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MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

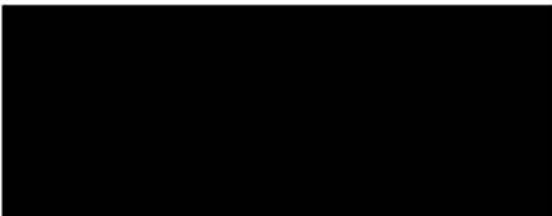
UNITED STATES OF AMERICA	AE 30
v.	(S) Defense Motion to Compel Production of Witnesses
MAJID SHOUKAT KHAN	February 28, 2019

1. ~~(S)~~ Timeliness

~~(S)~~ This motion is timely filed pursuant to the Amended Litigation and Trial Scheduling Order dated December 12, 2018 (AE 016BB).

2. ~~(S)~~ Relief Sought

~~(S)~~ Majid Khan, by and through his undersigned counsel, respectfully requests that the Military Judge grant this motion and order the Prosecution to produce the Defense's requested witnesses to testify in person in connection with his sentencing, including in support of his forthcoming motion for pretrial punishment credit and other presentencing motions. Mr. Khan specifically requests that the Military Judge order production of the 29 individuals identified as Witnesses #1, 2, 6-11, 14, 17, 27, 31-33, 40, 42, 44, 47-49, 53, 54, 63, 66, 67, 73-75, and 85 in the Defense's request for production that was served on the Prosecution on January 2, 2019. *See*



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Attachment C.¹

(U) Mr. Khan further requests that the Military Judge order the Prosecution to meet and confer in good faith with the Defense as to each of the Defense's other requested witnesses. As explained below, this relief is necessary because the Prosecution, having initially requested an in-person meet-and-confer conference to discuss the Defense's request for production of witnesses, and having abruptly cancelled that conference as it was scheduled to begin, has refused to negotiate with the Defense about its requested witnesses.

3. (U) Burden of Proof

(U) The moving party must demonstrate by a preponderance of the evidence that the requested relief is warranted. *See* R.M.C. 905(c); RC 3.8.

4. (U) Overview

(U) As Mr. Khan has explained in recent filings, he intends to present an extensive extenuation and mitigation case, and to argue for a sentence of less than 19 years in the presentencing proceedings and/or as a matter of clemency. He also intends to move for pretrial punishment credit against his sentence to reduce effectively any term of additional imprisonment that he may be required to serve after his sentence is imposed. In order to do this fully and adequately, Mr. Khan requires a substantial number of witnesses to appear in person and testify on his behalf at his sentencing hearing and related proceedings. In particular, Mr. Khan's extenuation and mitigation case must cover a 20-year time period. He must present a thorough and compelling social history that extends from his high school graduation in 1999 and the death

(U) Some of these requested witnesses are addressed in the body of this motion. Others are addressed only in Attachments C and E to the motion because their identities or the substance of their anticipated testimony are or may be classified. *See also* AE 029 (M.C.R.E. 505 notice).

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of his mother in 2001, which began his transformation from a typical Baltimore teenager to a high-value detainee at Guantánamo, through the present time, as well as matters concerning his rehabilitation and whether he is likely to present a future threat of dangerousness. The breadth of this case, as well as the nature and extent of Mr. Khan's brutal torture in CIA detention, and his subsequent decision to plead guilty and cooperate without exception for seven years *despite* the treatment and conditions he was subjected to, are exceptional by any reasonable measure.

~~(U)~~ This case certainly bears no resemblance to the ordinary court-martial where, for example, a typical cooperating defendant may make one or two drug purchases for criminal investigators in a sting operation shortly before being sentenced. It is not like an ordinary court-martial where a convicted defendant may seek to present only general evidence of good character and reputation. It is also not like an ordinary military or civilian case where a defendant convicted at trial or by guilty plea would be able to bring witnesses into the courtroom to testify at sentencing without permission from the prosecution. Nor is this case like *Al Darbi*, or other military commission guilty plea cases at Guantánamo, where there was little practical advantage to presenting an extensive sentencing case because the accused had an agreement to be transferred from Guantánamo soon after sentencing.² Mr. Khan has no such deal.³ His only

² ~~(U)~~ Despite their transfer deals, and contrary to the hardline position taken by the Prosecution in this case, the Prosecution permitted at least three family members of former detainee David Hicks to travel from Australia to Guantánamo for his sentencing. Former detainee Omar Khadr was also permitted to bring a Canadian professor with whom he had studied to Guantánamo, and to call a former Staff Judge Advocate at Guantánamo to testify on his behalf at sentencing by videolink.

³ ~~(U)~~ On February 22, 2019, Mr. Khan submitted to the Convening Authority a proposed modification of his plea agreement, which, if accepted, would give up his sentencing case in exchange for his transfer from Guantánamo in two years.

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chance to obtain an actual or effective sentence of less than 19 years and be reunited with his family before he reaches his 50s is to present a substantial extenuation and mitigation case, which his pretrial agreement specifically allows him to do.

~~(U)~~ But neither the Military Judge, the military panel, the Convening Authority, nor others who will decide Mr. Khan's fate can properly address the relevant matters of substantial significance or determine an appropriate sentence without hearing testimony from witnesses who were directly and personally involved with Mr. Khan during each step of his long journey from life in Baltimore, to his brief but undisputed involvement with terrorism, to his brutal torture in CIA detention, to his transfer to Guantánamo, and to his decision to accept full responsibility and atone for his actions. See *United States v. Williams*, 3 M.J. 239, 243-44 (C.M.A. 1977) (holding that testimony of witnesses who knew the accused at different and succeeding periods of time is material to sentencing and not cumulative); *United States v. Hanna*, 4 M.J. 938, 939 (U.S.N. Ct. M. Rev. 1978) (holding that family background is material to sentencing following guilty plea); cf. also, e.g., *United States v. Thomas*, 33 M.J. 644, 647-48 (N-M. Ct. Mil. Rev. 1991) (denying ineffective assistance of counsel claim where defense counsel "put on extensive extenuation and mitigation evidence, including the testimony of family and non-family witnesses . . . all of whom described appellant's personal and professional background from the time he was born through the time of trial. They testified as to his non-violent manner, his potential for rehabilitation and his ability to be a productive individual even in prison. A chaplain testified as to appellant's strong religious convictions, concern for his family, and his ability to be a productive member of society").

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~~(U)~~ Those who will decide Mr. Khan's punishment must hear directly from character witnesses such as the former Staff Judge Advocate at Guantánamo, a senior military officer who knew Mr. Khan personally for a period of years, recognized that he was materially different from other high-value detainees in terms of his character and motivation, and was intimately involved in Mr. Khan's decision to plead guilty and cooperate (Witness #27). See *United States v. Carpenter*, 1 M.J. 384, 386 (C.M.A. 1976) (holding that stipulation was not adequate substitute for personal appearance of superior military officer to provide character evidence at sentencing). They must also hear from others who have been, and continue to be, responsible for Mr. Khan's daily care and rehabilitation at Guantánamo (Witnesses #14, 17, 31).

~~(U)~~ In addition, those who will decide Mr. Khan's fate must hear from hostile witnesses such those responsible for Mr. Khan's brutal torture, whose demeanor and manner of testimony on the witness stand would be particularly important to observe in person (Witnesses #40, 42, 44, 47-49, 53, 54, 63, 66, 67, 73-75, 85). Their testimony about Mr. Khan's torture is essential to show the extent to which he has already been punished severely for his offenses. See *United States v. Sweeney*, 34 C.M.R. 379, 384-85 (C.M.A. 1964) (court "wholeheartedly agree[s]" that witnesses' personal appearance and manner of testifying, personal integrity, and demeanor on the witness stand go to weight of the testimony, and would be lost and ineffective if witnesses could not testify in person).

~~(U)~~ Nor can an appropriate sentence be determined without hearing from those directly impacted by the offenses to which Mr. Khan pled guilty and who have suffered in his subsequent absence. These witnesses include, for example, his wife (Witness #9), his young daughter whom he has never met (Witness #10), and a victim in this case (Witness #11). Each would provide

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compelling testimony favorable to him. As explained below, the substantial weight and credibility of the in-person testimony that such witnesses would provide is obvious. Put another way, could there be more persuasive testimony in extenuation and mitigation of Mr. Khan's sentence than for him to meet his daughter for the first time ever in the courtroom? To hear from this child about the impact of his absence on her life in Pakistan, without ever knowing him, and how she and her mother, Mr. Khan's wife, remain fearful each day in their village outside of Karachi because they live under threat from terrorist groups as a direct consequence of his cooperation with the U.S. government? Or to hear a victim in this case express sympathy for Mr. Khan, who has accepted legal responsibility for the terrorist acts that caused this person's serious injuries? There is precedent in courts-martial and these military commissions for such testimony.

(U) Yet, the Prosecution has improperly denied Mr. Khan's requests for nearly all of his requested witnesses, including the foregoing individuals and others who may be willing to testify voluntarily at Guantánamo. The Prosecution has also refused to meet and confer or otherwise negotiate with the Defense concerning the Defense's witnesses. The Military Judge should therefore grant this motion in its entirety.

5. (U) Background

A. (U) Core Themes of Mr. Khan's Extenuation and Mitigation Case

(U) As Mr. Khan's family and other witnesses will testify, Mr. Khan moved to the United States with his family in 1996, settled near Baltimore, Maryland, and obtained political asylum status in this country. He graduated from Owings Mills High School in 1999, and continued to live and work in the area. He bought a home, paid taxes, and supported his family.

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~~(S)~~ In April 2001, his mother died from hepatitis. Her death was devastating to Mr. Khan, his seven siblings, and their father. Mr. Khan, the sixth sibling and youngest of the four Khan sons, was particularly distraught by the loss of his mother, with whom he was the closest among the Khan children. Her death threw Mr. Khan's life into turmoil, which was compounded by the profound insecurity and difficulty of his being effectively stuck between two cultures, neither of which suited him entirely. Mr. Khan was the son of a traditional Pakistani family, with all the attendant responsibilities of working fulltime to support his family financially, even while in high school, and with the expectation that he live a modest, conservative lifestyle. He was also young, popular, and ambitious, and he strove to be a disk jockey, have a girlfriend, and lead a typical "American" lifestyle. He was confused, lonely, frustrated, and miserable.

~~(S)~~ In what is undoubtedly a familiar theme for those who are lost, Mr. Khan turned to religion. He became more devout and looked to Islam to provide answers to questions about who he was, and to give purpose and meaning to his life. He altered his life to fit a more Islamic style and spent more time worshiping at the Islamic Society of Baltimore. He taught computer classes to students there and continued to explore his interest in religion. But he was still lonely and unhappy—so much so that at times he felt that he wanted to die.

~~(S)~~ In February 2002, Mr. Khan went to Pakistan to get married. His marriage was arranged to one of his cousins. Although he was only in Pakistan for a short time, it was at this point that Mr. Khan was introduced by certain members of his extended family to terrorism in Pakistan. They told him in essence that if he wanted to live a proper Islamic life, Al Qaeda was the true path for him. Unfortunately, in what Mr. Khan came to realize too late was a grievous error of judgment, he believed them.

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(U) Mr. Khan returned to the United States soon after getting married, and his father and siblings begged him to stay away from extremism and confiscated his travel documents. But Mr. Khan eventually deceived his father into allowing him to return to Pakistan later that year—a pivotal moment that neither father nor son has recovered from, or will likely ever recover from, emotionally—where he resumed and deepened his involvement with terrorism. This led to Mr. Khan's capture in March 2003, only a year after traveling to Pakistan to get married, and his disappearance into secret CIA detention. For more than two years afterward, Mr. Khan's family had no idea where he was or whether he was alive. They placed his portrait on the mantel of their family home, next to his deceased mother's, believing that they would never see him again. Mr. Khan's wife [REDACTED] also thought that their daughter, [REDACTED] who was born shortly after Mr. Khan's capture, would never meet her father.

(U) The point is that Mr. Khan was not born an extremist or a terrorist. He also did not simply wake up one day and decide that he wanted to become involved with Al Qaeda and commit terrorist acts. Nor did he act out of hatred for the United States or those who have been hurt by his actions. Rather, his involvement with terrorism, and the reasons that he is in the situation that he is today, are the result of a series of events and choices that he made in his life, all of which he fully acknowledges and accepts responsibility for, and deeply regrets. This is a core theme of Mr. Khan's case in extenuation and mitigation of his sentence.

(U) As addressed in his request for production of witnesses, additional themes of his sentencing case that must be explained fully and adequately to the Military Judge, the military panel, the Convening Authority, and others who will decide his fate include: his torture and other unlawful abuse in CIA detention; his decision to plead guilty and cooperate with the U.S.

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government; his physical and mental health; and his rehabilitation, likelihood of future dangerousness, and prospects for successful reintegration into society after release. *See* Attachment C, ¶ 6; *see also* R.M.C. 1001(h) (addressing sentencing principles of rehabilitation, general deterrence, specific deterrence, and social retribution); R.M.C. 1001(f)(1) (guilty plea is a mitigating factor at sentencing); *see also* 18 U.S.C. § 3553(a) (federal sentencing factors).

Each concerns a matter of substantial significance to the determination of Mr. Khan's appropriate sentence. *See* R.M.C. 1001(e)(2).

B. ~~(S)~~ **Production of Mr. Khan's Requested Witnesses Is Essential to Matters of Substantial Significance to the Determination of an Appropriate Sentence**

~~(S)~~ In order to present these matters of substantial significance to the determination of his sentence effectively, it is essential that Mr. Khan be allowed to call witnesses of his choosing to testify in person in support of his extenuation and mitigation case. Indeed, among other relevant provisions in his plea agreement, Mr. Khan specifically bargained for the right to call "live witnesses and present evidence" in extenuation and mitigation for sentencing purposes. *See* AE 012, ¶ 21. His ability to call live witnesses is particularly important for several reasons.

~~(S)~~ First, the Prosecution insists that he is not entitled to the production of *any* exculpatory or other favorable evidence in extenuation and mitigation of his sentence. *See* AE 028. If the Prosecution is correct that Mr. Khan is not entitled to production of *Brady* material, which the Defense disputes, *see id.*, witness testimony would constitute essentially the only evidence at sentencing. Because Mr. Khan pled guilty and agreed to cooperate there would not be a sufficient trial record or other factual basis for determining an appropriate sentence in this case without witness testimony. The Stipulation of Fact entered at the time of his plea may be

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sufficient to prove Mr. Khan's guilt, but it does not address matters in extenuation and mitigation of his sentence.

~~(S)~~ In addition, witness testimony is imperative to the determination of an appropriate sentence in order to rebut the Prosecution's sentencing case. The Prosecution has signaled its intention to present an aggravation case and attempt to maximize the punishment imposed on Mr. Khan, despite the fact that he is the only high-value detainee who has agreed to cooperate with the government, and despite the fact that he has for seven years always provided complete and truthful information, never changed his facts, never minimized his own role and responsibility for his actions, and never looked back from the "leap of faith" that he took when he decided to cooperate with the United States. Tr. at 82. The Prosecution will undoubtedly ask the military panel to impose the maximum sentence of 40 years allowable under the sentencing range established in the plea agreement, notwithstanding the sentencing caps provided for elsewhere in the agreement. See AE 012, ¶¶ 5, 8; AE 013, ¶¶ 1, 3. Despite Mr. Khan's exceptional record of cooperation, the Prosecution also continues to cast some doubt as to whether it will afford him the benefit of his bargain and verify that he has cooperated as required under the terms of his plea agreement in order to cap his maximum sentence at no more than 19 years. See, e.g., AE 026A, at 3 n.1.

~~(S)~~ Any withholding of cooperation credit would not be in good faith, particularly if the Prosecution were somehow to misconstrue Mr. Khan's attempt to obtain a sentence of less than 19 years, which his plea agreement explicitly allows, or the zealous advocacy of his counsel on

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his behalf as “non-cooperation” under the terms of his plea agreement.⁴ But the fact remains that because Mr. Khan pled guilty and gave up his right to a trial of his guilt, his extenuation and mitigation case presents his only opportunity to present evidence and explain to the panel and others who may determine his punishment his personal story, the significance of his decision to cooperate despite his horrific torture, as well as the nature and extent of his cooperation, and the other factors he has set forth above. It is the only way for him to build an evidentiary record to support his request for a lesser punishment. *See United States v. Manos*, 37 C.M.R. 274, 278 (C.M.A. 1967) (explaining that because a military panel imposes punishment in post-finding proceedings, military rules “clearly envision” that an accused is entitled to present evidence and witnesses who may testify in mitigation and extenuation); *id.* at 279 (explaining that because the government may obtain an “easy conviction” via an accused’s guilty plea, it is particularly important for an accused to try to mitigate his or her punishment with reference to applicable sentencing factors).

~~(S)~~ As Mr. Khan has also explained, his presentation of an effective case in extenuation and mitigation of his sentence will be a significant undertaking. To be clear, again, this is not a case where a convicted defendant will seek to introduce only general evidence of his or her good character and reputation. It will require a substantial number of witnesses to testify on his behalf concerning several inter-related sentencing themes that span a period of 20 years of his life. There is simply no way for the Military Judge, the military panel, the Convening Authority, or others who will decide his fate to determine and impose an appropriate sentence without hearing

⁴ ~~(S)~~ To the contrary, failure to develop and present a robust mitigation case at sentencing could constitute ineffective assistance of counsel. *See Wiggins v. Smith*, 539 U.S. 510, 522-23 (2003).

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the testimony of witnesses who were directly and personally involved with Mr. Khan during each step of his long journey, which will culminate with his sentencing starting July 8th. Nor may they assess the weight and credibility of these witnesses' testimony fully and adequately except by bringing them to the courtroom in person. The only alternative is imposition of a sentence on a cold and sparse record—which is likely exactly what the Prosecution wants here.

C. ~~(S)~~ The Prosecution's Refusal to Meet and Confer or Negotiate Regarding Mr. Khan's Request for Production of Witnesses

~~(U)~~ On January 2, 2019, in accordance with the scheduling order entered in this case, *see* AE 016BB, the Defense served the Prosecution with a request for production of 115 witnesses. The request included detailed information about each individual, their anticipated testimony, and why their in-person testimony was important to Mr. Khan's extenuation and mitigation case. *See* Attachment C. The Defense also indicated that it expected some of its requested witnesses to travel to Guantánamo voluntarily to provide testimony, but that they would require travel orders and other logistical support to enter the Naval base. *See id.*, ¶ 3. In addition, the Defense asked to meet and confer with the Prosecution concerning the Defense's witness list. *See id.*, ¶ 5.

~~(U)~~ On January 18, 2019, the Prosecution contacted the Defense to arrange a time to meet and confer regarding the Defense's request for production. The Defense responded the same day and the parties arranged to meet at a secure location on January 29, 2019. Shortly thereafter, the parties discussed logistics for the conference, specifically taking into account that some of the Defense's request for production was classified. The Prosecution also indicated that it would respond to the request witness-by-witness in a chart form, identifying each of the requested individuals by the numbered request (as the Defense has referred to some of the witnesses in this motion). The Defense also spent considerable time planning for the conference and reviewing its

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request for production to determine where negotiation and agreement among the parties might be possible.

~~(S)~~ But that effort was in vain. On January 29, 2019, after the Defense had already assembled for the conference, the Prosecution abruptly cancelled the conference and stated in substance that it would not negotiate regarding the Defense's witness list. The Prosecution indicated that it would grant only a few of the Defense's requested witnesses, and, when contacted by Mr. Khan's counsel by telephone, provided no further explanation for its denial of the witness requests and its refusal to participate in a meet and confer with the Defense.

~~(S)~~ On February 1, 2019, the Prosecution served the Defense with its response to the Defense's request for production of witnesses. It denied substantially all of Mr. Khan's requested witnesses in a blanket, conclusory fashion on the ground that he had failed to satisfy the requirements of R.M.C. 1001(e)(2)—a rule that applies only to sentencing witnesses whose attendance requires a subpoena or travel orders at government expense, and which would not be relevant as to several of the Defense's requested witnesses in an ordinary court-martial or federal criminal trial where they could appear at the courthouse voluntarily.

