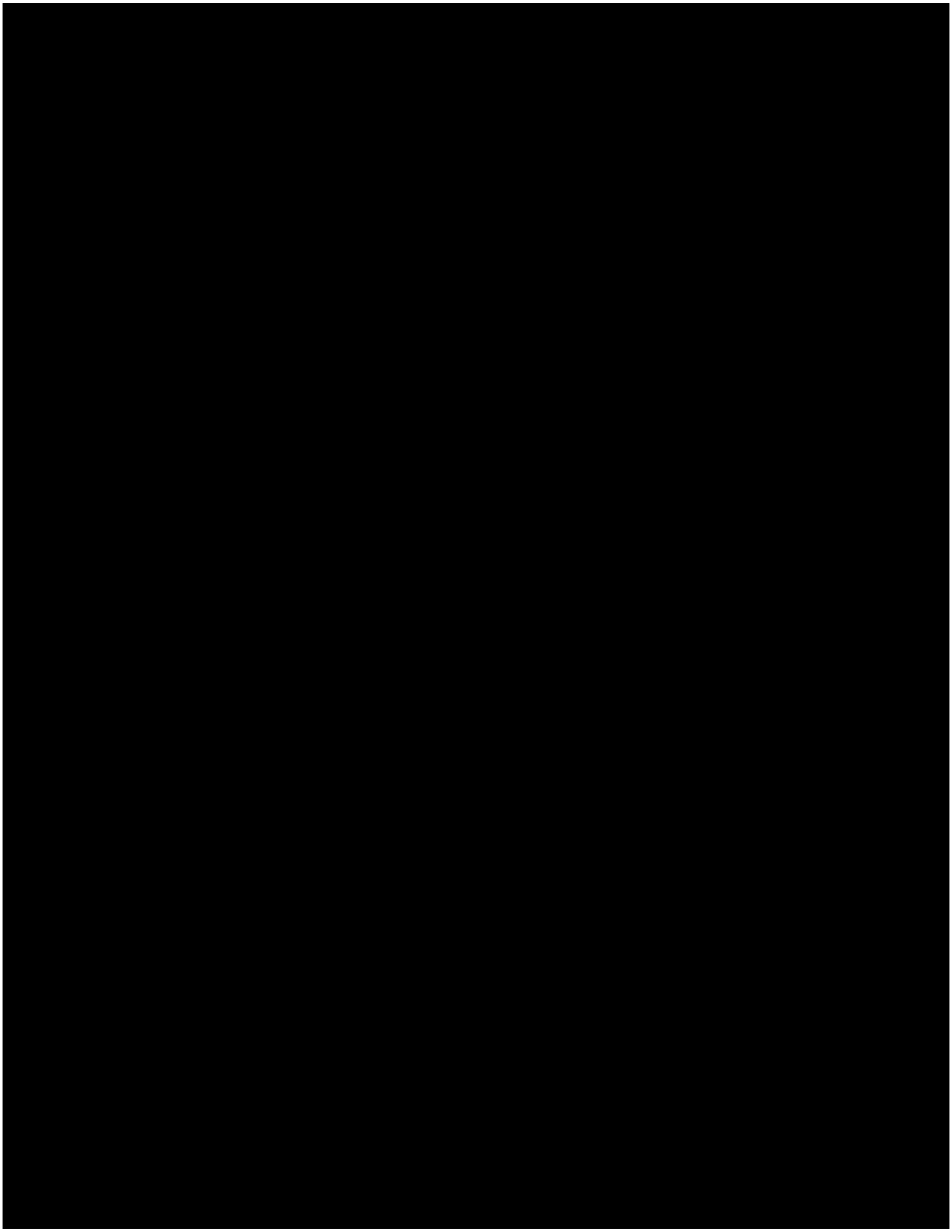

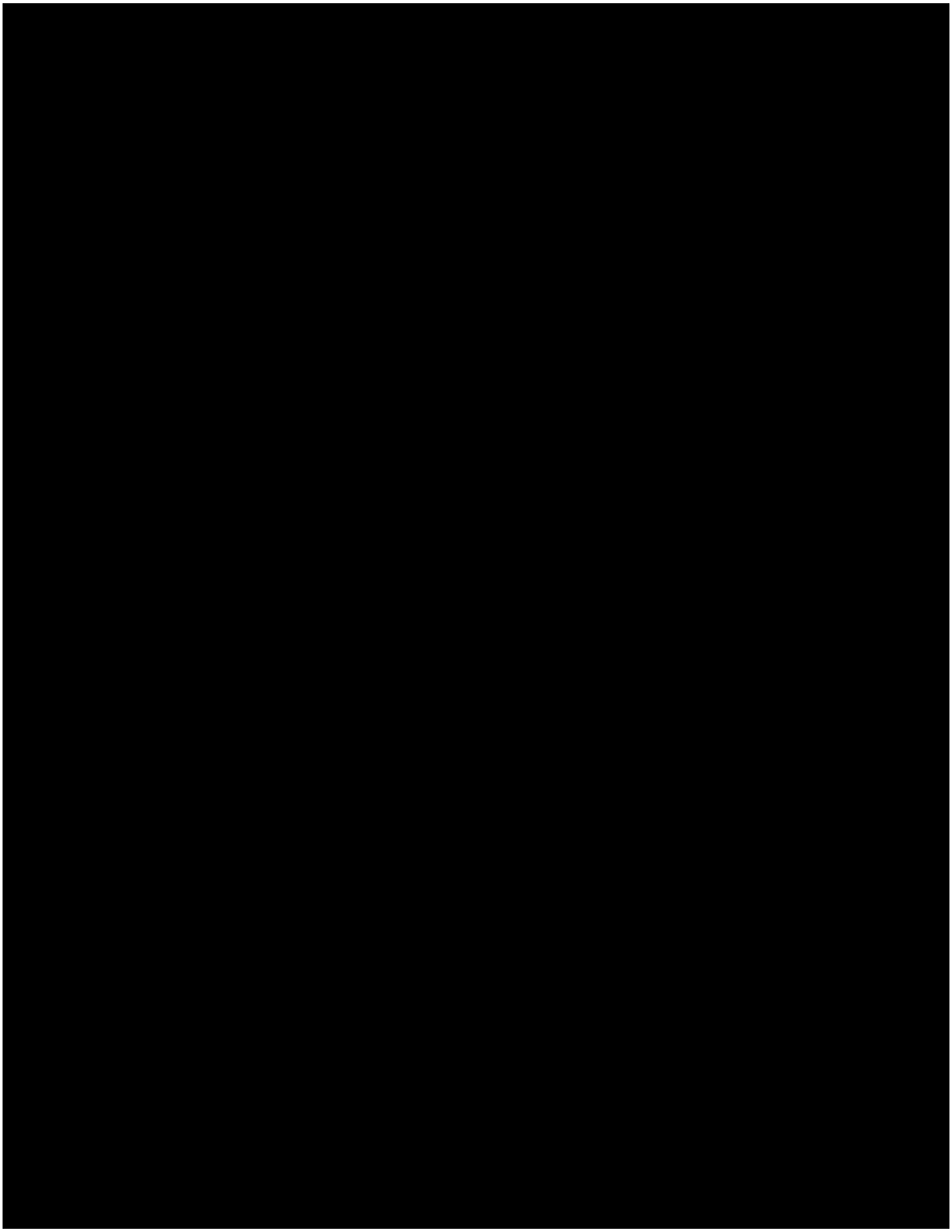

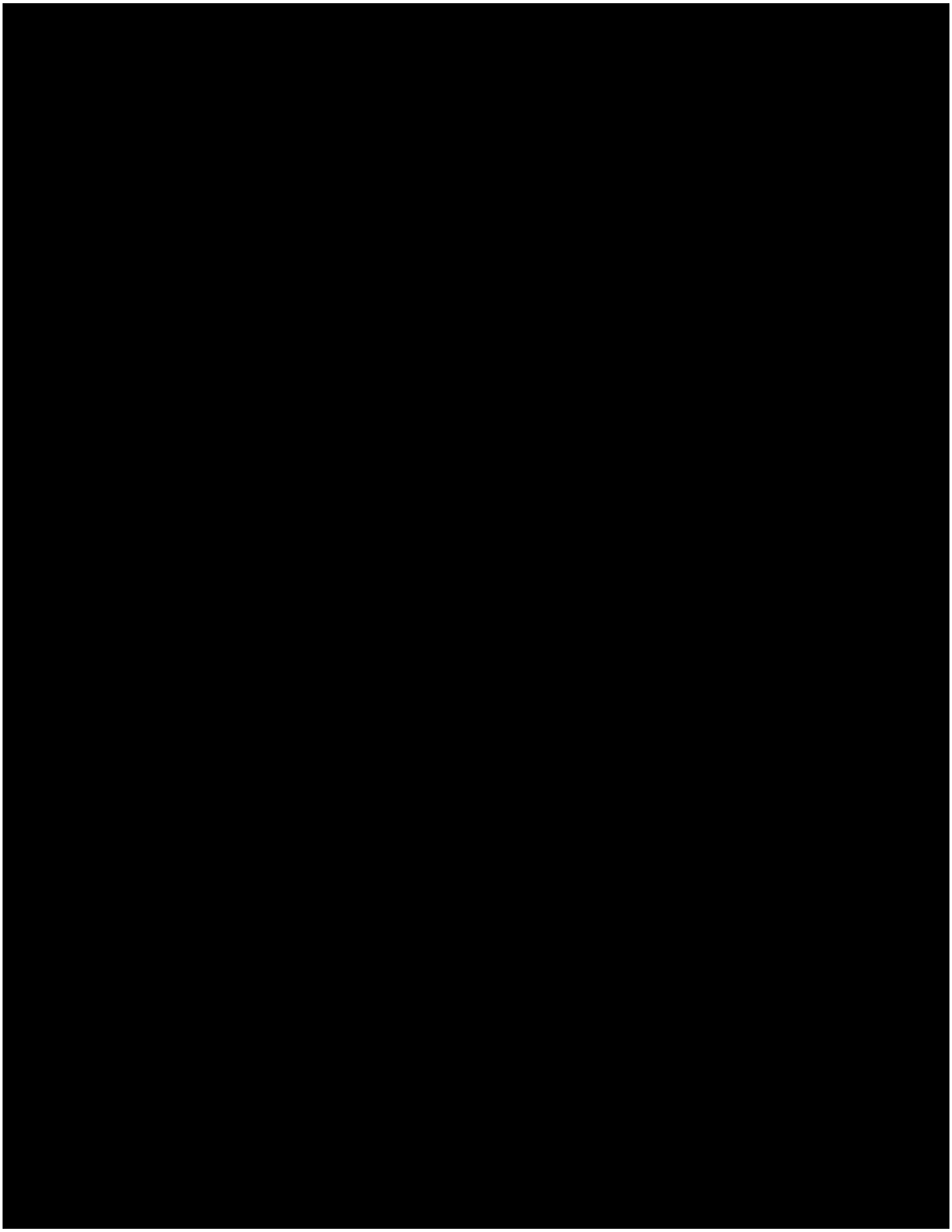

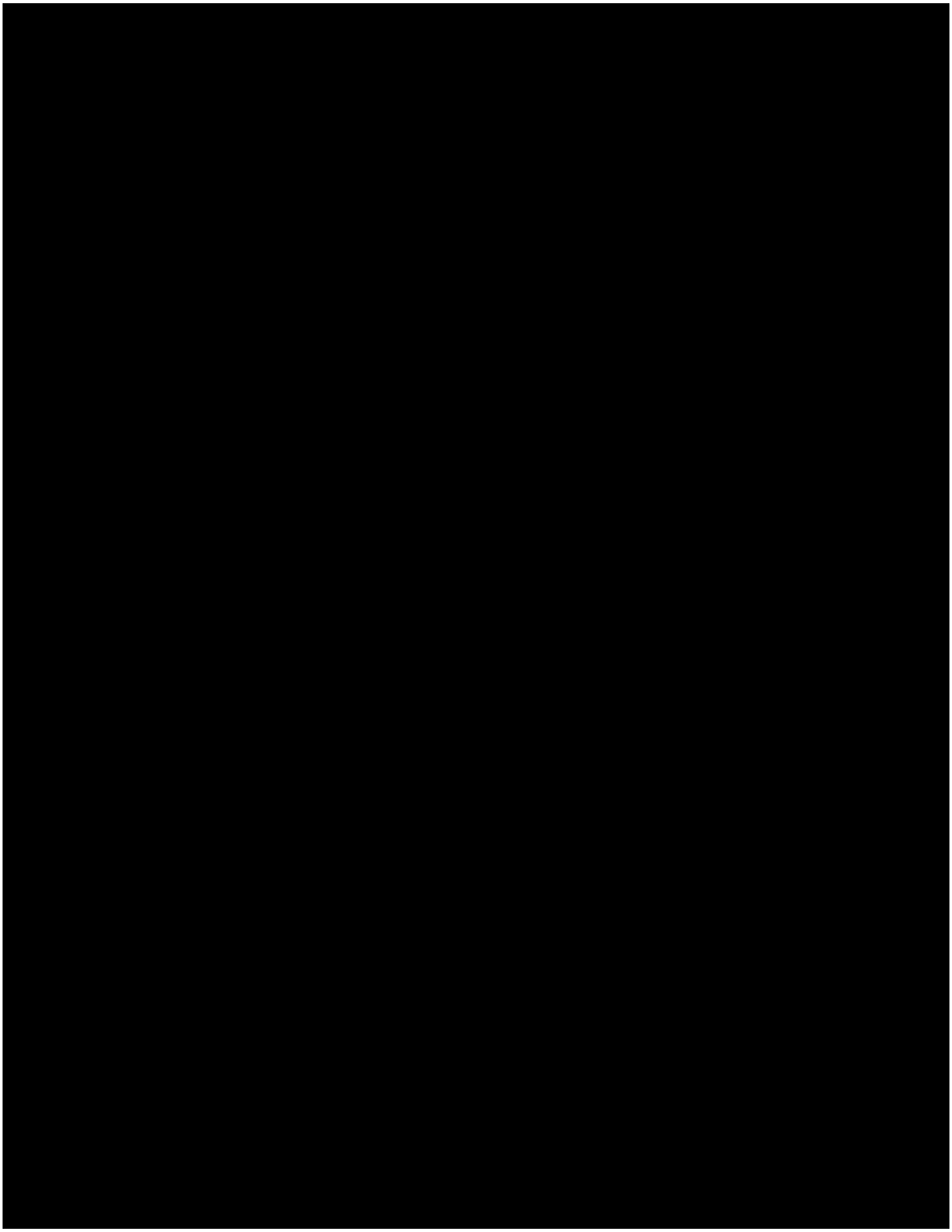