~~(S)~~ The only witnesses that the Prosecution approved were Mr. Khan's two experts (Witnesses #32, 33), and three witnesses who would be most benefit the Prosecution's own sentencing case, [REDACTED]

[REDACTED] It also approved the testimony by [REDACTED] videoconference of Mr. Khan's father, who does not speak English and would plainly be unable to testify effectively via remote access (Witness #8), and one of Mr. Khan's siblings whom the Prosecution may consider the least harmful to its own case (Witness #1). See Attachment D.

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~~(S)~~ This motion followed.

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

~~(S)~~ Having failed to persuade Mr. Khan to give up a substantial extenuation and mitigation sentencing case, it appears that the Prosecution's current strategy is to use its administrative powers to control the production of witnesses, and, more specifically, to control who may or may not travel to Guantánamo by any means, in order to prevent Mr. Khan from presenting a robust sentencing case. To be direct, the Prosecution is effectively using its ability to control who can or cannot set foot on the base to undermine Mr. Khan's sentencing case and thereby bolster its longstanding desire for Mr. Khan to accede to whatever sentence the Prosecution believes he deserves. This is clear in several respects.

~~(S)~~ First, the Prosecution has denied nearly all of Mr. Khan's requested witnesses regardless of whether they might be willing to appear and testify voluntarily on his behalf, and regardless of whether they would be able to provide their own funding for travel to the base. For example, even though many of Mr. Khan's family members are U.S. citizens who could purchase their own plane tickets on the regular AMC Rotator or IBC Air commercial flights to and from the base in order to appear and testify at his sentencing, the Prosecution apparently will not issue them country clearances. As noted above, the Prosecution also denied completely Mr. Khan's request for his wife and daughter in Pakistan, who have the necessary passports and exit visas to attend the sentencing.

~~(S)~~ The Prosecution likewise denied the former Staff Judge Advocate, who will return from an overseas deployment in time for the hearings in July. More strikingly, the Prosecution denied a victim in this case who previously travelled to Guantánamo at the government's

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invitation for purposes of attending Mr. Khan's guilty plea proceedings. Again, the Defense understands that each of these individuals would provide important and compelling testimony on Mr. Khan's behalf. The Prosecution has simply acted to block Mr. Khan from calling those witnesses who would be most helpful to his case. It has done so without any individualized analysis or explanation of why his requests for these individuals are insufficient to permit their appearance; the Prosecution simply ignores most of the witnesses.

~~(S)~~ Notably, too, as explained in Attachment E, the Prosecution has denied every single witness who would testify about Mr. Khan's torture. It has attempted instead to excise Mr. Khan's torture entirely from his sentencing proceedings despite its obvious significance to his extenuation and mitigation case, and the determination of an appropriate sentence. *See also* R.M.C. 1001(c), Discussion.⁵ Indeed, these witnesses are essential to show the extent of the pretrial punishment that Mr. Khan endured, and to place his decision to cooperate despite his torture in its appropriate context.

~~(S)~~ Lest there be any doubt that these decisions were driven not by the merits of whether Mr. Khan's requests satisfied the requirements of R.M.C. 1001(e)(2), but rather by considerations of whether or to what extent each witness would testify favorably for Mr. Khan, it is helpful to consider the victim requested by Mr. Khan (Witness #11). The Prosecution brought this individual to Guantánamo in February 2012 to attend Mr. Khan's guilty plea and speak at a press conference afterward that was attended by media from around the world. More recently,

⁵ ~~(S)~~ As noted below, the government has gone so far as to imply that if Mr. Khan were to pursue sentencing credit for his torture, that might violate a term of his plea agreement that prevents him from *suing* officials or agencies of the U.S. government for damages as a result of his torture. *See infra* at 24-27 & Attachment F, at 2.

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the Prosecution interviewed this same person about the possibility of testifying for the Prosecution at Mr. Khan's sentencing. When the person informed the Prosecution (and later the Defense) that the person would testify favorably to Mr. Khan—including by stating that this person was living a full and vibrant life despite serious injuries sustained as a result of Mr. Khan's offense conduct, that this person believed that Mr. Khan was less culpable than other high-value detainees, that he had suffered enough, and that he should not be punished further as long as he presented no threat of future dangerousness—the Prosecution not only decided not to call this person to testify, but denied the Defense's request to call this person on the purported ground that the person's anticipated testimony was not relevant, material, or necessary to Mr. Khan's sentencing.

~~(S)~~ The anticipated live testimony of this individual plainly could not be more necessary, or the weight and credibility of this person's testimony more important, to Mr. Khan's extenuation and mitigation case or to the determination of an appropriate sentence. Indeed, by making this person unavailable based on the substance of the person's anticipated testimony because it would be helpful to Mr. Khan's sentencing case, the Prosecution comes dangerously close to obstruction.⁶ In no event is the denial legally justifiable.

~~(S)~~ To the contrary, given the unique circumstances of this case described above, the denial of this witness and the other requested witnesses would violate the Constitution, and the Military Commissions Act of 2009 and related authorities. In addition, for the reasons explained

~~(S)~~ On February 27, 2019, as this motion was nearing completion, the Defense received an email from the victim indicating that this person had decided not to make a statement regarding Mr. Khan's sentencing. The Defense understands that the email was sent after prior communication with the Prosecution.

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below and in Attachment E, each of the witnesses that Mr. Khan moves to compel the Prosecution to produce satisfies the requirements of R.M.C. 1001(e)(2) and applicable case law.

I. ~~(S)~~ **The Prosecution's Refusal to Compel Production of Mr. Khan's Requested Witnesses in Order to Prevent Him from Presenting a Substantial Extenuation and Mitigation Case Is Unconstitutional**

~~(S)~~ Even setting aside the language Mr. Khan's plea agreement, which permits him to call live witnesses, *see* AE 012, ¶ 21, the Prosecution's attempt to stop defense witnesses from testifying is a clear violation of Mr. Khan's Fifth and Sixth Amendment rights. The Fifth Amendment's Due Process Clause and the Sixth Amendment's Compulsory Process Clause each guarantees every criminal defendant the opportunity to present a complete defense during both trial and sentencing proceedings. *See, e.g., Holmes v. South Carolina*, 547 U.S. 319, 324 (2006); *United States v. Davenport*, 445 F.3d 366, 372 (4th Cir. 2006). As the plain text of the Sixth Amendment makes clear, having this opportunity necessarily entails the right to present witnesses favorable to the defense. *See* U.S. Const. amend. VI; *Washington v. Texas*, 388 U.S. 14, 19 (1967); *Sweeney*, 34 C.M.R. at 382.

~~(S)~~ The structural importance of this right cannot be overstated. Safeguarding the Defense's ability to select and call witnesses is not only a crucial element of fair process, but, in an adversarial system like ours, is also necessary to protect the basic objective of any legitimate judicial proceeding—to uncover the truth. *See Holmes*, 547 U.S. at 330-31. For this reason, and as the Supreme Court has repeatedly made clear, “[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense.” *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *accord, e.g., Rock v. Arkansas*, 483 U.S. 44, 52 (1987); *Washington*, 388 U.S. at 19.

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~~(S)~~To ensure that this right is enforced, the Fifth and Sixth Amendments constrain any prosecutorial or judicial action that would substantially interfere with a defendant's ability to present witnesses of his choosing. The government, for instance, may not remove defense witnesses from the United States, *see, e.g., United States v. Leal-Del Carmen*, 697 F.3d 964, 970 (9th Cir. 2012), may not threaten them in an effort to stop them from testifying, *see, e.g., United States v. Viera*, 819 F.2d 498, 502-05 (5th Cir. 1987), may not advise them not to assist the defense, *see, e.g., United States v. Peter Kiewit Sons' Co.*, 655 F. Supp. 73, 76-78 (D. Colo. 1986), and may not otherwise discourage them from testifying in favor of the defense and against the government, *see, e.g., United States v. Morrison*, 535 F.2d 223, 227-28 (3d Cir. 1976). Even courts must not rigidly apply evidentiary rules that preclude important defense witnesses from testifying, *see, e.g., Holmes*, 547 U.S. at 324-25, and must carefully avoid taking actions that would frighten defense witnesses from the stand, *see, e.g., Webb v. Texas*, 409 U.S. 95, 96-98 (1972).

~~(S)~~These principles make clear that, at the very least, the government cannot use its authority to block defense witnesses' access to the courthouse. *United States v. Filippi*, 918 F.2d 244 (1st Cir. 1990), is instructive. Just like the Prosecution's refusal to permit defense witnesses access to Guantánamo in this case, the prosecutor in *Filippi* failed to arrange permission for a foreign defense witness to enter the United States for purposes of attending trial. *Id.* at 247. The First Circuit held that this "deliberate omission to act, where action was required, . . . constitute[d] a violation of the Sixth Amendment right to compulsory process and, derivatively, the right to due process protected by the Fifth Amendment." *Id.* The same result obtains here. Simply put, "the government may not 'simultaneously prosecut[e] the defendant and attempt[]

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to restrict his ability to use information that . . . is necessary to defend himself against the prosecution.” *United States v. Paracha*, No. 03 CR 1197, 2006 WL 12768, at *10 (S.D.N.Y. Jan. 3, 2006) (alterations in original) (quoting *United States v. Fernandez*, 913 F.2d 148, 154 (4th Cir. 1990)).

~~(S)~~ This is not to say that the government could not have a legitimate interest in security or in “withhold[ing] from disclosure the identity of [certain] persons” whose presence the defense has requested. *Roviaro v. United States*, 353 U.S. 53, 69 (1957). But even those interests “must give way where,” as here, the relevant witnesses’ testimony is “relevant and helpful to the defense.” *Paracha*, 2006 WL 12768, at *9 (quoting *Rovario*, 353 U.S. at 59); *see also United States v. Moussaoui*, 382 F.3d 453, 466 n.18 (4th Cir. 2004) (“There is no question that the Government cannot invoke national security concerns as a means of depriving Moussaoui of a fair trial.”). More importantly, the Prosecution simply has not articulated any concerns about security at the Guantánamo facility, and, as explained above, some number of the witnesses that Mr. Khan seeks to call are already known to Mr. Khan and to the public, and would testify voluntarily on his behalf if permitted.

II. ~~(S)~~ **The Prosecution’s Refusal to Compel Production of Mr. Khan’s Requested Witnesses in Order to Prevent Him from Presenting a Substantial Extenuation and Mitigation Case Violates the Military Commission Act and Related Authorities**

~~(S)~~ In addition to Mr. Khan’s Fifth and Sixth Amendment rights to compulsory process of witnesses helpful to his sentencing, the Military Commissions Act of 2009 guarantees him “a reasonable opportunity to obtain witnesses and other evidence,” and that opportunity “shall be comparable to the opportunity available to a criminal defendant in a court of the United States under [A]rticle III of the Constitution.” 10 U.S.C. § 949j(a)(1). In addition, “[p]rocess issued in

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military commissions . . . to compel witnesses to appear and testify and to compel the production of other evidence . . . shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue; and shall run to any place where the United States shall have jurisdiction thereof." *Id.* § 919j(a)(2); *see also* R.M.C. 703(a). Military commission rules further require that the Defendant have an "equal opportunity" to the Prosecution to present its case, and "no party may unreasonably impede the access of another party to a witness or evidence." R.M.C. 701(j); *see also* R.M.C. 703(f); *Manos*, 37 C.M.R. at 279 (noting that courts have duty to ensure equal treatment for every litigant).

~~(S)~~ Here, the Prosecution's denial of substantially all of Mr. Khan's requested witnesses contravenes these principles and is unreasonable. In no meaningful sense can the Prosecution be said to have afforded Mr. Khan equal access to witnesses and evidence in this case. For example, and without limitation, again, it has notably attempted to excise from Mr. Khan's extenuation and mitigation case entirely any testimony or other evidence concerning his torture despite the obvious relevance of his torture to the determination and imposition of his punishment, and the fact that such testimony is explicitly permitted by his plea agreement. *See* AE 012, ¶¶ 21, 23, 26; AE 013, ¶ 4; R.M.C. 1001(c) & Discussion. The Prosecution does not want equal access to witnesses; it wants no access at all.

~~(S)~~ The Prosecution has also improperly denied Mr. Khan's request to call a victim, who previously traveled to Guantánamo for purposes of this very case, but apparently only after determining that person would testify favorably to Mr. Khan and perhaps contrary to the Prosecution's view of Mr. Khan's appropriate punishment. *See Sweeney*, 34 C.M.R. at 382 ("[Defendant] may not be deprived of the right to summon to his aid witnesses who it is believed

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may offer proof to negate the Government's evidence or to support the defense."). The Prosecution has also similarly denied the former Staff Judge Advocate, who will have recently returned from an overseas deployment and be available to testify in July, notwithstanding precedent in these very military commissions for such testimony. *See supra* note 2; *see also United States v. Rhodes*, 14 M.J. 919, 921-22 (C.M.R. 1982) ("Inconvenience to the service that must produce the witness before the court is not a valid consideration.").

~~(S)~~ The Prosecution has likewise denied Mr. Khan's family members from appearing in person, contrary to prior practice in the commissions. *See supra* note 2. It has sought improperly to pick and choose, to its substantive advantage, from among Mr. Khan's family members who would and would not be permitted to testify, and to limit the mode of their testimony as to make it less compelling and effective. *See supra* at 13; *Sweeney*, 34 C.M.R. at 382 (decisions about "[w]ho these witnesses shall be is a matter for the accused and his counsel"); *cf. United States v. Thornton*, 24 C.M.R. 256, 259 (C.M.A. 1957) ("An accused cannot be forced to present the testimony of a material witness on his behalf by way of stipulation or deposition. On the contrary, he is entitled to have the witness testify directly from the witness stand in the courtroom."). The Prosecution has also wielded its administrative power to control who may set foot at Guantánamo to block Mr. Khan's family and other witnesses who might be willing to appear voluntarily. *See supra* at 11-12, 14.

~~(S)~~ As to the latter point, 10 U.S.C. § 949j(a)(1) and R.M.C. 1001(e)(2) are intended to conform military practice with the rules and procedures followed in federal courts. *See Sweeney*, 34 C.M.R. at 382. In particular, the provisions are intended to mirror Federal Rule of Criminal Procedure 17(b), which permits a court to subpoena witnesses at government expense for

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indigent defendants. *See id.* But with respect to witnesses who may appear voluntarily or otherwise not at government expense, the applicable federal rule is rather Federal Rule of Criminal Procedure 17(a), under which defense counsel may obtain a blank subpoena from the court clerk for completion and issuance to a witness to ensure his or her appearance at trial without seeking leave of the court or the prosecution. Yet, unlike a civilian federal case or even an ordinary court-martial, the only reason that the Defense must move to compel production of such witness at all under R.M.C. 1001(e)(2) is because traveling to Guantánamo requires travel orders and country clearances—simple, routine paperwork—which the Prosecution is withholding to its substantive advantage. At minimum, this factor should bear favorably on the Military Judge's consideration of the Defense's witness requests and the equities of this motion. *See Sweeney*, 34 C.M.R. at 386 (explaining that all parties should be concerned with the right of the accused to secure the attendance of witnesses, the need to seriously consider the witness request, and taking necessary measures to comply with the request).

III. ~~(U)~~ **Mr. Khan's Requests for Production of Witnesses Satisfy the Requirements of R.M.C. 1001(e)(2) and Applicable Case Law**

~~(U)~~ Notwithstanding the Prosecution's unwillingness to negotiate with the Defense, Mr. Khan has narrowed his witness list substantially to 29 individuals whose production he now moves to compel. As explained in the Defense's request for production of witnesses, throughout this motion, and in Attachment E hereto, each individual's in-person testimony complies with the requirements of R.M.C. 1001(e)(2).

~~(U)~~ As an initial matter, there is presently no basis to consider whether alternate forms of evidence would be sufficient to meet the needs of the Commission in determining an appropriate sentence for Mr. Khan. That is so because the Prosecution thus far has provided only blanket or

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conclusory denials of Mr. Khan's witness requests; refused to negotiate with the Defense; failed to invoke any classified information or other evidentiary privileges; and failed to raise any practical difficulties of compelling witness testimony. See R.M.C. 1001(e)(2)(C)-(E). The only relevant inquiry at this time is whether the anticipated witness testimony is "necessary for consideration of a matter of substantial significance to a determination of an appropriate sentence," and whether "[t]he weight or credibility of the testimony is of substantial significance to the determination of an appropriate sentence." R.M.C. 1001(e)(2)(A)-(B).

~~(U)~~ Mr. Khan has addressed those factors throughout this motion with reference to witnesses who fall within four general categories: his family, including his wife and daughter; a victim in this case; Guantánamo-related witnesses; and torture witnesses. He will further address only a few of them here. In abundance of caution, most will be addressed only in Attachment E, which Mr. Khan incorporates herein by reference.

~~(U)~~ Mr. Khan's Family

~~(U)~~ Mr. Khan initially requested each of his siblings, his father, his wife, and his daughter. The Prosecution approved only two of those individuals as witnesses, and only by videoconference, Mr. Khan's father and one of his older brothers (Witnesses #1, 8). Mr. Khan has since narrowed his witness request to four of his siblings, his father, his wife and his daughter (Witnesses #1, 2, 6-10).

~~(U)~~ As described here and in greater detail in Attachment E, there is no adequate substitute in terms of the weight, credibility, and persuasiveness for the production of Mr. Khan's family members to testify on his behalf. The impact of Mr. Khan's disappearance and torture was devastating for his family members, including, in particular, his father. Mr. Khan's

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capture, disappearance and absence has weighed significantly on his father. If called to testify, for example, Mr. Khan's father would explain the terrible anxiety that he experienced while wondering, for a period of years, what had happened to his youngest son, and whether he could have done more to avert the unfortunate path that his youngest son had chosen. It was particularly difficult for Mr. Khan's father, as it would be for any father, and for Mr. Khan's wife, [REDACTED] and their daughter, [REDACTED] who was born after his capture and to this day has never met her father.

~~(U)~~ Each family member will explain how the terrible pain of Mr. Khan's disappearance and absence has impacted and permanently altered the course of their individual lives. They will explain how their pain was compounded when Mr. Khan's name appeared for the first time after his disappearance in the case *United States v. Uzair Paracha*, when prosecutors in the Southern District of New York revealed in late 2005 that Mr. Khan was in U.S. custody, and when he later arrived at Guantánamo in September 2006. The public pressure on Mr. Khan's family was extraordinary. Revelations that Mr. Khan had been tortured, including by waterboarding, beatings, and anal rape while in CIA custody only made the situation worse for them to bear. The impact of these revelations was so great that Mr. Khan's father has become clinically depressed, and suffers from anxiety, diabetes, and high blood pressure. Indeed, he has serious heart disease and may not survive to see his son released from custody before the expiration of a sentence not to exceed 19 years.

~~(U)~~ Such an impact statement could not be effectively conveyed to the Military Judge or the military panel remotely, however, because Mr. Khan's father does not speak English. The weight and credibility of Mr. Khan's father's testimony also could not be assessed sufficiently

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via videoconference. Rather, it will be critically important and powerfully persuasive to see the anguish and tears of Mr. Khan's father in person on the witness stand when he talks about what has happened to his youngest son and the impact it has had on their family. It is also essential to Mr. Khan himself to see his father in person for the first time in more than sixteen years—and potentially for the last time in his father's life—in the courtroom.

~~(S)~~ Mr. Khan's Experts

~~(S)~~ A final point merits attention here. Mr. Khan has requested that his two government-funded experts appear and testify in person on his behalf in connection with his sentencing and related proceedings (Witnesses #32, 33). The Prosecution has approved those requests; in the case of Mr. Khan's torture expert, the approval is subject to resolution of the conflict issue addressed in the AE 026 series. See Attachment D, at 3. For its part, the Convening Authority has approved the Defense's request for appointment and funding of Mr. Khan's medical expert as a witness, and deferred consideration of the Defense's request to employ its torture expert as a witness pending resolution of the conflict waiver. However, one potential issue concerning the production of these experts remains unresolved.