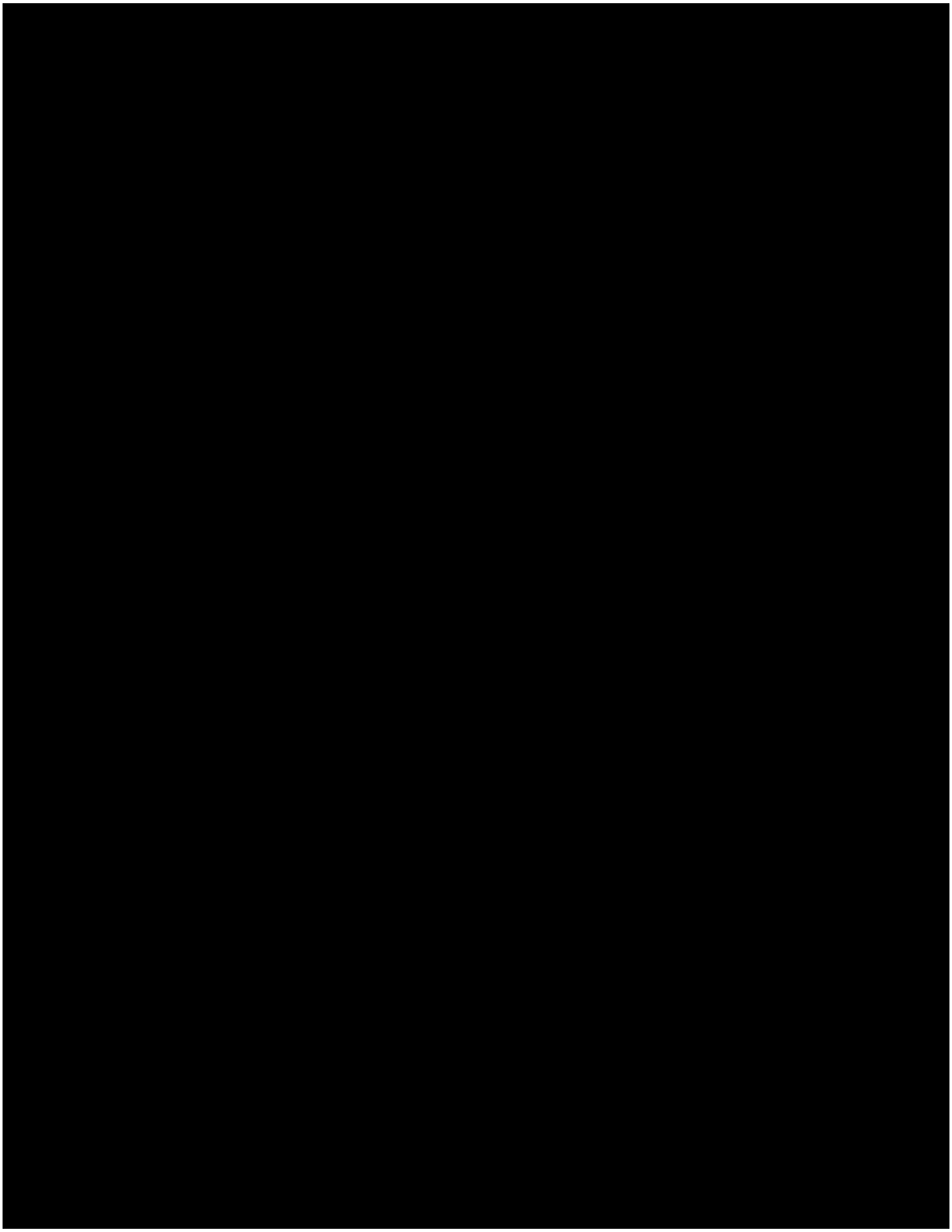

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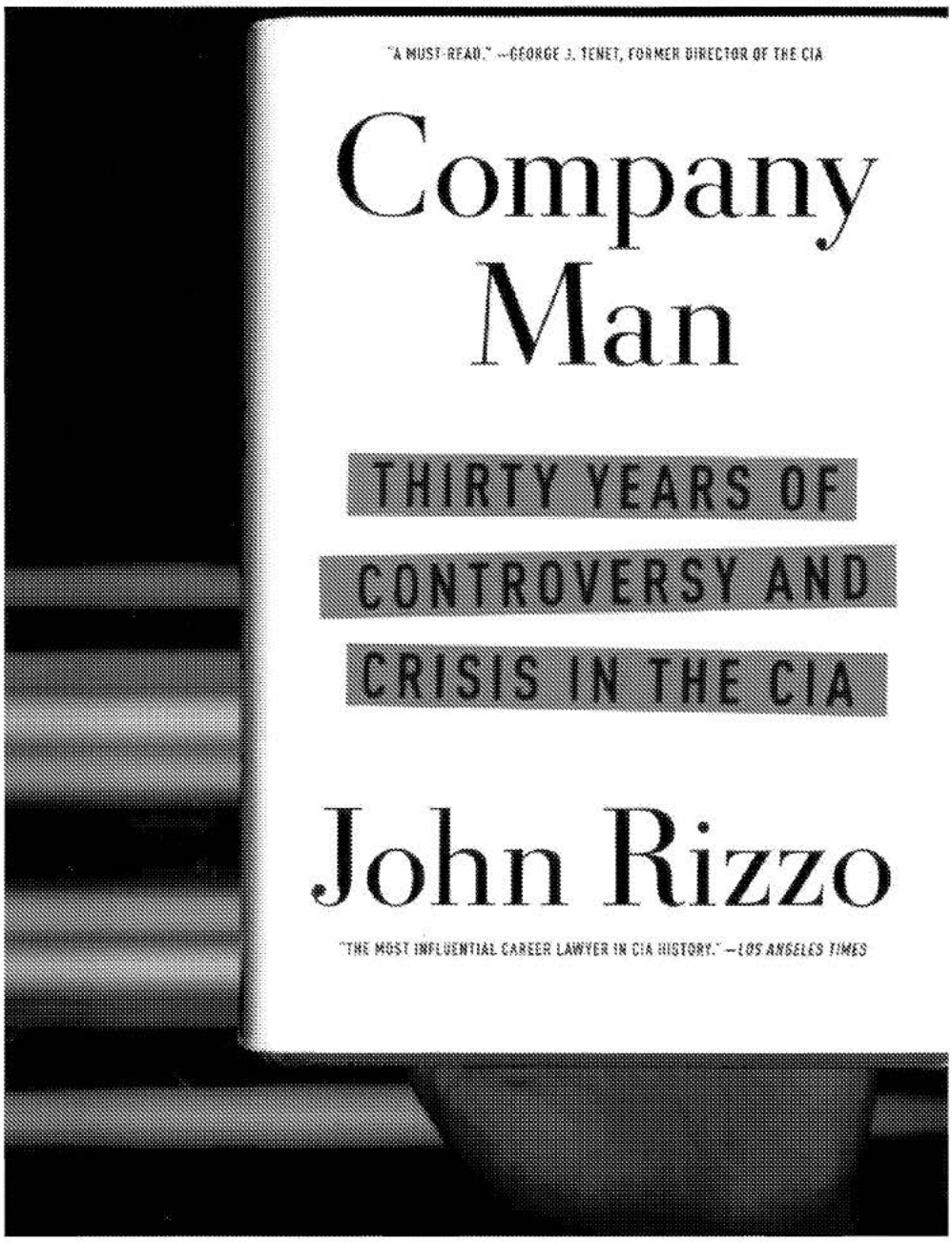