~~(S)~~ In its approval of Mr. Khan's request for the medical expert to serve as an expert witness, the Convening Authority has included the following caveat:

You also proffer that Dr. [REDACTED] will testify in support of an impending motion for pretrial punishment credit. . . . [But] Article 13 of the UCMJ and Rule for Court-Martial 305, pertaining to pretrial punishment, do not apply to Mr. Khan . . . Additionally, your impending motion seems directly inconsistent with paragraph 11 of the Pretrial Agreement, which states that once his guilty plea is accepted, Mr. Khan will not initiate any legal claims against the United States Government regarding his capture, detention, or confinement conditions prior to the plea. Consequently, Dr. [REDACTED] is not approved to testify in support of any motion for pretrial punishment credit.

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Attachment F, at 2.

~~(S)~~ The Convening Authority's message in this regard is abundantly clear. First, although the Prosecution has approved Mr. Khan's request to produce his medical expert, the Convening Authority is purporting to deny Mr. Khan's request for his medical expert to appear and testify in connection with his pretrial punishment motion, which the Convening Authority purports to decide for itself is not applicable in this case as a matter of law. Second, as noted above, *see supra* note 5, the Defense understands that the Convening Authority is threatening defense counsel that if Mr. Khan litigates a pretrial punishment motion in an attempt to reduce the effective term of any sentence of imprisonment that may be imposed, that effort—simply presenting that legal argument on behalf of Mr. Khan—could be considered by the Convening Authority as grounds to move to withdraw from his plea agreement.

~~(U)~~ The Convening Authority's conduct is wholly improper in each regard. As an initial matter, the suggestion that simply requesting pretrial punishment credit would violate paragraph 11 of the plea agreement is frivolous, at best. Paragraph 11 prohibits Mr. Khan from *suing* the United States or its agencies or officials for his torture, which, of course, he has not done. *See also, e.g.*, Tr. at 84 (Trial Counsel: "our understanding of the PTA is Mr. Khan is limited from *suing* officials or agencies of the United States Government") (emphasis added); *id.* at 84-85 (Military Judge: "this only applies to the United States and its agencies *as defendants*") (emphasis added). It is Mr. Khan who is the defendant here, not the U.S. government or its agencies or officials. Moreover, as explained at length in recent filings, Mr. Khan's plea agreement and applicable law expressly permit him to present factual and legal arguments about the determination of an appropriate sentence, including based on his torture.

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~~(S)~~ At worst, the Convening Authority's statement could reasonably be viewed as an attempt to pressure Mr. Khan's defense counsel not to raise a viable legal claim for pretrial punishment credit, or to advocate zealously for their client, as they are of course ethically obligated to do. It is also fairly interpreted as an improper attempt to influence and subvert the sentencing proceedings in this case; it certainly raises that appearance. See R.M.C. 701(j), Discussion ("Convening authorities . . . should make no statement, oral or written, and take no action which could reasonably be understood to discourage or prevent witnesses from testifying before a military commission, or as a threat of retribution for such testimony."); see also R.M.C. 104(a) (prohibiting, among other things, attempts to coerce or influence the professional judgment of defense counsel). But the Prosecution's interpretation of Mr. Khan's plea agreement does not control, and neither does the improper interpretation by the Convening Authority; only the Military Judge's interpretation does.

~~(S)~~ Accordingly, to the extent the Convening Authority has attempted to prevent Mr. Khan's experts from appearing to testify on his behalf in connection with a particular hearing related to his sentencing, in support of a pretrial punishment motion, the Military Judge should compel the Prosecution to produce the experts at such a hearing, or at any sentencing-related hearing in this case. The failure to do so under these circumstances would constitute reversible error. See *United States v. Sears*, 43 C.M.R. 220, 224 (C.M.A. 1971) ("[C]apitulation to the will of the convening authority . . . [regarding which witnesses may be called to testify is] an abuse of discretion.").

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~~TOP SECRET// [REDACTED] //ORCON//NOFORN~~7. ~~(S)~~ Conclusion

~~(S)~~ The motion should be granted, and the Military Judge should order the Prosecution to produce the 29 witnesses requested by the Defense. The Military Judge should also order the Prosecution to meet and confer in good faith with the Defense as to each of the Defense's other requested witnesses.

8. ~~(S)~~ Oral Argument

~~(S)~~ The Military Judge has scheduled a hearing for the week of April 1, 2019 to resolve witness production issues. See AE 016BB, at 2.

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

~~(S)~~ No witnesses or evidence are required.

10. ~~(S)~~ Certificate of Conference

~~(S)~~ The parties have conferred. The Prosecution has not stated its position within 24 hours and is therefore presumed to object to the requested relief. RC 3.5.k.

11. ~~(S)~~ Additional Information

~~(S)~~ The Defense has no additional information to present at this time.

12. ~~(S)~~ List of Attachments

- A. ~~(S)~~ Certificate of Service, dated February 28, 2019.
- B. ~~(S)~~ Proposed Order.
- C. ~~(S)~~ CLASSIFIED Defense request for production of witnesses.
- D. ~~(S)~~ Prosecution response to Defense request for production of witnesses.
- E. ~~(S)~~ CLASSIFIED Supplement.
- F. ~~(S)~~ Convening Authority's response to Defense expert witness request (Dr. [REDACTED]).

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Respectfully submitted,

/s/

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~~(S)~~ ATTACHMENT A

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MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>MAJID SHOUKAT KHAN</p>	<p>AE ____</p> <p>(U) [Proposed Order] Defense Motion to Compel Production of Witnesses</p> <p>March __, 2019</p>
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~~(U)~~ Majid Khan's motion to compel production of witnesses (AE 030) is hereby GRANTED.

~~(U)~~ The Prosecution is hereby ORDERED to produce the Defense's requested witnesses identified as Witnesses #1, 2, 6-11, 14, 17, 27, 31-33, 40, 42, 44, 47-49, 53, 54, 63, 66, 67, 73-75, and 85 in the Defense's request for production that was served on the Prosecution on January 2, 2019. See AE 030, Attachment C.

~~(U)~~ The Prosecution is hereby further ORDERED to meet and confer in good faith with the Defense as to each of the Defense's other requested witnesses.

~~(U)~~ SO ORDERED, this ____ day of March 2019.

Military Judge

PROPOSED ORDER / DEFENSE / 20190228

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(S) ATTACHMENT C

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2 Jan 2019

~~(S)~~ MEMORANDUM FOR CHIEF PROSECUTOR~~(U)~~ From: LCDR Jared A. Hernandez, JAGC, USN, Detailed Defense Counsel~~(U)~~ Subject: DEFENSE REQUEST FOR PRODUCTION OF WITNESSES IN *UNITED STATES v. MAJID KHAN*.~~(U)~~ Ref: (a) R.M.C. 703
(b) R.M.C. 1001

- ~~(U)~~ 1. In accordance with references (a) and (b), and the Amended Litigation And Trial Scheduling Order (AE# 016BB), the Defense requests the following witnesses be produced by the Government at presentencing and/or interlocutory hearing(s).
- ~~(U)~~ 2. The Defense respectfully requests the Government produce all of the listed witnesses.
- ~~(U)~~ 3. The Defense requests the Government produce all of the requested witnesses because these witnesses cannot travel to Naval Station Guantanamo Bay (NSGB) without the Government's assistance. This assistance includes, but is not limited to, the issuance of travel orders and theater/country clearances. The Defense expects several witnesses (family members, FBI agents, former prosecutors, anticipated Defense experts, the victim, [REDACTED] etc.) to travel voluntarily. In the event any witness declines to travel voluntarily, the Government should compel the witness's attendance at NSGB in order to testify in person at the presentencing proceedings and/or interlocutory hearing(s).
- ~~(U)~~ 4. The Defense provides the contact information for certain witnesses including members of the Khan family and certain other witnesses below. For all other witnesses, contact information is known to the Government with the exception of witnesses #98-113. The Defense will provide contact information for those individuals at a later date when it is obtained by the Defense's investigator who has not yet been hired and cleared to meet with Mr. Khan.
- ~~(U)~~ 5. Each witness's appearance in-person is required due to the unique facts and circumstances of the case under the factors detailed within R.M.C. 703 and R.M.C. 1001, and by the First, Fifth and Sixth Amendments of the United States Constitution. However, the Defense requests the opportunity to meet and confer with the Government concerning this request for production.
- ~~(U)~~ 6. Each of the requested witnesses will provide relevant and material information including, without limitation, testimony in extenuation and mitigation at Mr. Khan's sentencing. This information includes, without limitation, information concerning; a) Mr. Khan's family background; b) how Mr. Khan became involved with terrorism; c) Mr. Khan's actions as described in the stipulation of fact; d) the nature and duration of Mr. Khan's capture, detention, and confinement; e) Mr. Khan's decision to plead guilty and cooperate with the Government, his substantial assistance to the Government, and his continuing fulfillment of his cooperation

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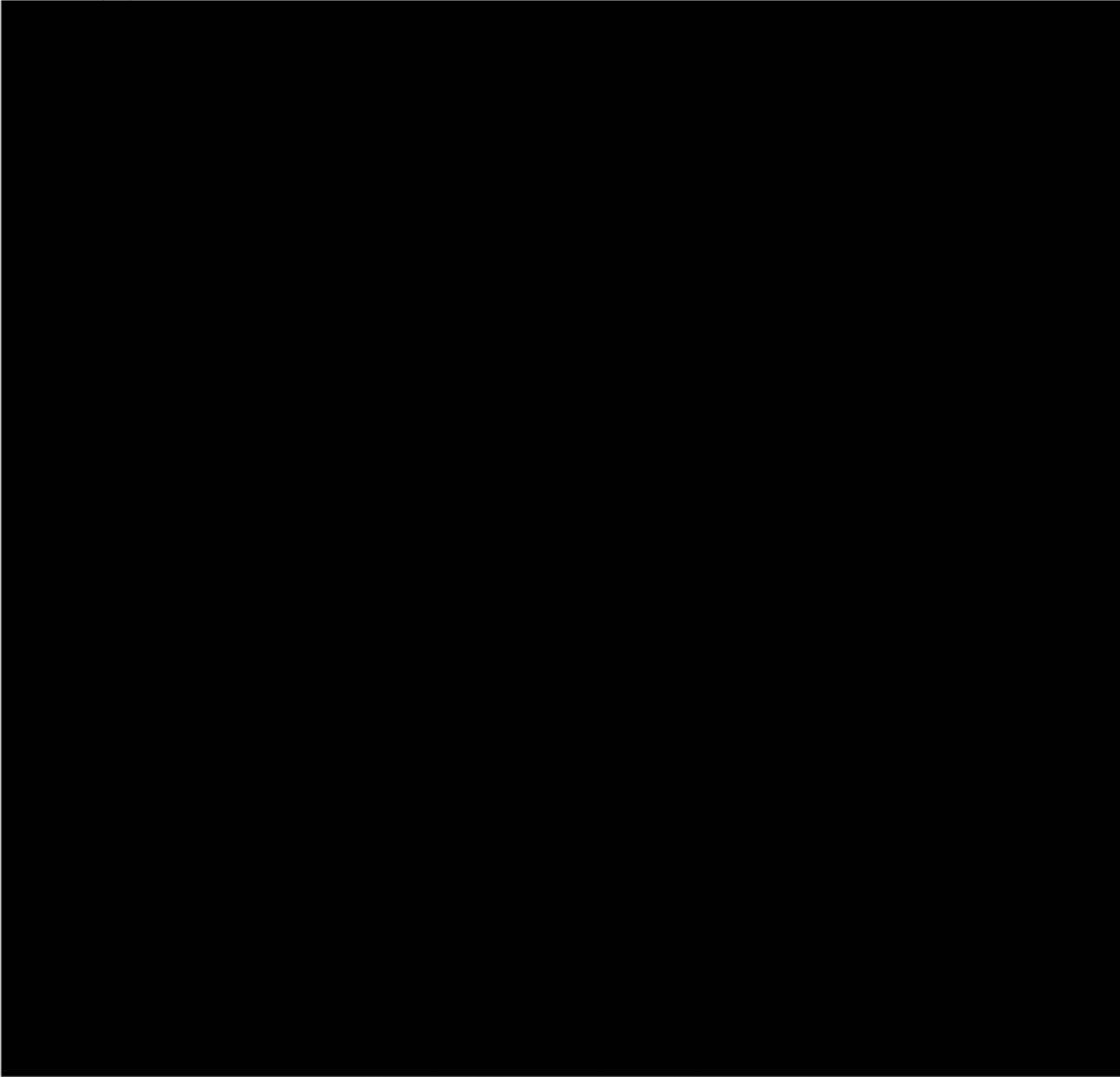
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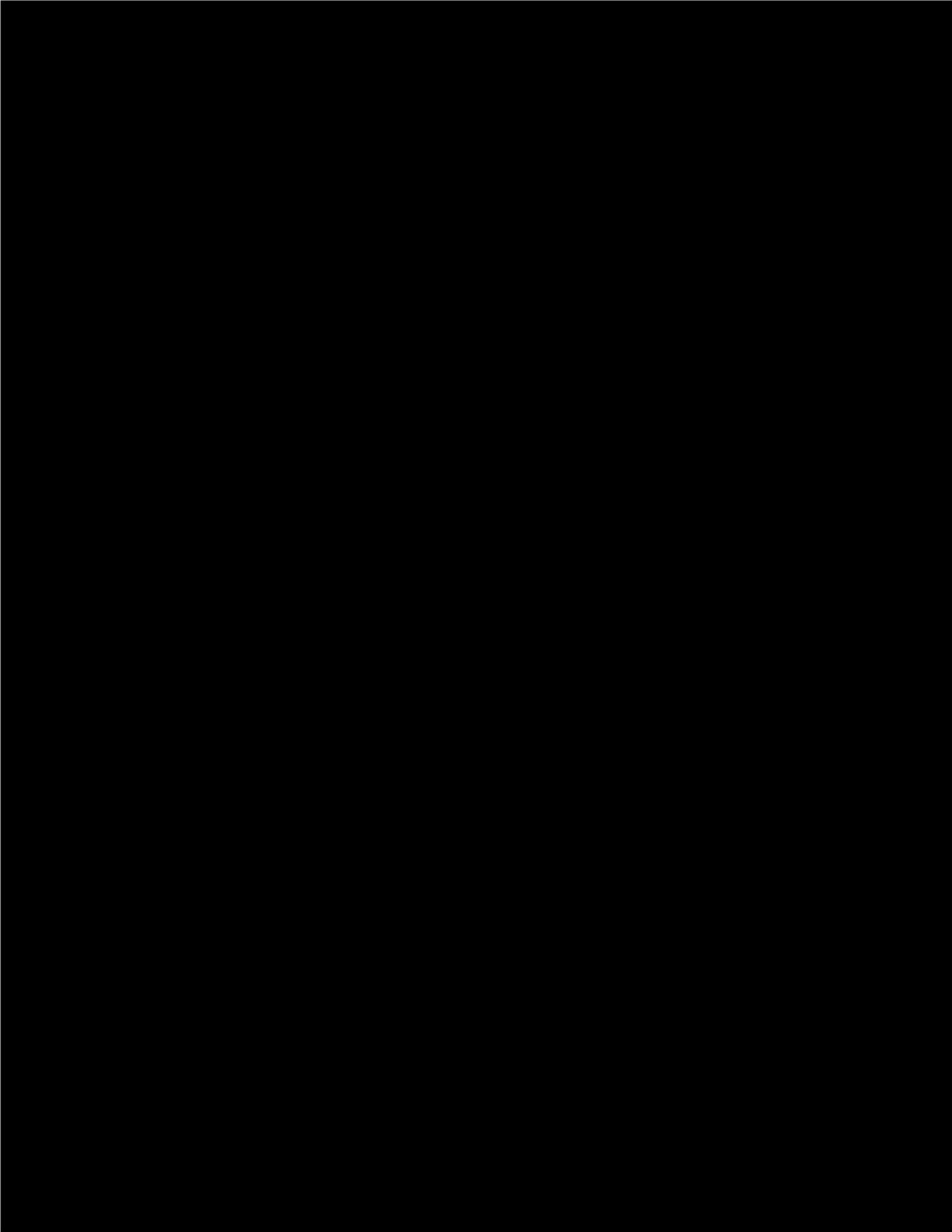
obligations; f) Mr. Khan's physical and mental condition; g) Mr. Khan's rehabilitation, likelihood of future dangerousness, and prospects for successful reintegration into society. The Defense provides a synopsis of each witness's expected testimony below.

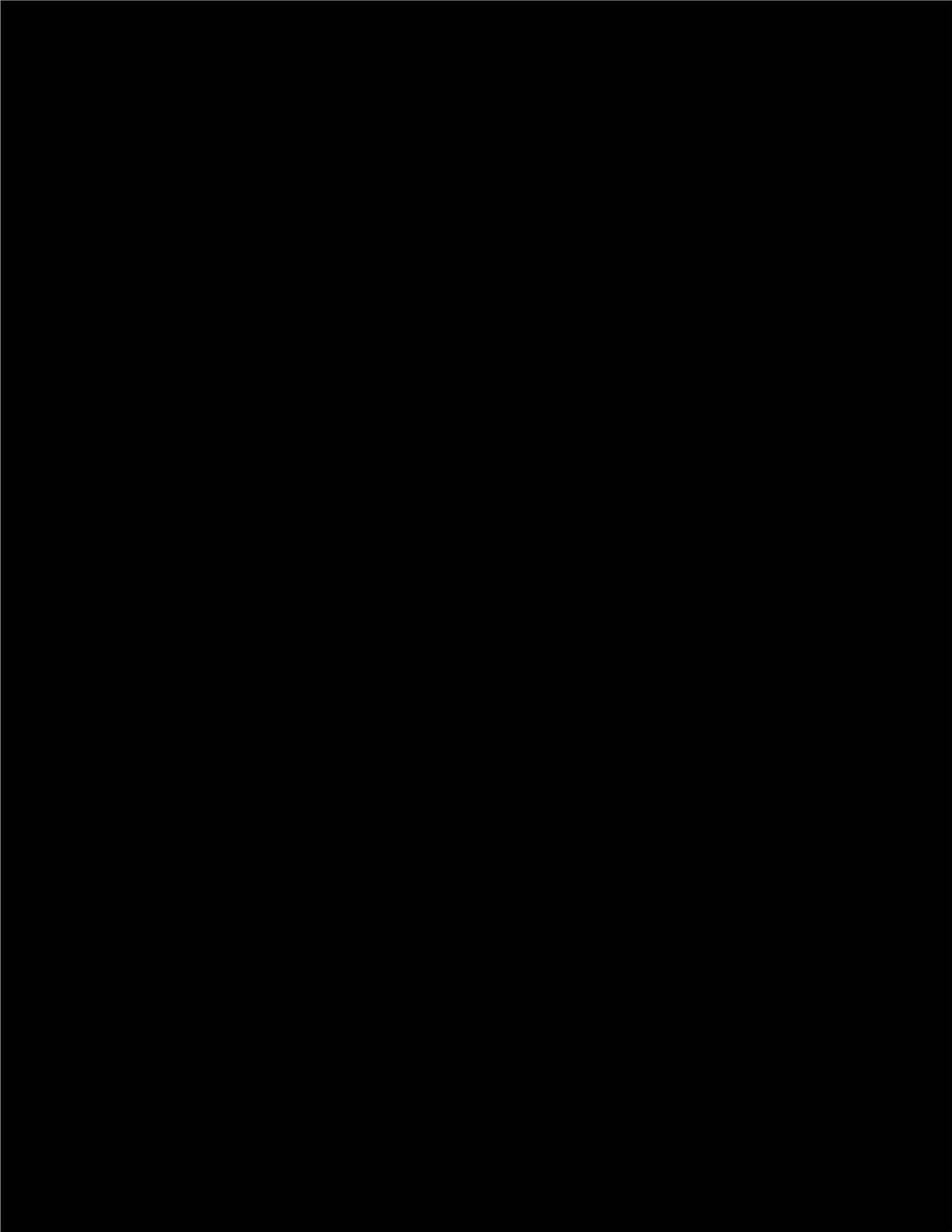
~~(S)~~ Family of Mr. Khan:

~~(S)~~ Each of the following witnesses (#1-10) will testify about Mr. Khan's family and personal background; how Mr. Khan became involved with terrorism; Mr. Khan's rehabilitation, likelihood of future dangerousness, and prospects for successful reintegration into society. Additionally, they will testify as to the impact of Mr. Khan's detention and torture on the Khan family.