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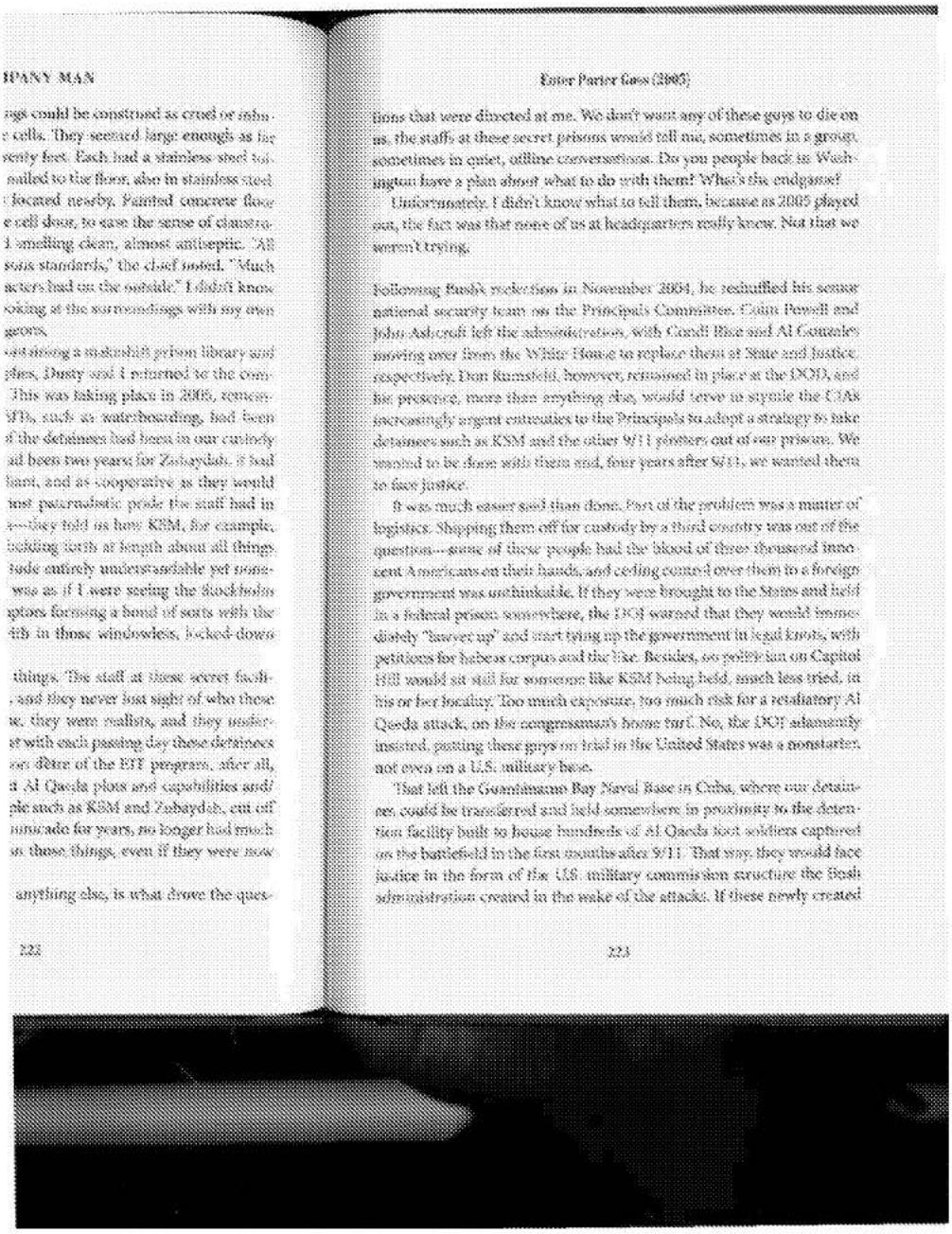

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ngs could be construed as cruel or inhu-
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venty feet. Each had a stainless steel toi-
nailed to the floor, also in stainless steel
located nearby. Painted concrete floor
e cell door, to ease the sense of claustro-
l smelling clean, almost antiseptic. "All
soss standards," the chief noted. "Much
acters had on the outside." I didn't know
oking at the surroundings with my own
geons.
ast among a makeshift prison library and
ples, Dusty and I returned to the com-
This was taking place in 2006, remem-
EITs, such as waterboarding, had been
f the detainees had been in our custody
ad been two years for Zubaydah, 18 had
lant, and as cooperative as they would
ost paternalistic pride the staff had in
—they told us how KSM, for example,
bedding forth at length about all things
rade entirely understandable yet some-
was as if I were seeing the Stockholm
ptors forming a bond of sorts with the
ffs in those windowless, locked-down

things. The staff at these secret facili-
, and they never lost sight of who these
re, they were realists, and they under-
st with each passing day these detainees
ore future of the EIT program, after all,
a Al Qaeda plots and capabilities and/
ple such as KSM and Zubaydah, cut off
nunicado for years, no longer had much
to those things, even if they were now

anything else, is what drove the ques-

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Enter Parter Goss (2005)

tions that were directed at me. We don't want any of these guys to die on us, the staffs at these secret prisons would tell me, sometimes in a group, sometimes in quiet, offline conversations. Do you people back in Washington have a plan about what to do with them? What's the endgame?

Unfortunately, I didn't know what to tell them, because as 2005 played out, the fact was that none of us at headquarters really knew. Not that we weren't trying.

Following Bush's reelection in November 2004, he reshuffled his senior national security team on the Principals Committee. Colin Powell and John Ashcroft left the administration, with Condi Rice and Al Gonzales moving over from the White House to replace them at State and Justice, respectively. Don Rumsfeld, however, remained in place at the DOD, and his presence, more than anything else, would serve to stymie the CIA's increasingly urgent entreaties to the Principals to adopt a strategy to take detainees such as KSM and the other 9/11 plotters out of our prisons. We wanted to be done with them and, four years after 9/11, we wanted them to face justice.

It was much easier said than done. Part of the problem was a matter of logistics. Shipping them off for custody by a third country was out of the question—some of these people had the blood of three thousand innocent Americans on their hands, and ceding control over them to a foreign government was unthinkable. If they were brought to the States and held in a federal prison somewhere, the DOJ warned that they would immediately "lawyer up" and start tying up the government in legal knots, with petitions for habeas corpus and the like. Besides, no politician on Capitol Hill would sit still for someone like KSM being held, much less tried, in his or her locality. Too much exposure, too much risk for a retaliatory Al Qaeda attack, on the congressman's home turf. No, the DOJ adamantly insisted, putting these guys on trial in the United States was a nonstarter, not even on a U.S. military base.

That left the Guantánamo Bay Naval Base in Cuba, where our detainees could be transferred and held somewhere in proximity to the detention facility built to house hundreds of Al Qaeda foot soldiers captured on the battlefield in the first months after 9/11. That way, they would face justice in the form of the U.S. military commission structure the Bush administration created in the wake of the attacks. If these newly created

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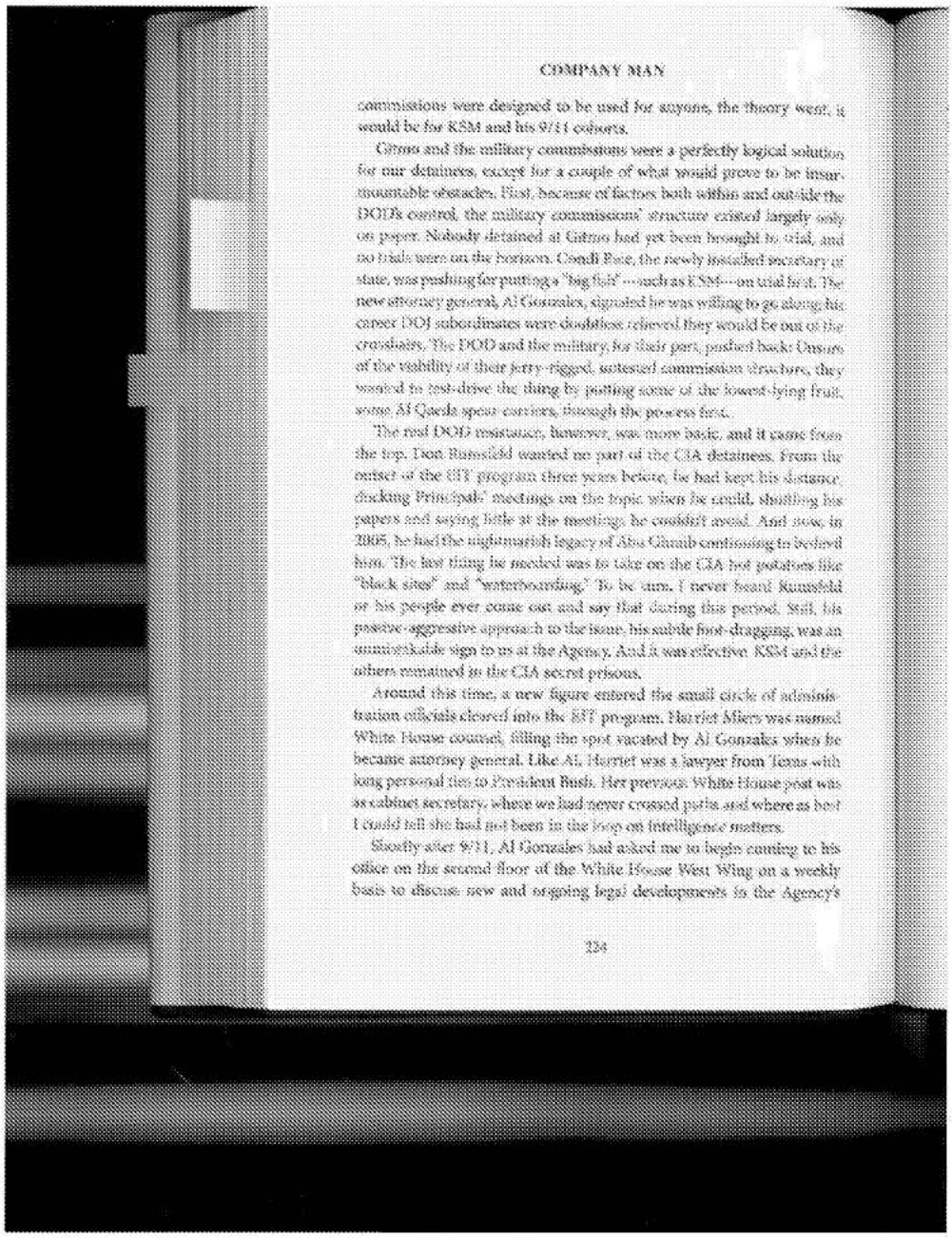

COMPANY MAN

commissions were designed to be used for anyone, the theory went, it would be for KSM and his 9/11 cohorts.

Gitmo and the military commissions were a perfectly logical solution for our detainees, except for a couple of what would prove to be insurmountable obstacles. First, because of factors both within and outside the DOD's control, the military commissions' structure existed largely only on paper. Nobody detained at Gitmo had yet been brought to trial, and no trials were on the horizon. Condi Rice, the newly installed secretary of state, was pushing for putting a "big fish"—such as KSM—on trial first. The new attorney general, Al Gonzales, signaled he was willing to go along, his career DOJ subordinates were doubtless relieved they would be out of the crosshairs. The DOD and the military, for their part, pushed back: Unsure of the viability of their jerry-rigged, untested commission structure, they wanted to test-drive the thing by putting some of the lowest-lying fruit, some Al Qaeda spear carriers, through the process first.

The real DOD resistance, however, was more basic, and it came from the top. Don Rumsfeld wanted no part of the CIA detainees. From the outset of the EIT program three years before, he had kept his distance, ducking Principals' meetings on the topic when he could, shuffling his papers and saying little at the meetings he couldn't avoid. And now, in 2005, he had the nightmarish legacy of Abu Ghraib continuing to bedevil him. The last thing he needed was to take on the CIA hot potatoes like "black sites" and "waterboarding." To be sure, I never heard Rumsfeld or his people ever come out and say that during this period. Still, his passive-aggressive approach to the issue, his subtle foot-dragging, was an unmistakable sign to us at the Agency. And it was effective. KSM and the others remained in the CIA secret prisons.

Around this time, a new figure entered the small circle of administration officials cleared into the EIT program. Harriet Miers was named White House counsel, filling the spot vacated by Al Gonzales when he became attorney general. Like Al, Harriet was a lawyer from Texas with long personal ties to President Bush. Her previous White House post was as cabinet secretary, where we had never crossed paths and where as best I could tell she had not been in the loop on intelligence matters.

Shortly after 9/11, Al Gonzales had asked me to begin coming to his office on the second floor of the White House West Wing on a weekly basis to discuss new and ongoing legal developments in the Agency's