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(U) Victim:

[REDACTED]

~~(S)~~ Current and former Government officials involved in Mr. Khan's case:

(U) Each of the following witnesses (#12-25) will testify about Mr. Khan's actions as described in the stipulation of fact; the nature and duration of Mr. Khan's capture, detention, and confinement; Mr. Khan's decision to plead guilty and cooperate with the Government and his substantial assistance to the Government at different periods of time; Mr. Khan's physical and mental condition; Mr. Khan's rehabilitation and prospects for successful reintegration into society. In particular, these witnesses will testify that Mr. Khan continues to fulfill the terms of his cooperation agreement with the Government and does not pose a future threat.

[REDACTED]

13. (U) Timothy W. Harvey, FBI [REDACTED]

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[REDACTED]

14. ~~(S)~~ Michael Fregeau, FBI – Baltimore

[REDACTED]

15. ~~(S)~~ C. Andrew de la Rocha, FBI – JTF

[REDACTED]

16. ~~(S)~~ Oscar A. Ramirez, FBI – JTF

[REDACTED]

17. ~~(S)~~ Beth A. Schwarz, FBI – JTF

[REDACTED]

18. ~~(S)~~ Jeffrey Seawell, FBI – JTF

[REDACTED]

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19. ~~(U)~~ Brian A. Ozden, FBI – JTF

[REDACTED]

20. ~~(U)~~ Pat, Last Name Unknown, NYPD

[REDACTED]

21. ~~(U)~~ David C. Cudmore, FBI – JTF

[REDACTED]

22. ~~(U//FOUO)~~ Ali Soufan, FBI

[REDACTED]

23. ~~(U)~~ Stephen Gaudin, FBI

[REDACTED]

24. ~~(U)~~ Arthur M. Cummings, II, FBI, Executive Assistant Director, National Security Branch

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~~(S)~~ Joint Task Force (JTF) GTMO:

~~(U)~~ Each of these witnesses (#26-31) will testify about the nature and duration of Mr. Khan's detention and confinement at NSGB; Mr. Khan's physical and mental condition at NSGB; and Mr. Khan's rehabilitation, likelihood of future dangerousness and prospects for successful reintegration into society. Each individual will testify regarding his or her personal knowledge of these matters for the particular timeframe that they interacted with Mr. Khan directly.

26. ~~(S)~~ Rear Admiral David B. Woods, JTF Commander

- a. Synopsis of Expected Testimony:
 - i. He will testify regarding the approved removal of Mr. Khan from Camp 7 and the creation of his current facility.

27. ~~(U//FOUO)~~ CAPT Thomas J. Welsh, JAGC, USN, SJA JTF

- a. Contact Information:
 - i. Email: Thomas.welsh [REDACTED]
- b. Synopsis of Expected Testimony:
 - i. Mr. Welsh was instrumental in facilitating Mr. Khan's decision to plead guilty and will testify regarding his efforts.
 - ii. Mr. Welsh will detail that he spent nearly every single day with Mr. Khan while he was SJA.
 - iii. Mr. Welsh will provide testimony that he referred to Mr. Khan as his fifth or sixth child.

28. ~~(S)~~ Colonel Donnie Thomas, JDG Commander

- a. Synopsis of Expected Testimony:
 - i. Mr. Thomas was responsible for Mr. Khan's conditions of confinement during his tenure as JDG Commander and will provide testimony regarding Mr. Khan's detention.

29. ~~(U)~~ Colonel Steven Gabavics, JDG Commander

- a. Synopsis of Expected Testimony:
 - i. Mr. Gabavics was responsible for Mr. Khan's conditions of confinement during his tenure as JDG Commander and will provide testimony regarding Mr. Khan's detention

30. ~~(S)~~ Camp 7 OICs (2006-2019)

- a. Synopsis of Expected Testimony:

[REDACTED]

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- i. These individuals will testify they were responsible for Mr. Khan's conditions of confinement and day-to-day interactions with the guard force, DSMP, and other personnel.

31. ~~(U)~~ Camp 7 Senior Medical Officers (2006-2019)

a. Synopsis of Expected Testimony:

- i. These individuals will testify they were responsible for Mr. Khan's healthcare and medical treatment. They will testify regarding his physical and mental health including the harm caused by his torture and abuse by the CIA.

~~(U)~~ **Anticipated Defense Experts:**

~~(U)~~ A synopsis of testimony for these witnesses (#32-33) will be provided in accordance with the milestones set within the Amended Litigation And Trial Scheduling Order (AE 016BB). However, we reasonably expect these witnesses to testify about the nature and duration of Mr. Khan's capture, detention, and confinement; Mr. Khan's physical and mental condition; and Mr. Khan's rehabilitation, likelihood of future dangerousness and prospects for successful reintegration into society. Contact information was previously provided to the Government within each expert consultant request.

32. ~~(U)~~ Dr. [REDACTED]

33. ~~(U)~~ Mr. Steven Kleinman

~~(U)~~ **White House:**

~~(U)~~ Each of these witnesses (#34-35) will testify about the nature and duration of Mr. Khan's capture, detention, and confinement. They will testify regarding the implementation and execution of the CIA's RDI program. They will also testify that the CIA lied to the White House, the Department of Justice, and the United States Congress concerning the RDI program and its use of torture.

34. ~~(U)~~ President George W. Bush

a. Synopsis of Expected Testimony:

- i. President Bush will testify regarding the memorandum of notification authorizing the RDI program and delegation of the program to the CIA.

35. ~~(U)~~ Condoleezza Rice

a. Synopsis of Expected Testimony:

- i. Ms. Rice will testify regarding [REDACTED] involvement with the abuse of detainees at DETENTION SITE COBALT, including Khalid el-Masri who was detained with Mr. Khan.

~~(U)~~ **CIA Directors:**

~~(U)~~ Each of these witnesses (#36-38) will testify about the nature and duration of Mr. Khan's capture, detention, and confinement. In particular, these witnesses will testify regarding the

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Memorandum of Notification authorizing the implementation and execution of the CIA's RDI program. They will also testify that the CIA lied to the White House, the Department of Justice, and the United States Congress concerning the RDI program and its use of torture.

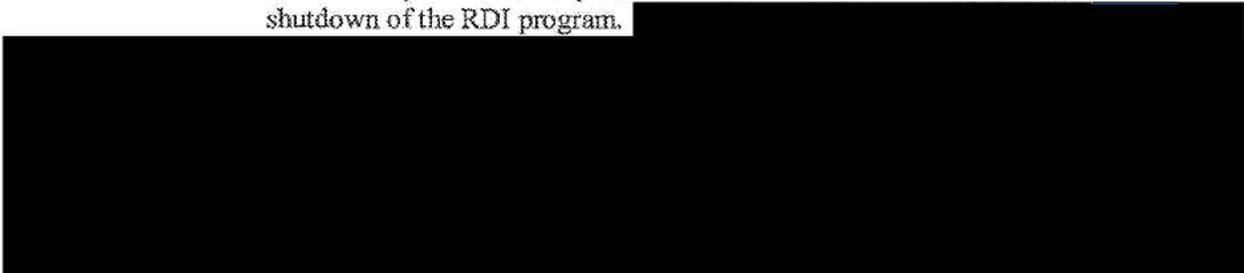
36. ~~(U)~~ George Tenet

a. Synopsis of Expected Testimony:

- i. George Tenet will testify regarding the RDI program's formation and implementation. Mr. Tenet will also testify regarding the Agency's management and oversight of the RDI program. He will also testify regarding the contents of the May 2004 CIA Inspector General report and the Agency's response.

37. ~~(TS//ORCON//NOFORN)~~ Michael Hayden

a. Synopsis of Expected Testimony:

- i. Michael Hayden will testify about the closure of ALEC station and the shutdown of the RDI program.
- 

38. ~~(U)~~ John O. Brennan

a. Synopsis of Expected Testimony:

- i. John Brennan will testify concerning the CIA's response to the SSCI report, including concerning the use of rectal feeding(s) on Mr. Khan. Mr. Brennan will also testify concerning the Panetta Review which corroborates the SSCI report.

~~(U)~~ CIA Operations Directorate / National Clandestine Services (NCS):



39. ~~(U)~~ Cofer Black, Director CIA's CTC 

a. Synopsis of Expected Testimony:

- i. He will provide background of the CIA's efforts against al-Qaeda.
- ii. He will detail the overall structure and function of the CTC within CIA.

40. ~~(U)~~ James Pavitt, Deputy Director of Operations 

a. Synopsis of Expected Testimony:

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- i. Mr. Pavitt will testify specifically about the establishment and operation of the RDI program including the decision to target, capture, detain and interrogate Mr. Khan.
- ii. He will testify about the evolution of the RDI program from its inception through his departure from CIA, including the establishment of DETENTION SITE COBALT and the problems that existed there [REDACTED] to its closure.

41. ~~(TS//ORCON//NOFORN)~~ Stephen Kappes, Associate/Deputy Director of Operations [REDACTED]

42. ~~(TS//ORCON//NOFORN)~~ Jose Rodriguez, Head of CTC [REDACTED] Deputy Director of Operations [REDACTED]

a. Synopsis of Expected Testimony:

- i. Mr. Rodriguez will provide testimony regarding the CTC's operation during the time of Mr. Khan's capture and detention
- ii. Mr. Rodriguez will provide detailed testimony concerning Mr. Khan
- iii. [REDACTED]
- iv. [REDACTED]

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46.

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[REDACTED]

55.

56.

57.

[REDACTED]

~~(S)~~ CIA Office of Medical Services (OMS) psychologists and contractors:

~~(S)~~ Each of these witnesses (#58-66) will testify regarding the nature and duration of Mr. Khan's capture, detention, and confinement and his torture while in CIA detention. Additionally, these witnesses will detail the day-to-day operation of the RDI program, specifically concerning the involvement of medical officials within OMS and the implementation and execution of OMS policy and protocols for the capture, rendition, detention, interrogation and torture of CIA detainees, including Mr. Khan. The Defense expects these individuals to testify specifically of the use of rectal feeding and rehydration, sleep deprivation, waterboarding, water-dousing, and other EITs. We also expect them to testify regarding Mr. Khan's hunger strikes, attempted suicide and acts of self-mutilation, including as described in the SSCI report.

58.

[REDACTED]

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63. ~~(U//FOUO)~~ James Elmer Mitchell, Contract Psychologist with the CIA

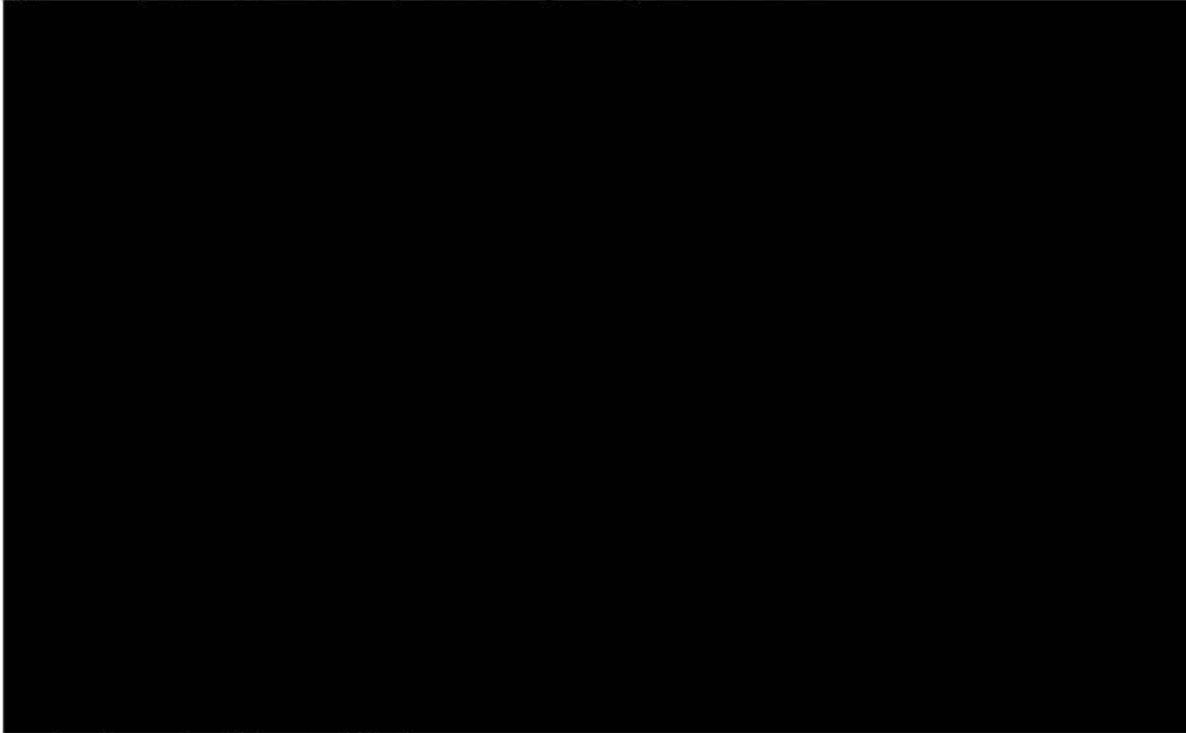
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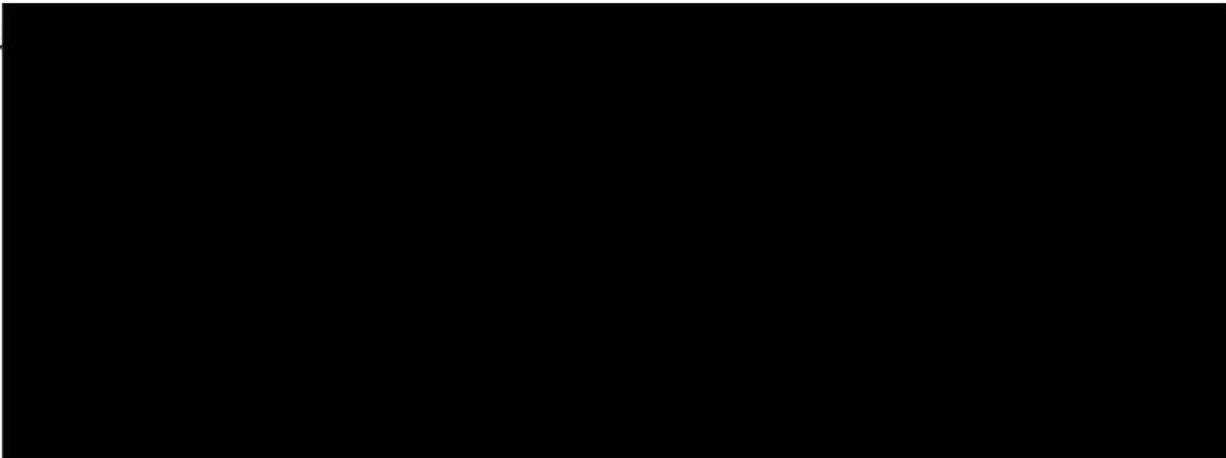
- b. Synopsis of Expected Testimony:
 - i. Mr. Mitchell will testify regarding his involvement in the interrogation, torture and abuse of detainees, including Mr. Khan.

64. ~~(U//FOUO)~~ John "Bruce" Jessen, Contract Psychologist with the CIA



- b. Synopsis of Expected Testimony:
 - i. Mr. Jessen will testify regarding their involvement in the interrogation, torture and abuse of detainees, including Mr. Khan.

65.



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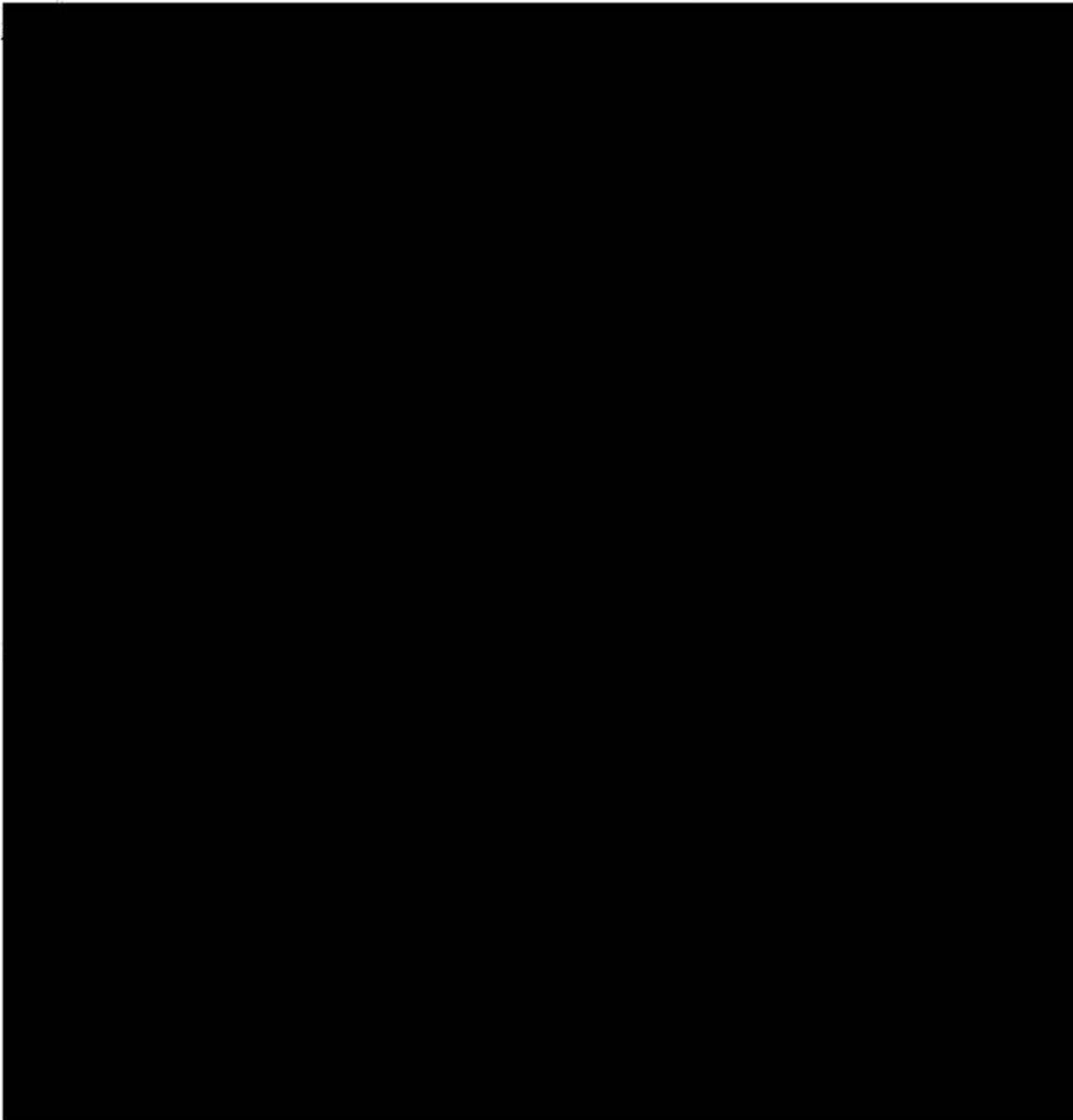
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~~(S)~~ Director(s) of CIA OMS from 2003-2006, whose identity is known to the Government, but unknown to the Defense

~~(U)~~ CIA and DOJ lawyers:

~~(U)~~ Each of these witness will testify regarding the nature and duration of Mr. Khan's capture, detention, and confinement. They will also testify concerning the purported legality or authorization of EITs such as those used on Mr. Khan, including, for example, waterboarding, sleep deprivation, rectal feeding/sodomy and others. These witnesses will also testify concerning the day-to-day monitoring of the RDI program and the CIA's response to the CIA OIG report and inquiries from other agencies, including the United States Congress.