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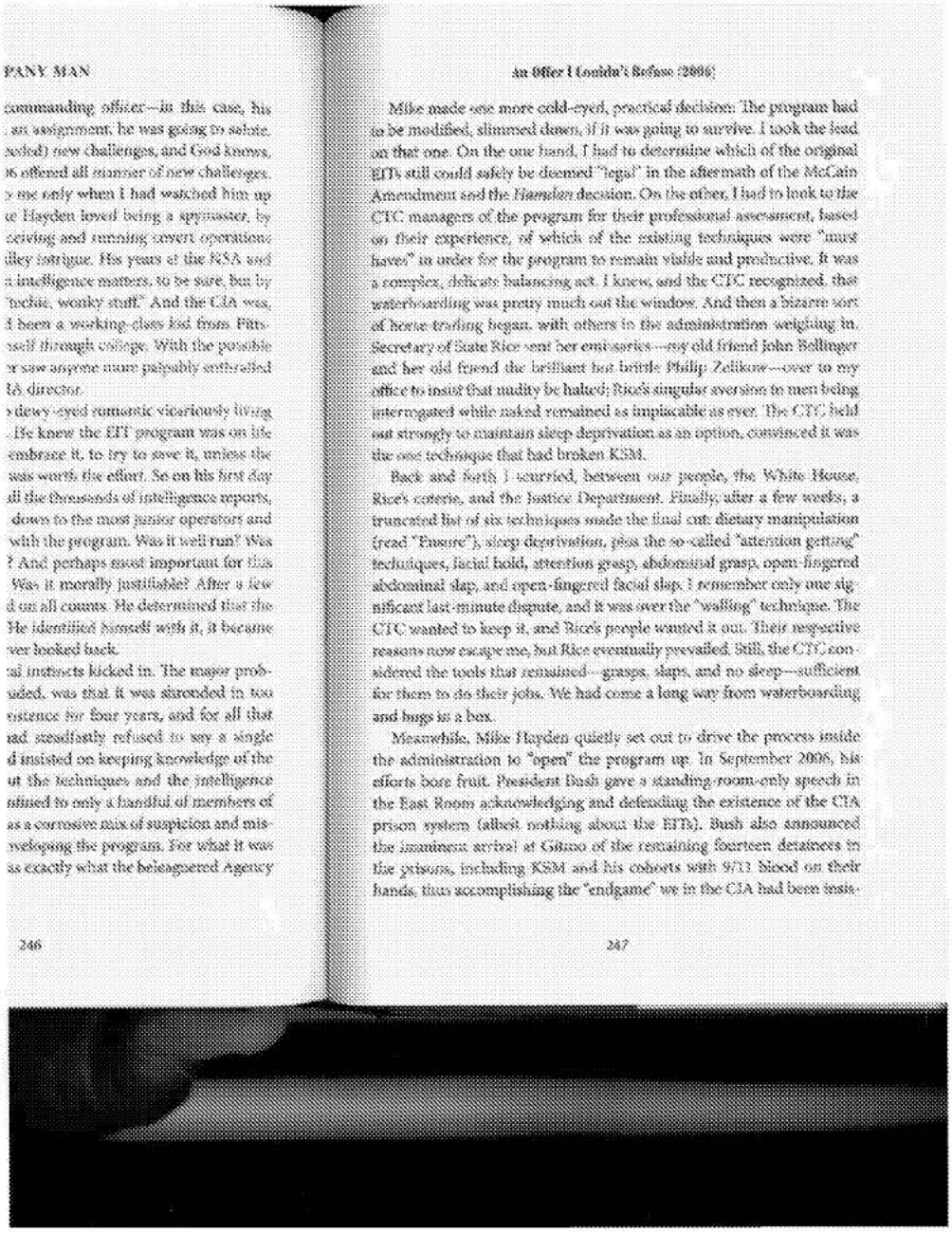

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commanding officer—in this case, his
an assignment, he was going to salute,
nded) new challenges, and God knows,
s offered all manner of new challenges.
y me only when I had watched him up
e Hayden loved being a spymaster, by
ceiving and running covert operations
iley intrigue. His years at the NSA and
e intelligence matters, to be sure, but by
"techie, wonky stuff." And the CIA was,
d been a working-class kid from Pitts-
self through college. With the possible
er saw anyone more palpably enthralled
IA director.
a dewy-eyed romantic vicariously living
. He knew the EIT program was on life
embrace it, to try to save it, unless she
was worth the effort. So on his first day
all the thousands of intelligence reports,
down to the most junior operators and
with the program. Was it well run? Was
? And perhaps most important for this
Was it morally justifiable? After a few
d on all counts. He determined that the
He identified himself with it, it became
ver looked back.
al instincts kicked in. The major prob-
ided, was that it was shrouded in too
existence for four years, and for all that
had steadfastly refused to say a single
d insisted on keeping knowledge of the
ut the techniques and the intelligence
ntined to only a handful of members of
as a corrosive mix of suspicion and mis-
veloping the program. For what it was
as exactly what the beleaguered Agency

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An Offer I Couldn't Refuse (2006)

Mike made one more cold-eyed, practical decision: The program had to be modified, slimmed down, if it was going to survive. I took the lead on that one. On the one hand, I had to determine which of the original EITs still could safely be deemed "legal" in the aftermath of the McCain Amendment and the *Hamdan* decision. On the other, I had to look to the CTC managers of the program for their professional assessment, based on their experience, of which of the existing techniques were "must haves" in order for the program to remain viable and productive. It was a complex, delicate balancing act. I knew, and the CTC recognized, that waterboarding was pretty much out the window. And then a bizarre sort of horse trading began, with others in the administration weighing in. Secretary of State Rice sent her emissaries—my old friend John Bellinger and her old friend the brilliant but brittle Philip Zelikow—over to my office to insist that nudity be halted; Rice's singular aversion to men being interrogated while naked remained as implacable as ever. The CTC held out strongly to maintain sleep deprivation as an option, convinced it was the one technique that had broken KSM.

Back and forth I scurried, between our people, the White House, Rice's coterie, and the Justice Department. Finally, after a few weeks, a truncated list of six techniques made the final cut: dietary manipulation (read "Ensure"), sleep deprivation, plus the so-called "attention getting" techniques, facial hold, attention grasp, abdominal grasp, open-fingered abdominal slap, and open-fingered facial slap. I remember only one significant last-minute dispute, and it was over the "walling" technique. The CTC wanted to keep it, and Rice's people wanted it out. Their respective reasons now escape me, but Rice eventually prevailed. Still, the CTC considered the tools that remained—grasps, slaps, and no sleep—sufficient for them to do their jobs. We had come a long way from waterboarding and bugs in a box.