66.



67.

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~~(S)~~ [REDACTED] ~~(U//FOUO)~~

[REDACTED]

68. ~~(U//FOUO)~~ John Yoo, DOJ lawyer

[REDACTED]

~~(U)~~ CIA Office Inspector General (OIG) and U.S. Senate Investigator:

~~(U)~~ Each of these witness will testify regarding the nature and duration of Mr. Khan's capture, detention, and confinement. They will also testify concerning the purported legality or authorization of EIT's such as those used on Mr. Khan, including for example, waterboarding, sleep deprivation, rectal feeding/sodomy, and others. These witnesses will detail the torture and abuses of detainees, including Mr. Khan, at DETENTION SITE COBALT.

69. ~~(S)~~ John Helgerson, CIA OIG

- a. Synopsis of Expected Testimony:
 - i. Mr. Helgerson will testify regarding details of his investigation in the RDI program, specifically the crimes detailed within the CIA OIG report.
 - ii. He will detail why the report was started, the factual findings of the report and the conclusions stated regarding the RDI program.
 - iii. Mr. Helgerson will testify regarding all references to DETENTION SITE COBALT and/or Mr. Khan detention, interrogation, and torture within the CIA OIG report.

70.

[REDACTED]

71. ~~(S)~~ Daniel Jones, SSCI staffer and principal author of the SSCI "Torture" Report

- a. ~~(U)~~ Contact Information:
 - i. ~~(U)~~ Defense will provide this contact presently.
- b. Synopsis of Expected Testimony:

~~(S)~~ [REDACTED] ~~(U//FOUO)~~

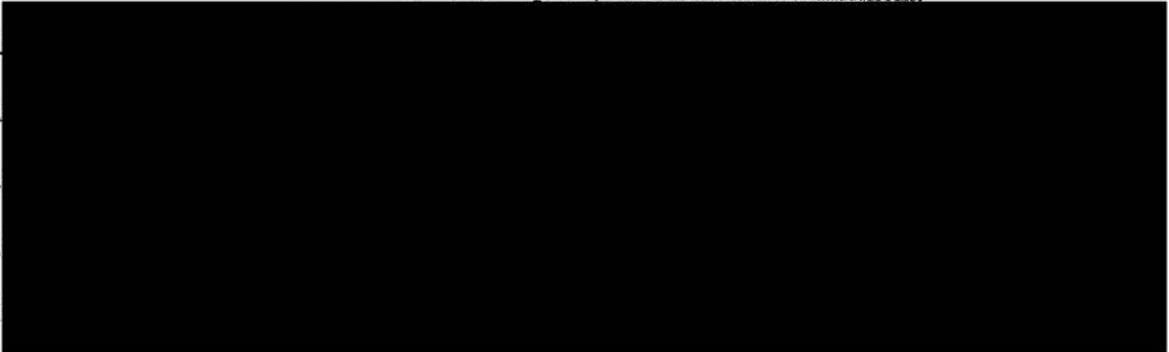
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- i. Daniel Jones will testify regarding the substance of the redacted portions of the SSCI, including the sections specifically regarding Mr. Khan.

~~(U)~~ CIA operators involved in Mr. Khan's capture, rendition, detention, and interrogations, whose identities are known to the Government, but unknown to the Defense:

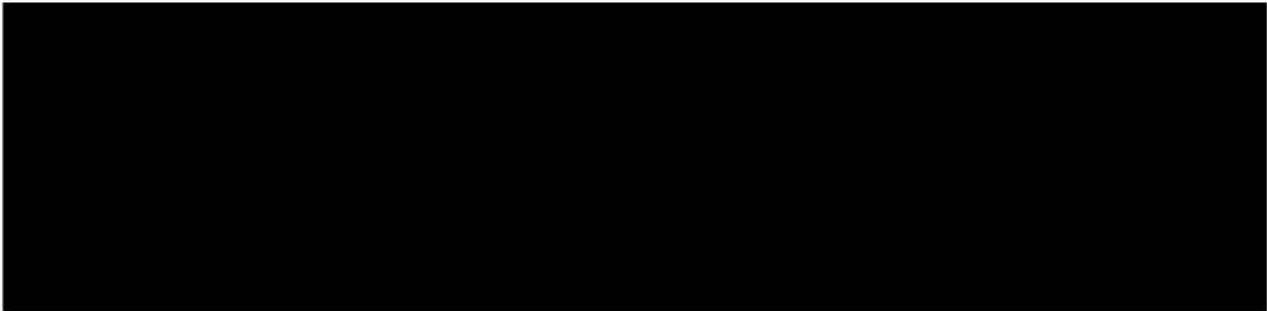
~~(U)~~ Each of these witness (#72-77) will testify specifically about their torture and abuse of Mr. Khan as well as the nature and duration of his capture, detention and confinement.

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- 76.

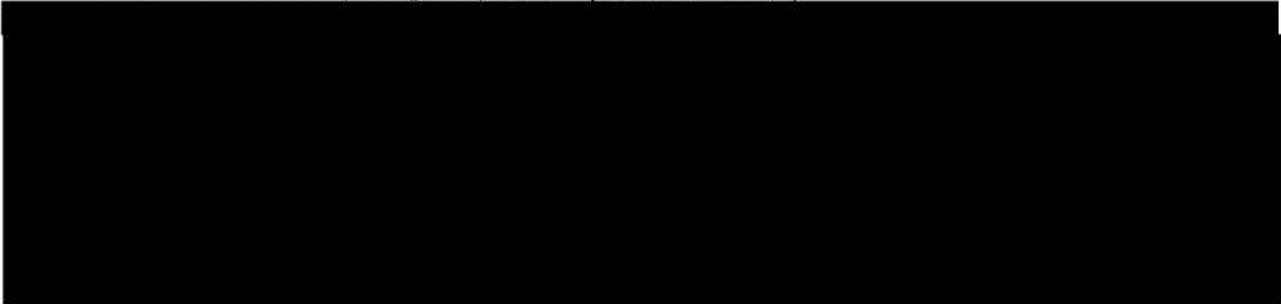


77. ~~(U)~~ Medical officials involved in Mr. Khan's capture, rendition, detention, and interrogations while in CIA custody (2003-2006), whose identities are known to the Government, but unknown to the Defense.

78. ~~(U)~~ CIA rendition team members, involved in Mr. Khan's capture, rendition, detention, and interrogations while in CIA custody (2003-2006), whose identities are known to the Government, but unknown to the Defense



79. ~~(U//FOUO)~~ Kathryn Bigelow, Director, *Zero Dark Thirty*

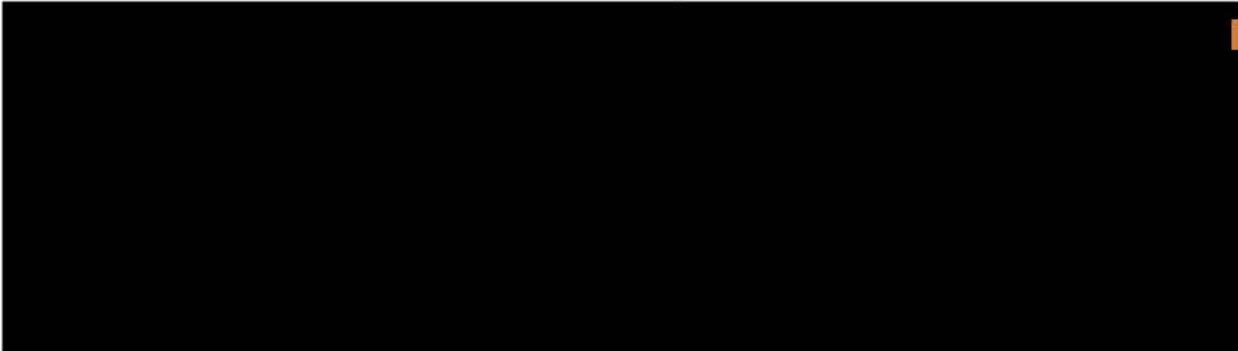


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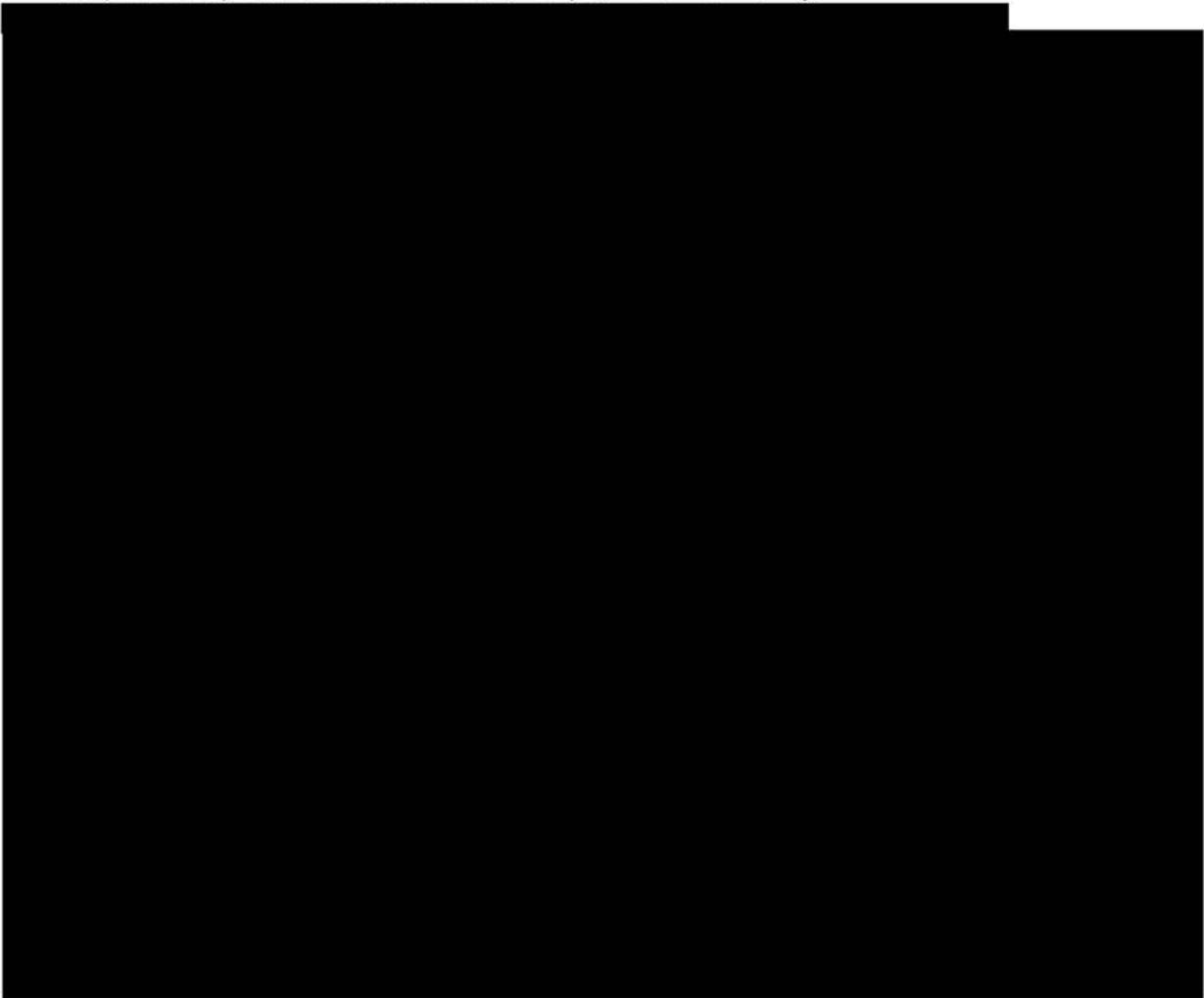
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80. ~~(U//FOUO)~~ Mark Boal, Writer, *Zero Dark Thirty*



81. ~~(U//FOUO)~~ Jessica Chastain, Actor, "Maya," *Zero Dark Thirty*



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~~(TS//ORCON//NOFORN)~~ [REDACTED]

83.

84.

[REDACTED]

85. ~~(TS//ORCON//NOFORN)~~ Suleiman Abdualloh Salim AKA Isse Al-Tanzania

86.

87.

[REDACTED]

~~(TS//ORCON//NOFORN)~~ Additional JTF Personnel, specifically requested by Mr. Khan, whose identities are known to the Government, but unknown to the Defense.

~~(S)~~ Each of these witnesses (#89-97) will testify regarding the nature and duration of Mr. Khan's detention and confinement at NSGB; Mr. Khan's physical and mental condition; and Mr. Khan's rehabilitation, likelihood of future dangerousness and prospects for successful reintegration into society. These individuals personally and frequently interacted with Mr. Khan over the course of his detention at NSGB.

88. ~~(TS//ORCON//NOFORN)~~ [REDACTED] DSMP (March 2012)

89. ~~(TS//ORCON//NOFORN)~~ [REDACTED] Psych (January 2013)

90. ~~(TS//ORCON//NOFORN)~~ [REDACTED] SJA (Feb 2013)

91. ~~(TS//ORCON//NOFORN)~~ [REDACTED] SMO (May 2013)

92. ~~(TS//ORCON//NOFORN)~~ [REDACTED] DSMP, (Oct. 2014)

93. ~~(TS//ORCON//NOFORN)~~ [REDACTED] DSMP (June 2015)

~~(TS//ORCON//NOFORN)~~ [REDACTED]

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94. ~~(TS)~~ [REDACTED] ~~ORCON//NOFORN~~ [REDACTED] Psych (Sept. 2016)

95. ~~(TS)~~ [REDACTED] ~~ORCON//NOFORN~~ [REDACTED] DSMP (Sept. 2016)

96. ~~(TS)~~ [REDACTED] ~~ORCON//NOFORN~~ [REDACTED] Psych (Jan. 2018)

[REDACTED]

~~(S)~~ Each of these witnesses (#98-113) will testify regarding Mr. Khan's family background.

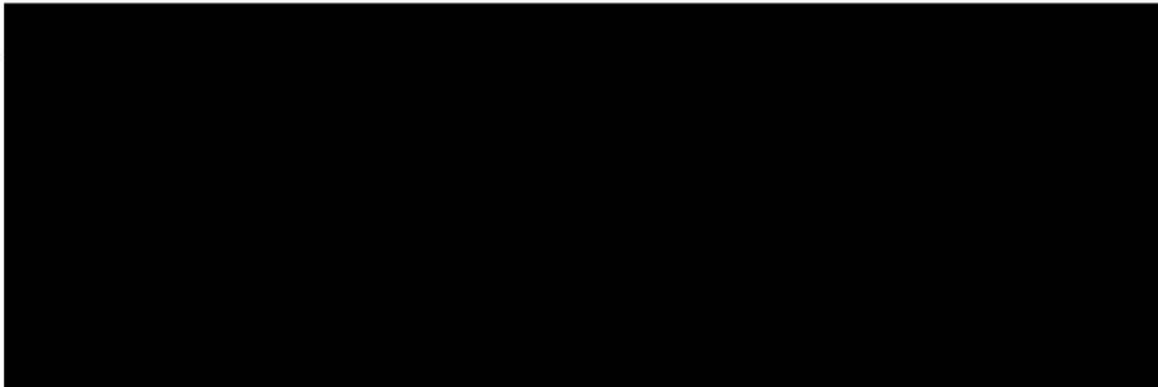
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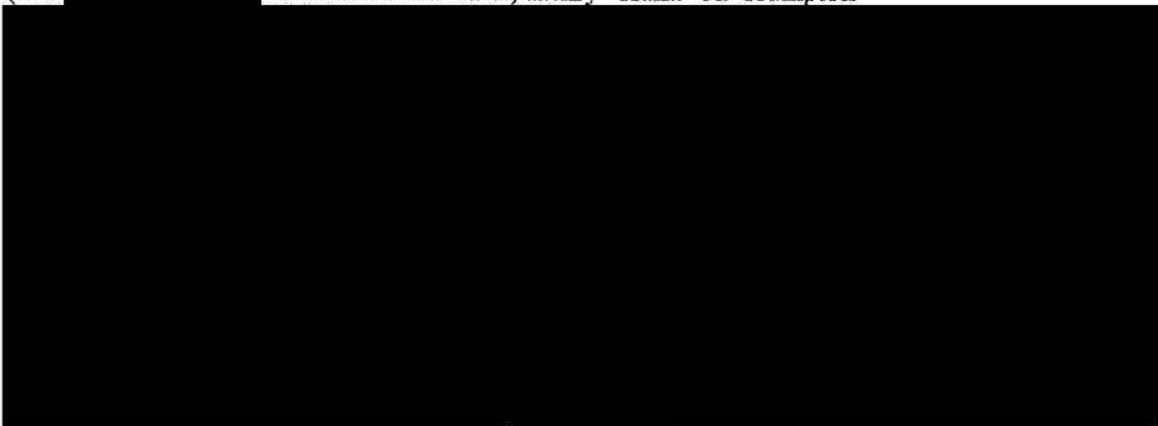
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113.



114. ~~(TS// [REDACTED] //ORCON//NOFORN)~~ Henry "Hank" A. Crumpton



115. ~~(TS// [REDACTED] //ORCON//NOFORN)~~

- a. Synopsis of Expected Testimony:
 - i. Mr. [REDACTED] will testify regarding the operations of Blackwater contractors.
 - ii. He will provide details regarding Blackwater's contracted operations to provide logistical services for to the RDI program, specifically the transportation of detainees and perimeter security of black sites.
 - iii. Additionally, Mr. [REDACTED] will explain why the security forces at and around Camp 7 were initially DOD contractors.

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~~(U)~~ ATTACHMENT D

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OFFICE OF THE
CHIEF PROSECUTOR

DEPARTMENT OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1610 DEFENSE PENTAGON
WASHINGTON, DC 20301-1610

1 February 2019

MEMORANDUM FOR DEFENSE COUNSEL, UNITED STATES v. MAJID SHOUKAT
KHAN

SUBJECT: GOVERNMENT RESPONSE TO DEFENSE REQUEST FOR PRODUCTION OF
WITNESSES AT GOVERNMENT EXPENSE

1. The Prosecution is in receipt of your witness list dated 2 January 2019 (hereinafter "Request") asking the Government to produce 110 specific, named or unnamed individuals and an unknown number of other unnamed individuals to appear before the Accused's presentencing proceedings. Based on the information provided and in accordance with the terms of the pretrial agreement (PTA) between the Convening Authority (CA) and the Accused, the Prosecution:

- (a) will arrange for the in-person presence of five of your requested witnesses at the presentencing hearing;
- (b) will arrange for testimony via video teleconference from the National Capital Region for two of your requested witnesses at the presentencing hearing, and
- (c) denies your request for production of all other requested witnesses.