Meanwhile, Mike Hayden quietly set out to drive the process inside the administration to "open" the program up. In September 2006, his efforts bore fruit. President Bush gave a standing-room-only speech in the East Room acknowledging and defending the existence of the CIA prison system (albeit nothing about the EITs). Bush also announced the imminent arrival at Gitmo of the remaining fourteen detainees in the prisons, including KSM and his cohorts with 9/11 blood on their hands, thus accomplishing the "endgame" we in the CIA had been insis-

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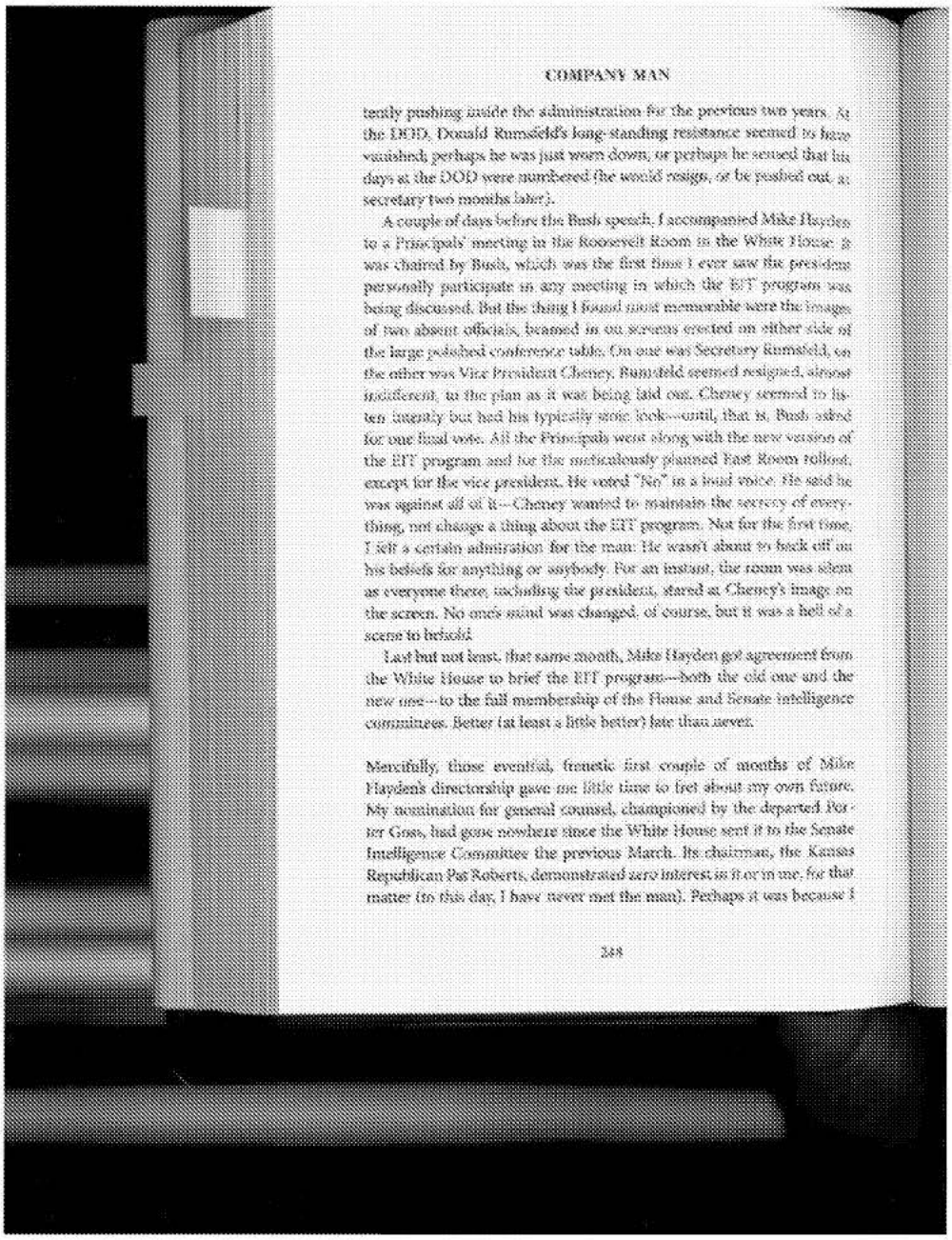

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tently pushing inside the administration for the previous two years. At the DOD, Donald Rumsfeld's long-standing resistance seemed to have vanished; perhaps he was just worn down, or perhaps he sensed that his days at the DOD were numbered (he would resign, or be pushed out, as secretary two months later).

A couple of days before the Bush speech, I accompanied Mike Hayden to a Principals' meeting in the Roosevelt Room in the White House; it was chaired by Bush, which was the first time I ever saw the president personally participate in any meeting in which the EIT program was being discussed. But the thing I found most memorable were the images of two absent officials, beamed in on screens erected on either side of the large polished conference table. On one was Secretary Rumsfeld, on the other was Vice President Cheney. Rumsfeld seemed resigned, almost indifferent, to the plan as it was being laid out. Cheney seemed to listen intently but had his typically stoic look—until, that is, Bush asked for one final vote. All the Principals were along with the new version of the EIT program and for the meticulously planned East Room rollout, except for the vice president. He voted "No" in a loud voice. He said he was against all of it—Cheney wanted to maintain the secrecy of everything, not change a thing about the EIT program. Not for the first time, I felt a certain admiration for the man: He wasn't about to back off on his beliefs for anything or anybody. For an instant, the room was silent as everyone there, including the president, stared at Cheney's image on the screen. No one's mind was changed, of course, but it was a hell of a scene to behold.

Last but not least, that same month, Mike Hayden got agreement from the White House to brief the EIT program—both the old one and the new one—to the full membership of the House and Senate intelligence committees. Better (at least a little better) late than never.

Mercifully, those eventful, frenetic first couple of months of Mike Hayden's directorship gave me little time to fret about my own future. My nomination for general counsel, championed by the departed Porter Goss, had gone nowhere since the White House sent it to the Senate Intelligence Committee the previous March. Its chairman, the Kansas Republican Pat Roberts, demonstrated zero interest in it or in me, for that matter (to this day, I have never met the man). Perhaps it was because I

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