2. Rule for Military Commission (R.M.C.) 1001(e) governs witness production at presentence proceedings. Military judges "may permit greater latitude than on the merits to receive information by means other than testimony presented through the personal appearance of witnesses." R.M.C. 1001(e)(1). "Whether a witness shall be produced to testify during presentence proceedings is a matter within the discretion of the military judge, subject to the limitations in R.M.C. 703(c), (e), and (f)." *Id.* See also *United States v. Combs*, 20 M.J. 441, 443 (C.M.A. 1985). "A witness may be produced to testify during presentence proceedings ...only if" the five conditions in R.M.C. 1001(e)(2)(A)-(E) are met. R.M.C.1001(e)(2). Those five conditions are:

- (A) The testimony expected to be offered by the witness is necessary for consideration of a matter of substantial significance to be a determination of an appropriate sentence, including evidence necessary to resolve an alleged inaccuracy or dispute as to a material fact;
- (B) The weight or credibility of the testimony is of substantial significance to the determination of an appropriate sentence;
- (C) The other party refuses to enter into a stipulation of fact containing matters to which the witness is expected to testify, except in an extraordinary case when such a stipulation of fact would be an insufficient substitute for the testimony;
- (D) Other forms of evidence, such as oral depositions, written interrogatories, telephonic testimony, two-way video conferences or other similar technology, or

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former testimony would not be sufficient to meet the needs of the military commission in the determination of an appropriate sentence; and

(E) The significance of the personal appearance of the witness to the determination of an appropriate sentence, when balanced against practical difficulties of producing the witness, favors production of the witness. Factors to be considered include the costs of producing the witness, the timing of the request for production of the witness, the potential for delay in the presentencing proceeding that may be caused by the production of the witness, and the likelihood of significant interference with intelligence activities, military operations or deployments, mission accomplishment, or essential training.

R.M.C. 1001(e)(2).

3. R.M.C. 703 specifies procedures for the production of witnesses for military commissions. Pursuant to this rule, for witnesses in sentencing, the Defense is required to submit to trial counsel a written list of witnesses whose production by the Government is requested by the Defense. *See* R.M.C. 703 (e)(2)(A). The request to produce a witness for sentencing must include:

the name, telephone number, if known, and address or location of the witness such that the witness can be found upon the exercise of due diligence, a synopsis of the testimony that it is expected the witness will give, and the reasons why the witness' personal appearance will be necessary under the standards set forth in R.M.C. 1001(e).

R.M.C. 703(e)(2)(B)(ii).

4. Despite your assertion that every one of these witnesses was required to testify in person based on unique facts and circumstances of the case, that broad, talismanic recitation of language from the rule does not meet the requirements of R.M.C. 1001(e)(2) or R.M.C. 703(e)(2)(B)(ii), which requires an individualized justification for the in person testimony of each witness. None of your individual witness synopses adequately indicates why those individual witnesses must testify in person, which is the requirement under the rule. Nevertheless, after carefully reviewing your request for the production of presentencing witnesses at the expense of the Government, and in accordance with the applicable R.M.C. and M.C.R.E. provisions, the Prosecution will arrange for the physical presence or video teleconference testimony of the following witnesses:

- a) [REDACTED] The Prosecution will arrange for [REDACTED] to testify via video teleconference from the National Capital Region.
- b) [REDACTED] The Prosecution will arrange for [REDACTED] to testify via video teleconference from the National Capital Region.
- c) Supervisory Special Agent (SSA) Timothy W. Harvey. The Prosecution will work with the FBI to make SSA Harvey available to testify in person at the Accused's presentencing hearing. If the Defense prefers a different FBI SA in lieu of SSA Harvey, the Prosecution will favorably consider the request and, if approved, will work with the Defense to facilitate

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[REDACTED]

the presence of said alternate FBI SA to testify at the Accused's presentencing hearing. To allow time for Government review and coordination regarding any such request for an alternate FBI SA to testify, the Prosecution invites the Defense to notify the Prosecution as soon as possible, if the Defense desires a different FBI SA to testify.

- d) SA David C. Cudmore. The Prosecution will work with the FBI to make SA Cudmore available to testify in person at the Accused's presentencing hearing. If the Defense prefers a different FBI SA in lieu of SA Cudmore, the Prosecution will favorably consider the request and, if approved, will work with the Defense to facilitate the presence of said alternate FBI SA to testify at the Accused's presentencing hearing. To allow time for Government review and coordination regarding any such request for an alternate FBI SA to testify, the Prosecution invites the Defense to notify the Prosecution as soon as possible, if the Defense desires a different FBI SA to testify.
- e) DoD Officer. The Prosecution will work with the Services to make a competent officer available to testify in person at the Accused's presentencing hearing regarding the Accused's conditions of confinement and his interactions with the guard force. However, by its agreement to produce such witness, and in accord with the terms of the PTA signed by the Accused and the CA, the Prosecution does not agree to the production of any records or other discovery as a consequence of agreeing to produce a DoD officer. The Accused has waived production of any discovery beyond R.M.C. 701(b)(1) and 701(d), pursuant to paragraph 12 of the PTA. If the Defense believes discovery production would be required to use or examine this witness, the Prosecution denies production of this witness.
- f) Dr. [REDACTED] (Expert #1). The Accused and the CA agreed that the Accused "will not retain or present at a sentencing hearing more than two expert consultants or witnesses at Government expense." AE 012 ¶23. The CA approved Dr. [REDACTED] as one of the two expert consultants/witnesses authorized by the terms of the PTA. Subject to Dr. [REDACTED] obtaining the required security and country clearances, the Prosecution will arrange to have Dr. [REDACTED] present in order to testify in person at the Accused's presentencing hearing.
- g) (Expert #2). The Accused and the CA agreed that the Accused "will not retain or present at a sentencing hearing more than two expert consultants or witnesses at Government expense." AE 012 ¶23. The CA disapproved Mr. Kleinman as the second of the two expert consultants/witnesses authorized by the terms of the PTA due to a potential conflict of interest. The CA committed to providing a suitable alternate expert. Provided such expert does not have a conflict of interest and obtains the required security and country clearances, the Prosecution will arrange to have that consultant/expert present in order to testify in person at the Accused's presentencing hearing.
5. The production at Government expense of all other named and unnamed individuals listed in the Defense Request is hereby denied because they fail to meet the requirements under R.M.C. 1001(e) and R.M.C. 703.
6. The Prosecution notes that it is willing to enter into appropriate stipulations concerning verifiable facts that are relevant, essential and non-cumulative to matters in extenuation and mitigation.

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7. The Prosecution also notes the Defense may request that the military judge, "with respect to matters in extenuation and mitigation or both, relax the rules of evidence. This may include admitting letters, affidavits, and other writings of similar authenticity and reliability." R.M.C. 1001(c)(3).

8. Should you have any questions, I may be reached in the office at [REDACTED] or by e-mail at joy.l.primoli.mil [REDACTED]

Respectfully,

//s//

JOY L. PRIMOLI, Lt Col, USAF
Trial Counsel

//s//

David L. O'Dowd, CDR, JAGC, USN
Assistant Trial Counsel

Office of the Chief Prosecutor
Office of Military Commission

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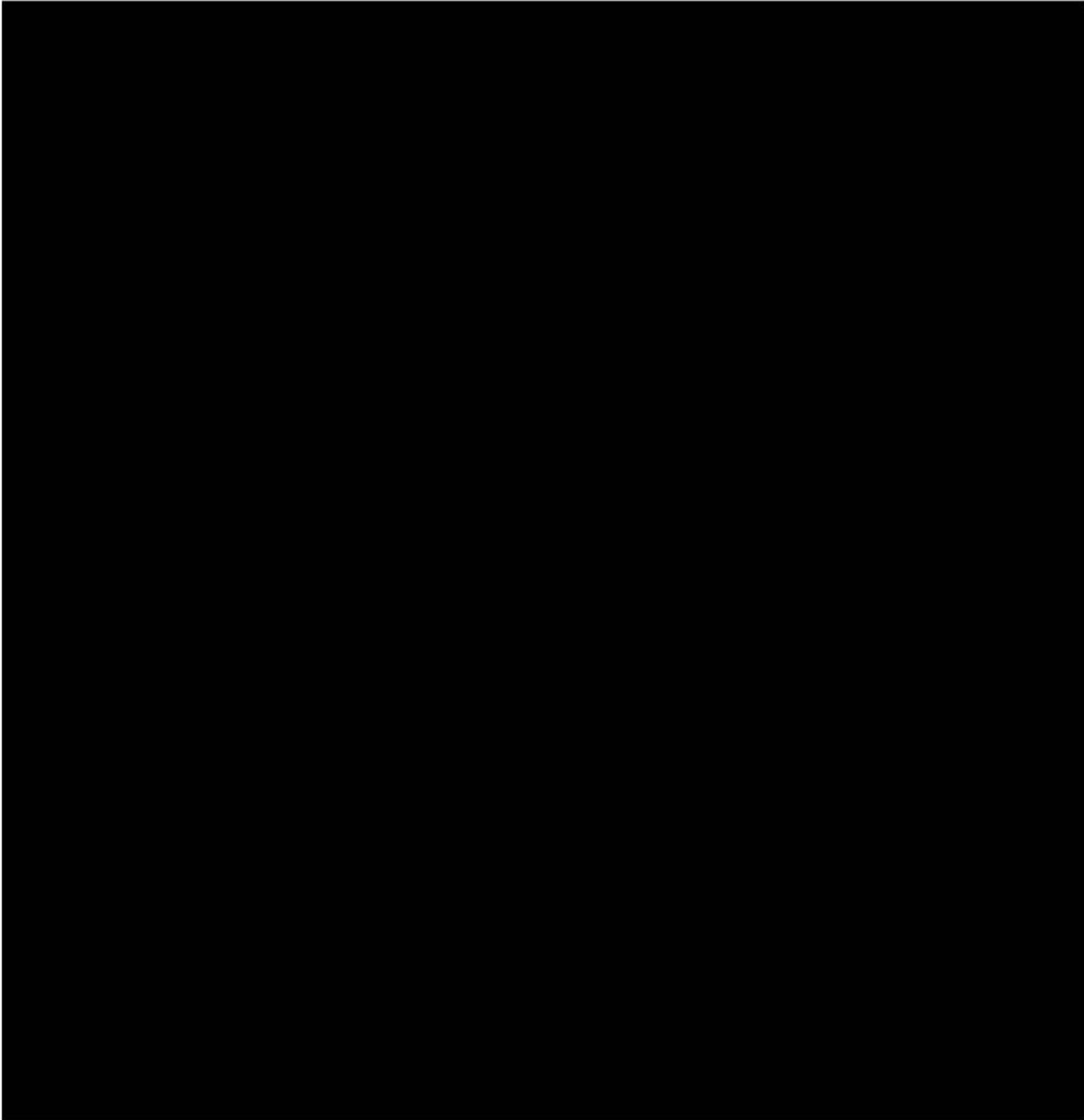
~~(S)~~ ATTACHMENT E

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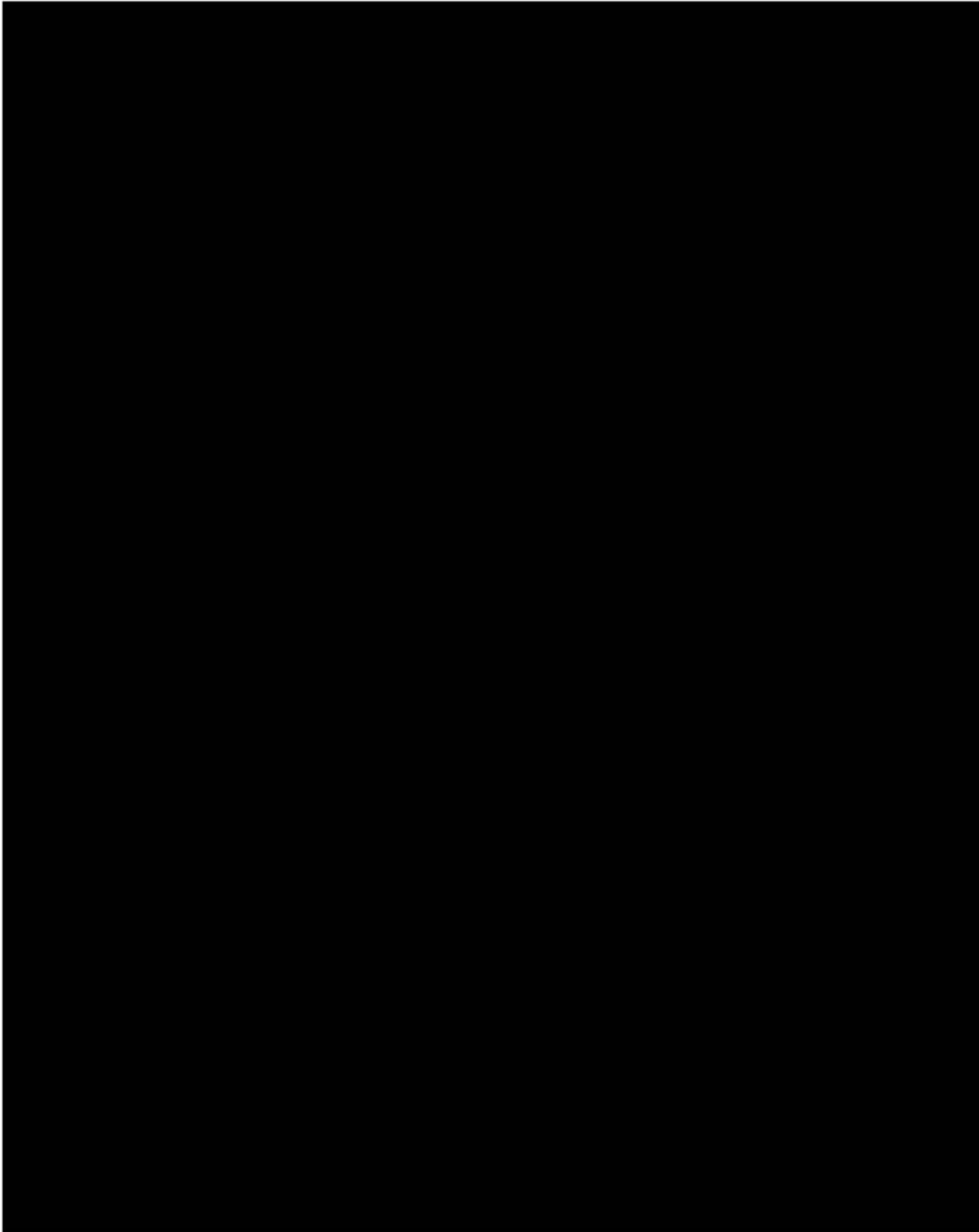
~~(U)~~ ATTACHMENT E

~~(U)~~ Mr. Khan provides the following additional information concerning the anticipated testimony of each of the witnesses that he moves to compel:

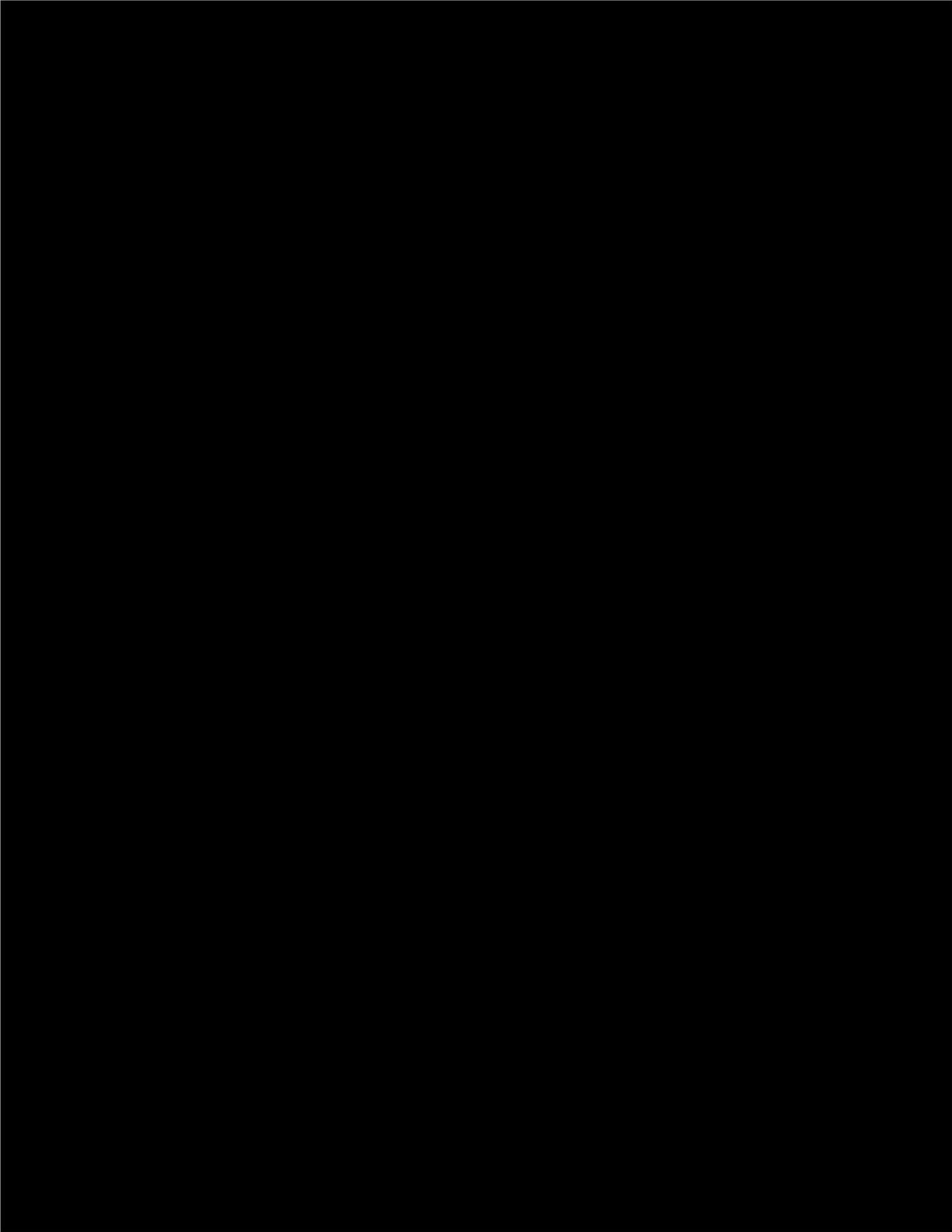


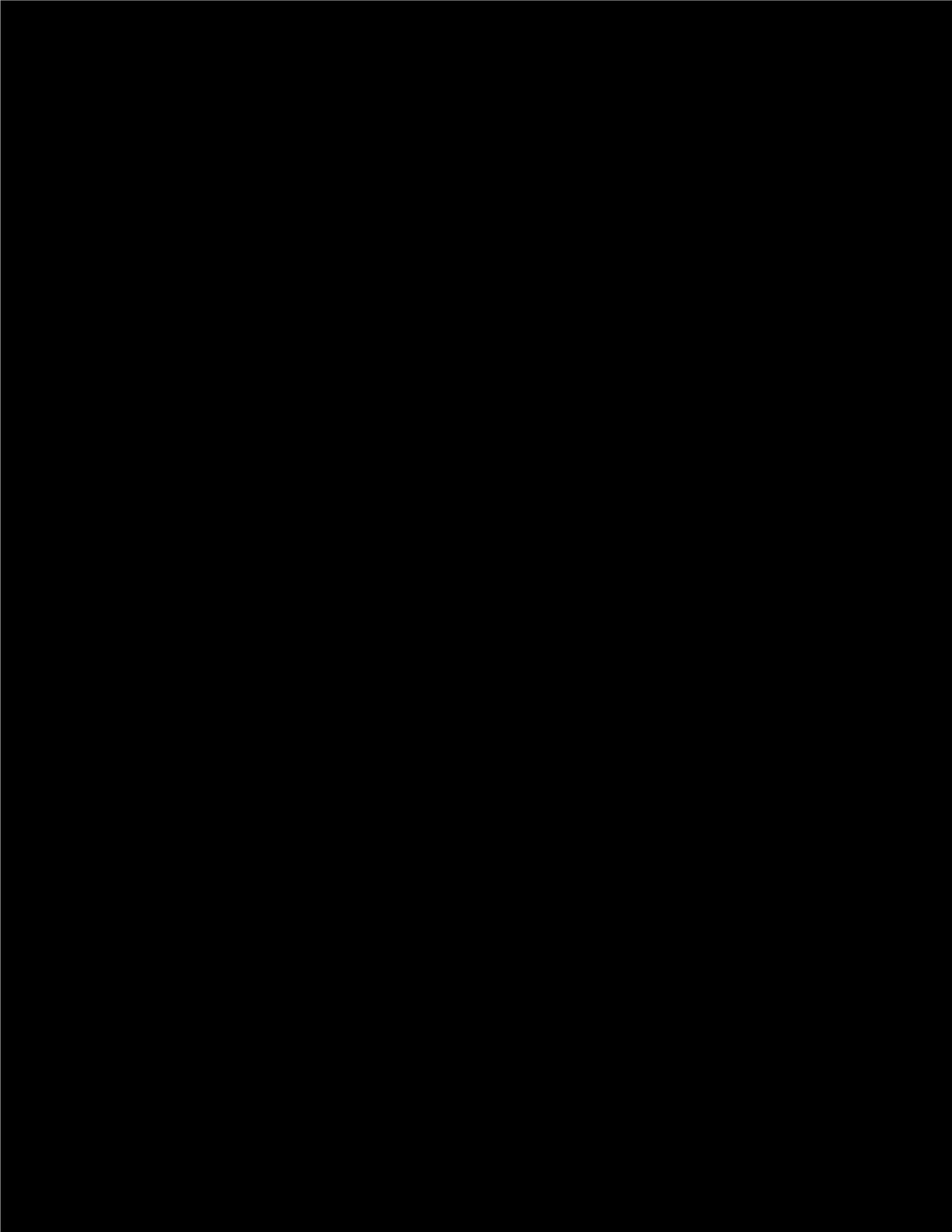
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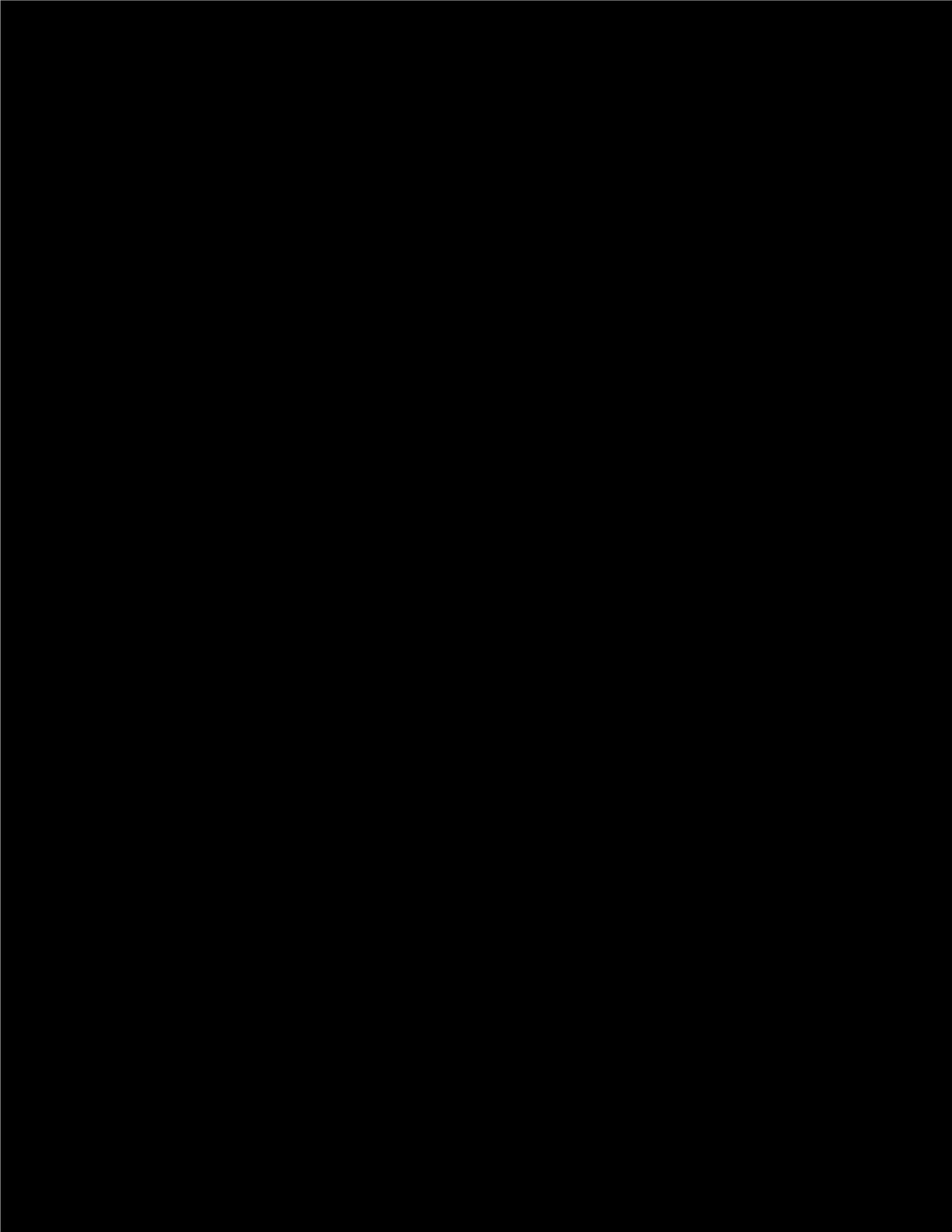
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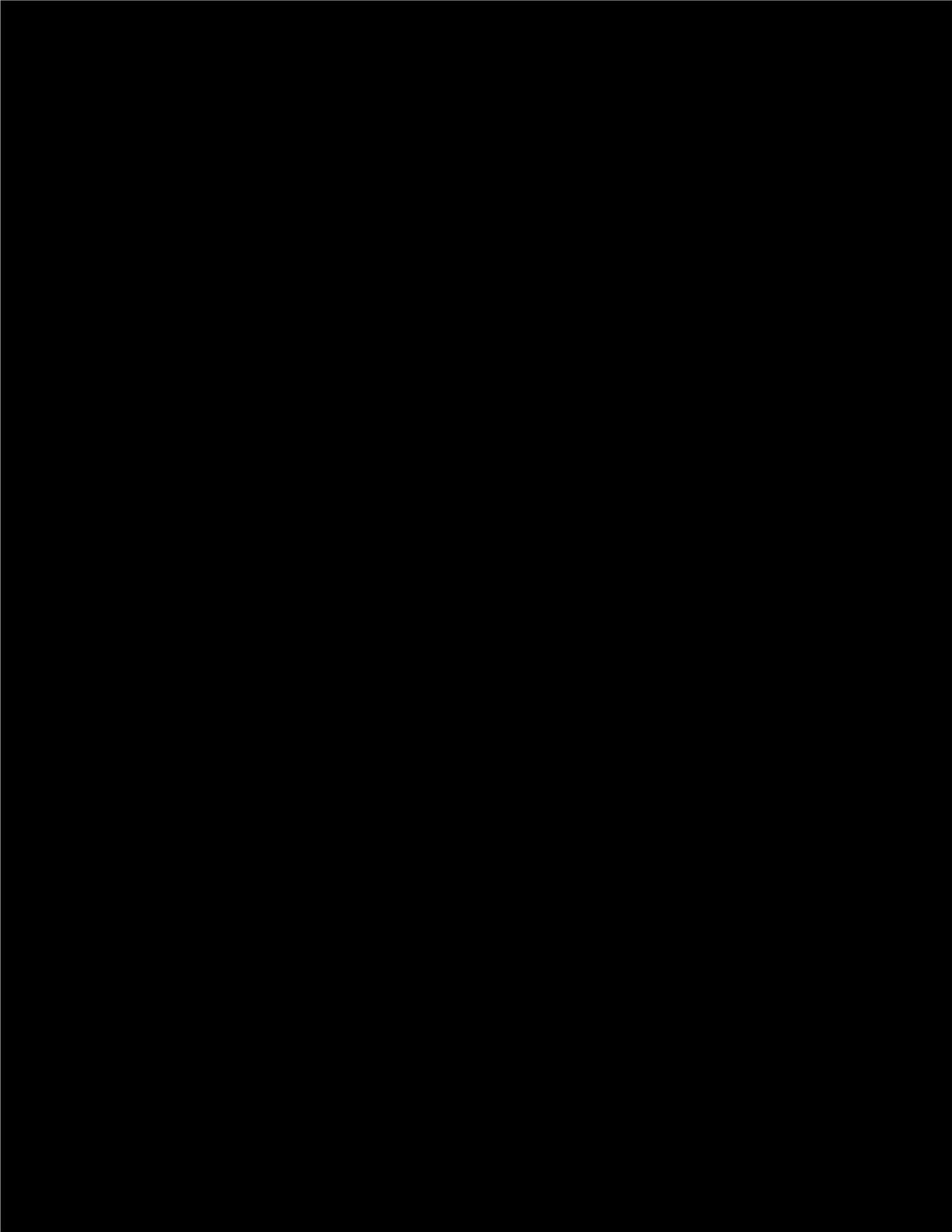


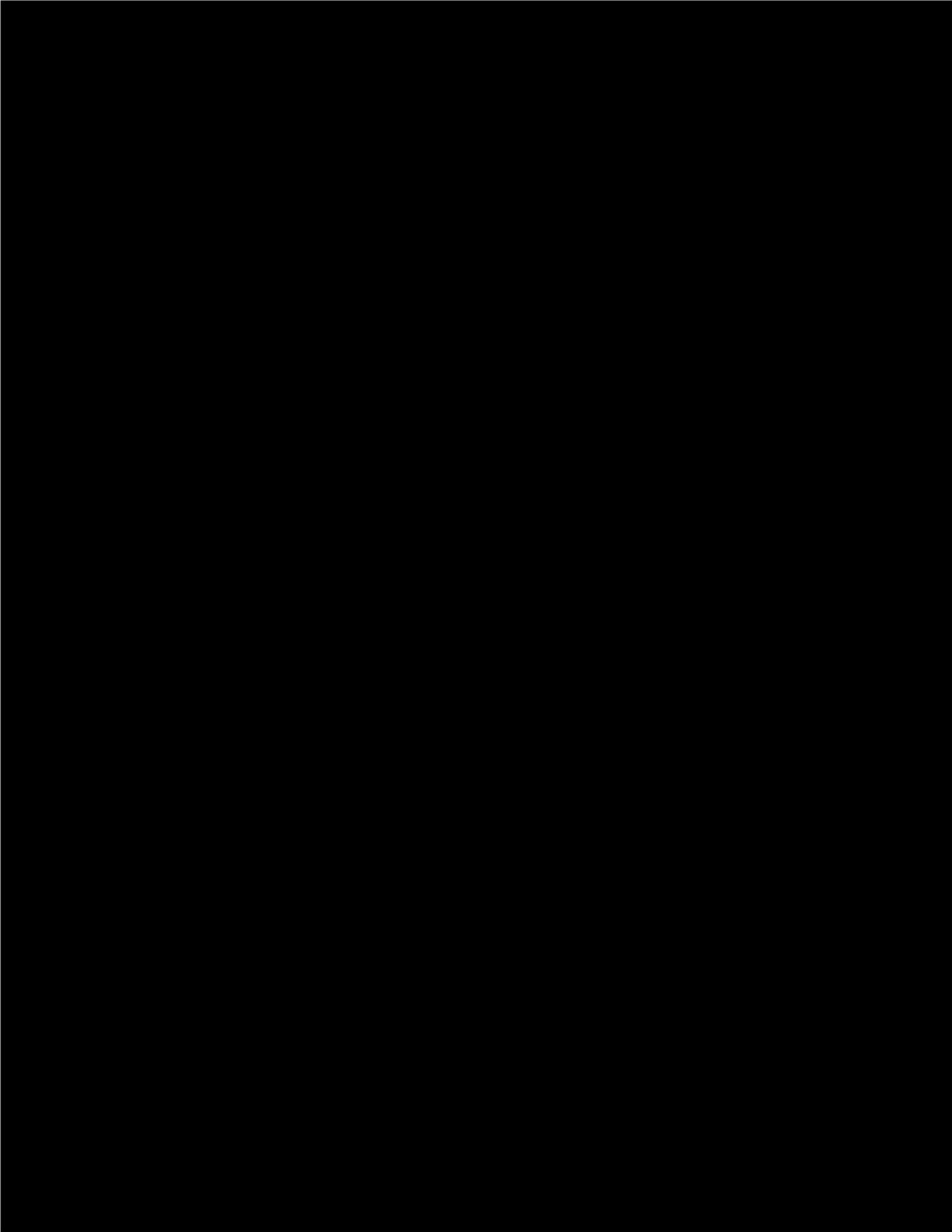
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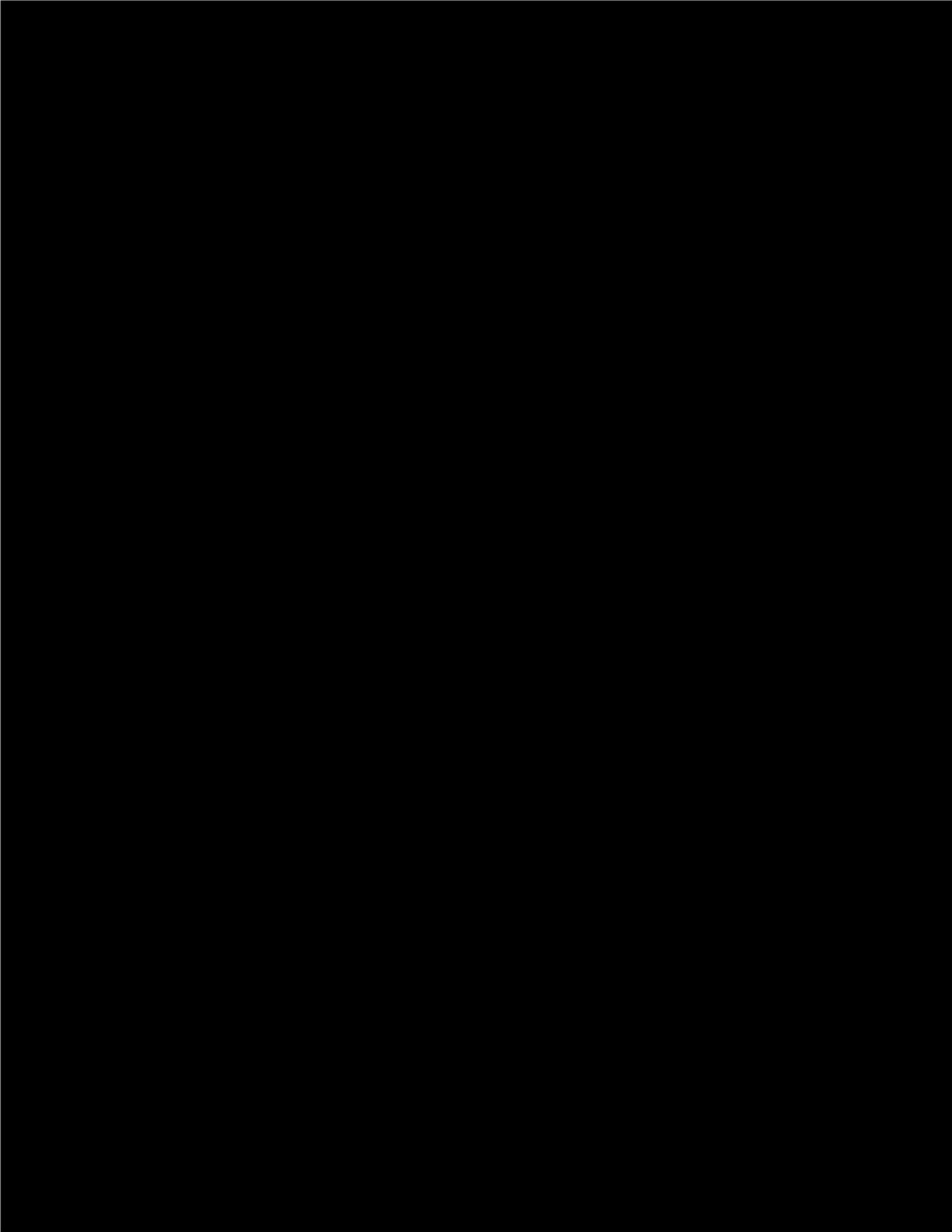












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~~(U//FOUO)~~ FBI SA Tim Harvey (Witness #13)

~~(U)~~ The Prosecution has agreed to produce this witness as requested by the Defense.

~~(U//FOUO)~~ FBI SAs at Guantanamo (Witnesses #14, 17, 21)

~~(S//NOFORN)~~ Mr. Khan requested several FBI agents to provide in-person testimony on his behalf concerning his day-to-day life at Guantanamo. [REDACTED]

[REDACTED] as well as his truthfulness, cooperation and substantial assistance to the government, which bear directly on his rehabilitative potential and lack of future dangerousness. The Prosecution has approved only one of those witnesses, FBI SA David Cudmore (Witness #21), who is the FBI agent presently responsible for Mr. Khan. The Defense requests that the Military Judge compel the Prosecution to produce two additional FBI witnesses, FBI SA Andrew de la Rocha (Witness #14), and FBI SA Beth Ann Schwarz (Witness #17), to provide similar testimony. Like SA Cudmore, these witnesses were previously responsible for Mr. Khan at Guantanamo. Their testimony is necessary, and would not be cumulative, however, because they will testify about their direct, personal, day-to-day interactions with Mr. Khan at different, non-overlapping periods of time. Specifically, SA de la Rocha will testify about these matters in the time period immediately after Mr. Khan's guilty plea, and SA Schwarz will testify about these matters after SA de la Rocha left Guantanamo and before SA Cudmore arrived.

~~(U//FOUO)~~ The testimony of each witness would be particularly compelling given their official roles as FBI agents, and their close, personal relationships with Mr. Khan during distinct periods of his seven-year cooperation. As important as his testimony will surely be, it would be wholly unrealistic to expect that SA Cudmore could provide full and adequate testimony covering the entire seven years that Mr. Khan has been a cooperating witness for the

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government; while he may be able to read and review records of prior interactions between Mr. Khan and the other FBI agents, that would not be an adequate substitute from hearing from those agents personally.

~~(U//FOUO)~~ The Prosecution has offered to produce an unnamed DOD official to testify about Mr. Khan's conditions of confinement at Guantanamo. See Attachment D, ¶ 4.e. As with SA Cudmore, however, it would be unrealistic and inadequate to expect such a single DOD official to testify competently about Mr. Khan's conditions for the entire seven-year period at issue.

~~(U//FOUO)~~ A final point bears emphasis: The FBI agents are critically important to Mr. Khan's case because for nearly the entire time since his guilty plea in 2012, Mr. Khan has been detained alone, separate from any other detainees. Essentially the only people with whom he has interacted are the FBI, the guard force, and medical personnel.

~~(U//FOUO)~~ **CAPT Thomas J. Welsh, JAGC, USN, SJA JTF (Witness #27)**

~~(U//FOUO)~~ CAPT Welsh is discussed at length in the motion to compel and Attachment C, and is one of Mr. Khan's most important witnesses. In addition to the information already provided, he will testify about his interactions with Mr. Khan on a day-to-day basis, as well as his interactions with other JTF leadership about Mr. Khan, including Rear Admiral David B. Woods, former JTF Commander, and Colonel Donnie Thomas, former JDG Commander.

~~(U//FOUO)~~ CAPT Welsh is currently deployed overseas in Europe, but will be returning to the United States at or about the time of Mr. Khan's sentencing trial. CAPT Welsh has requested that he be issued a subpoena for testimony, but if called is willing to testify very favorably for Mr. Khan in all of the ways that the Defense has described.

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~~(U//FOUO)~~ There is also precedent for CAPT Welsh's testimony: his SJA predecessor, CAPT Patrick McCarthy, JAGC, USN, testified at Omar Khadr's sentencing following his guilty plea; the Defense understands that he testified via videolink because he was deployed at the time of the sentencing. He testified in substance that he had been at Guantanamo long enough to see real jihadis, and Mr. Khadr was not one of them.

~~(U//FOUO)~~ The Defense expects CAPT Welsh to testify similarly on behalf of Mr. Khan. He will say, for example, that the Mr. Khan he knew appeared to be someone who had gotten caught up and was excited by his involvement in terrorism, in being a "big shot" in Karachi, but he did not appear to realize fully what he was getting himself into. CAPT Welsh will testify based on his interactions with Mr. Khan that Mr. Khan was not as dedicated or extremist in his views as other high-value detainees at Guantanamo; his reaction to CIA detention and Guantanamo was, "Holy shit, what did I get myself into and how am I going to get out of it? How can I get back to my wife and daughter?" The answer was to cooperate with the U.S. government, which Mr. Khan has done for seven years without wavering. Finally, CAPT Welsh will testify that based on his personal knowledge and interactions with Mr. Khan, Mr. Khan must be allowed to move beyond what he did.

~~(U//FOUO)~~ The Defense submits that such testimony would be invaluable to Mr. Khan at sentencing, again, particularly coming from a senior Naval officer, testifying in person before his peers on the panel.

~~(U//FOUO)~~ Camp 7, Senior Medical Officer (Witness #31)

~~(U//FOUO)~~ The Defense requests that the Military Judge order the Prosecution to produce a senior medical officer for Camp 7 to testify in person about Mr. Khan's healthcare and medical treatment. In particular, Mr. Khan requests a medical officer who will testify regarding

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his physical and mental health, including the lasting harm caused by his torture and abuse by the CIA. For example, and without limitation, such an officer would testify about Mr. Khan's

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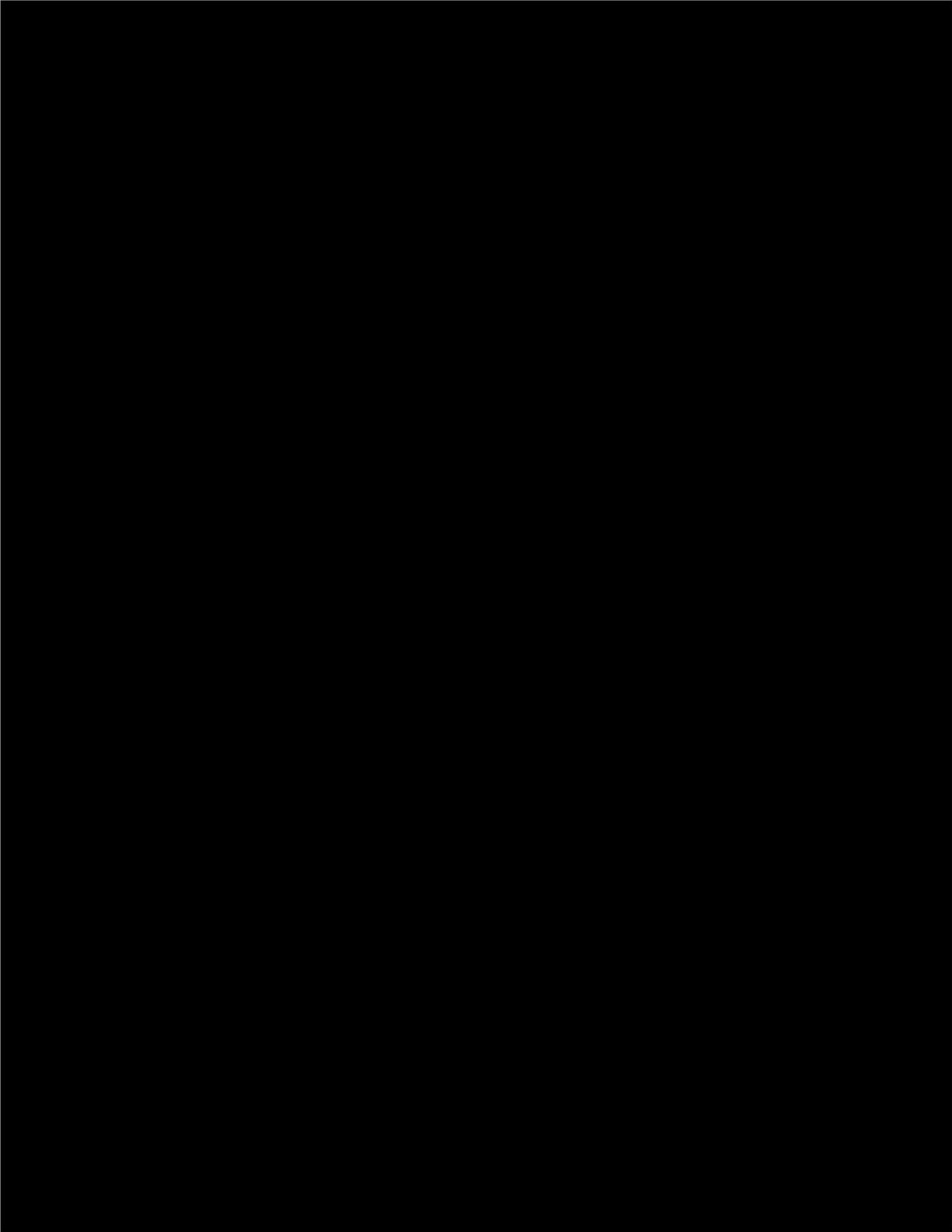
[REDACTED] scars on his body consistent with his prior torture; [REDACTED] and that he has previously been hospitalized at Guantanamo.

~~(U//FOUO)~~ Defense Expert Witnesses (Witnesses #32, 33)

~~(U//FOUO)~~ As addressed in the motion to compel, the Prosecution has agreed to produce Mr. Khan's medical expert, Dr. [REDACTED] (Witness #32), subject to the purported caveat imposed by the Convening Authority that is addressed in the motion. The Prosecution has also agreed to produce Mr. Khan's torture expert, Mr. Steven Kleinman, subject to resolution of the conflict issue addressed in the motion.

[REDACTED]

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[REDACTED]

~~(U//FOUO)~~ James Pavitt (Witness #40)

[REDACTED]

~~(U//FOUO)~~ Jose Rodriguez (Witness #42)

~~(TS//ORCON//NOFORN)~~ Mr. Rodriguez was the head of the Counter Terrorism Center

at the CIA [REDACTED]

[REDACTED] In that capacity, and as described in his torture narrative *Hard Measures*, [REDACTED]

[REDACTED]

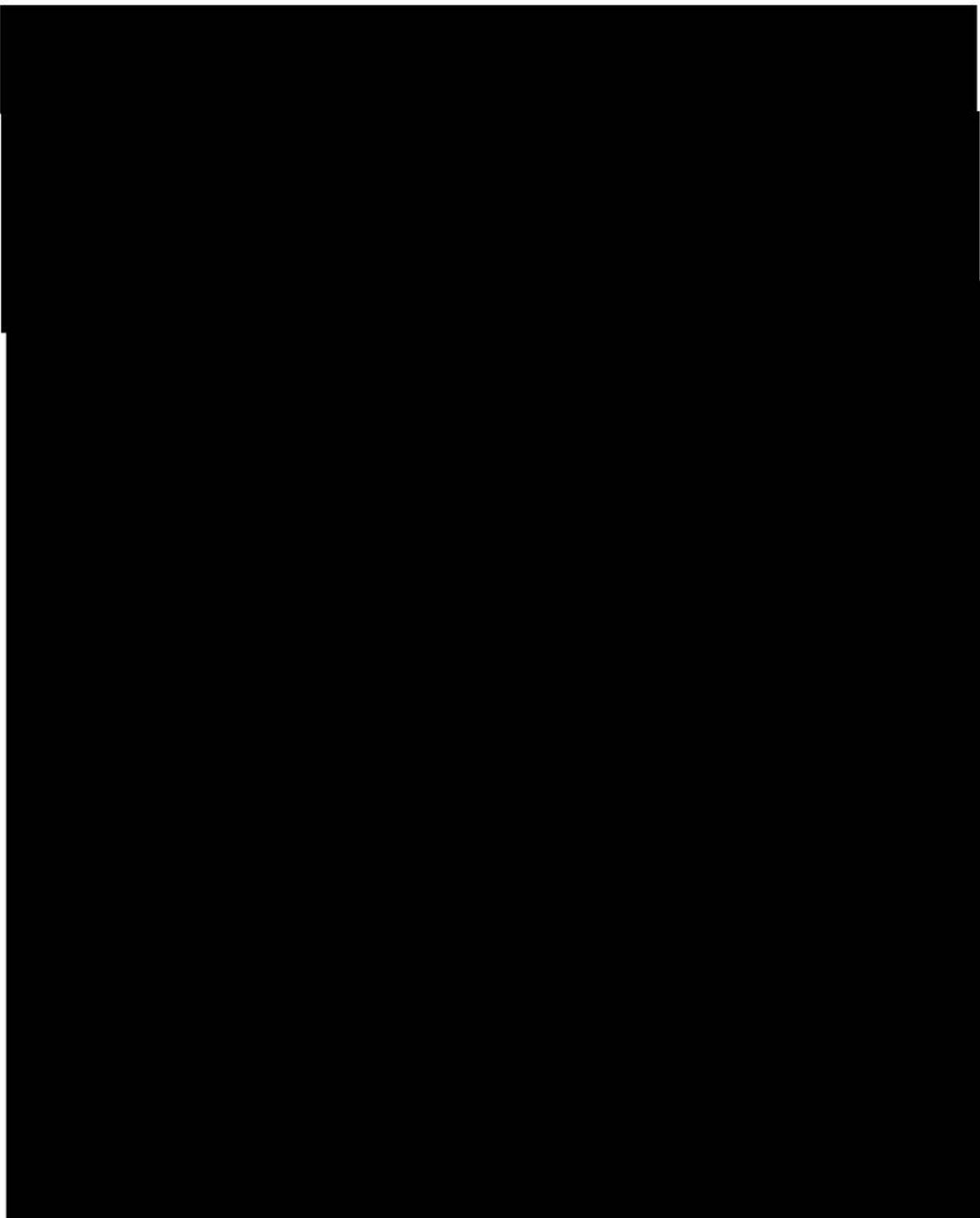
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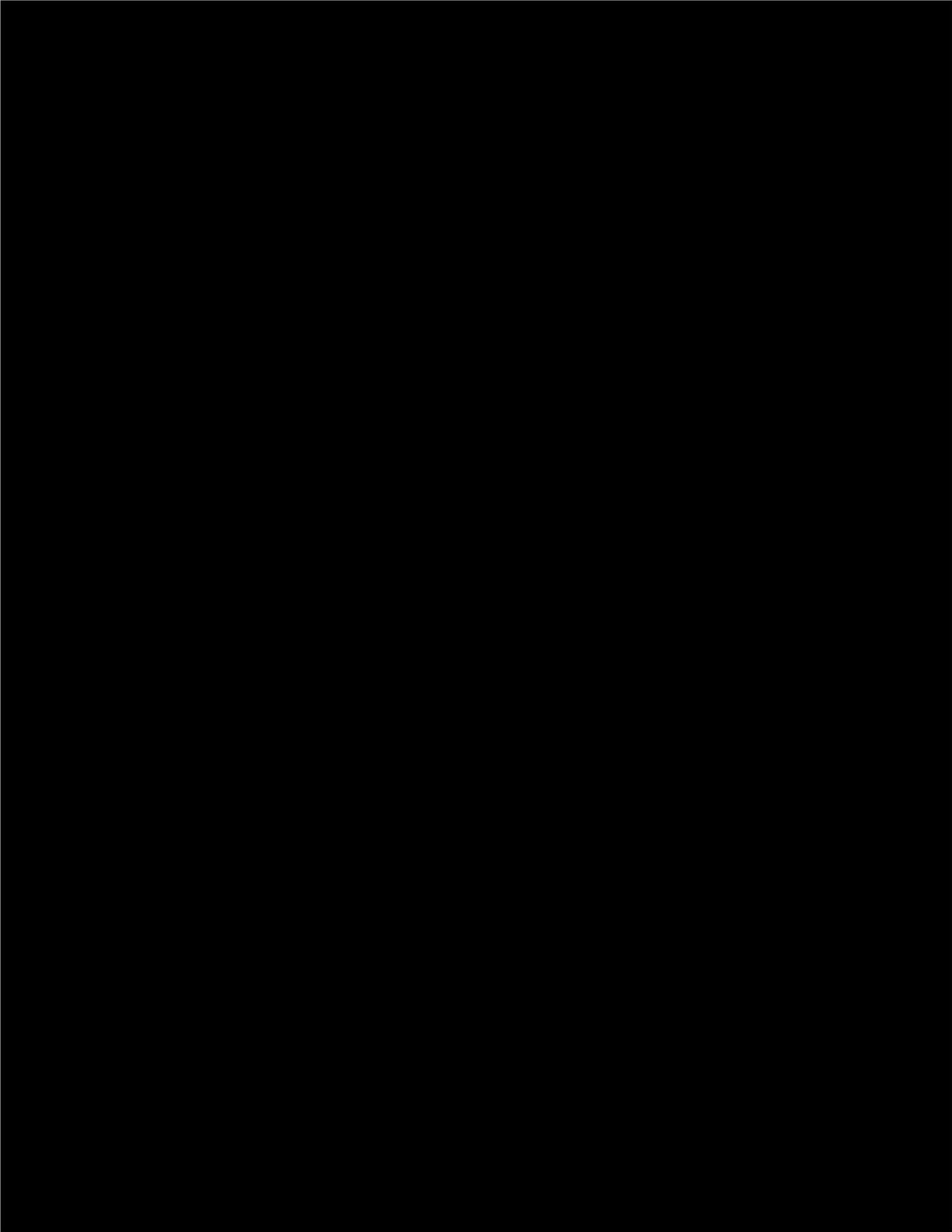
[REDACTED] when Mr. Rodriguez served as the Deputy Director of Operations, he was personally responsible for approving the torture techniques very likely used on Mr. Khan. [REDACTED]

Again, the Defense believes this witness will be extremely hostile to questioning and the panel must view in-person testimony in order to adequately evaluate the demeanor of this witness during his testimony.

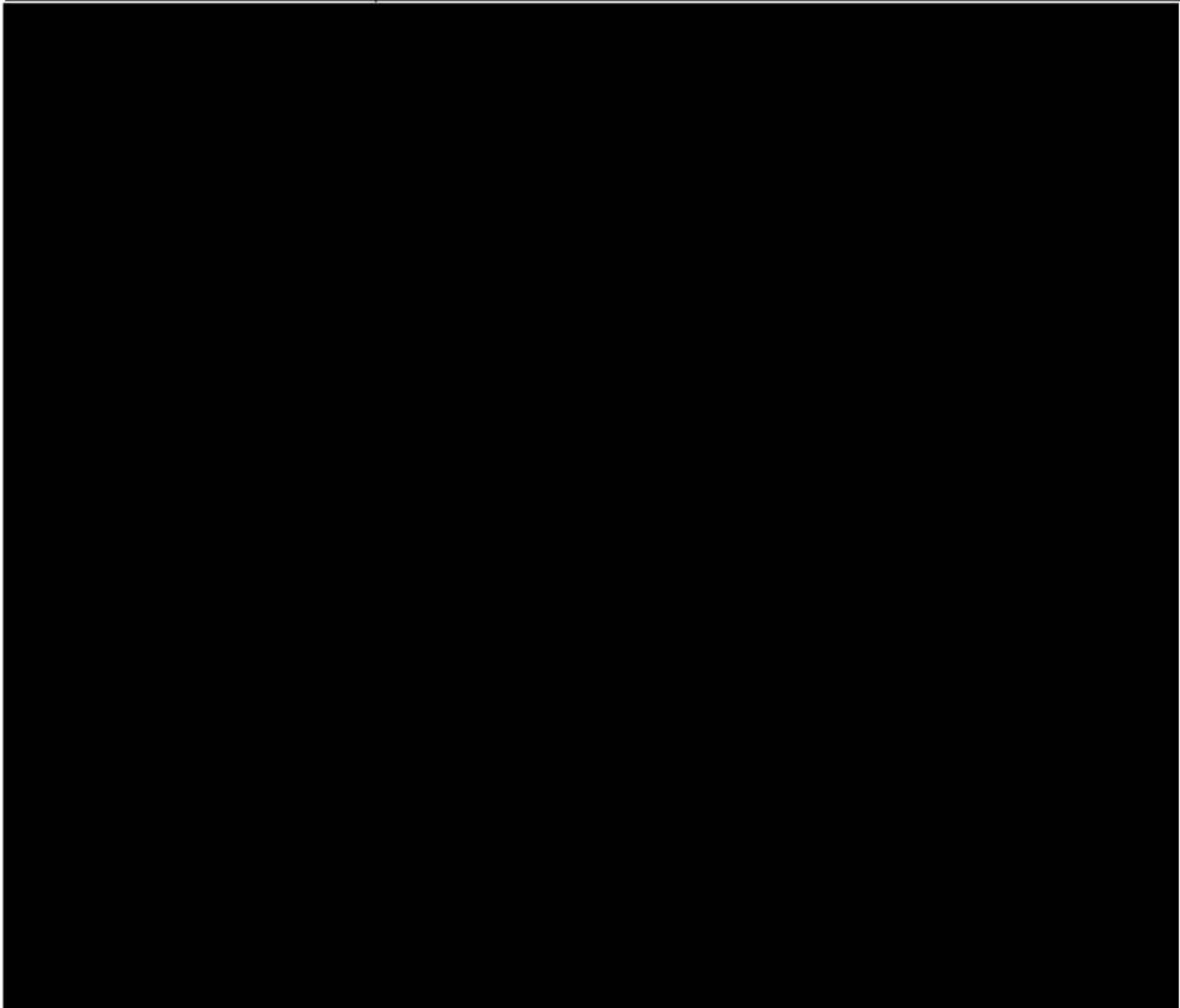
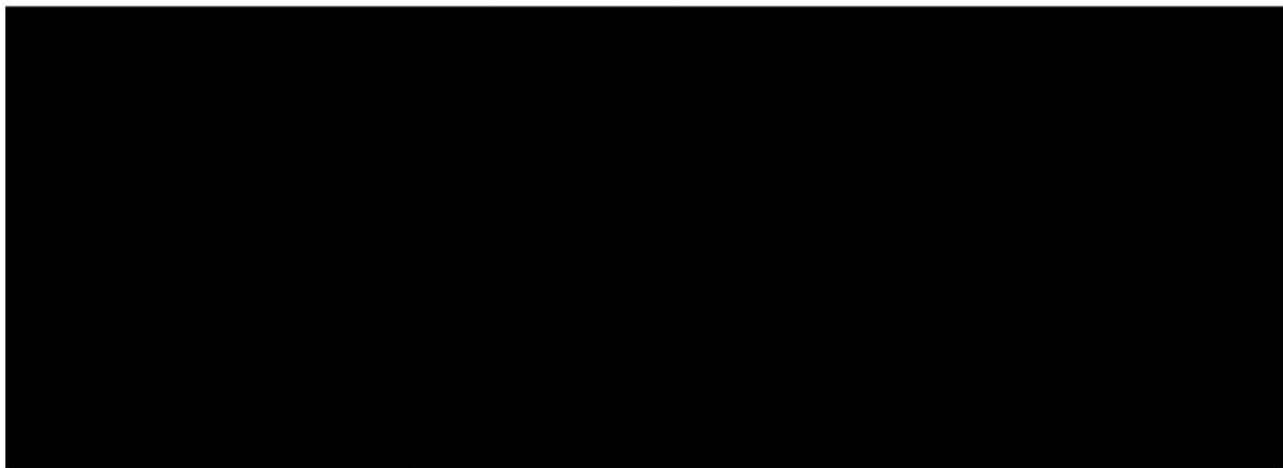
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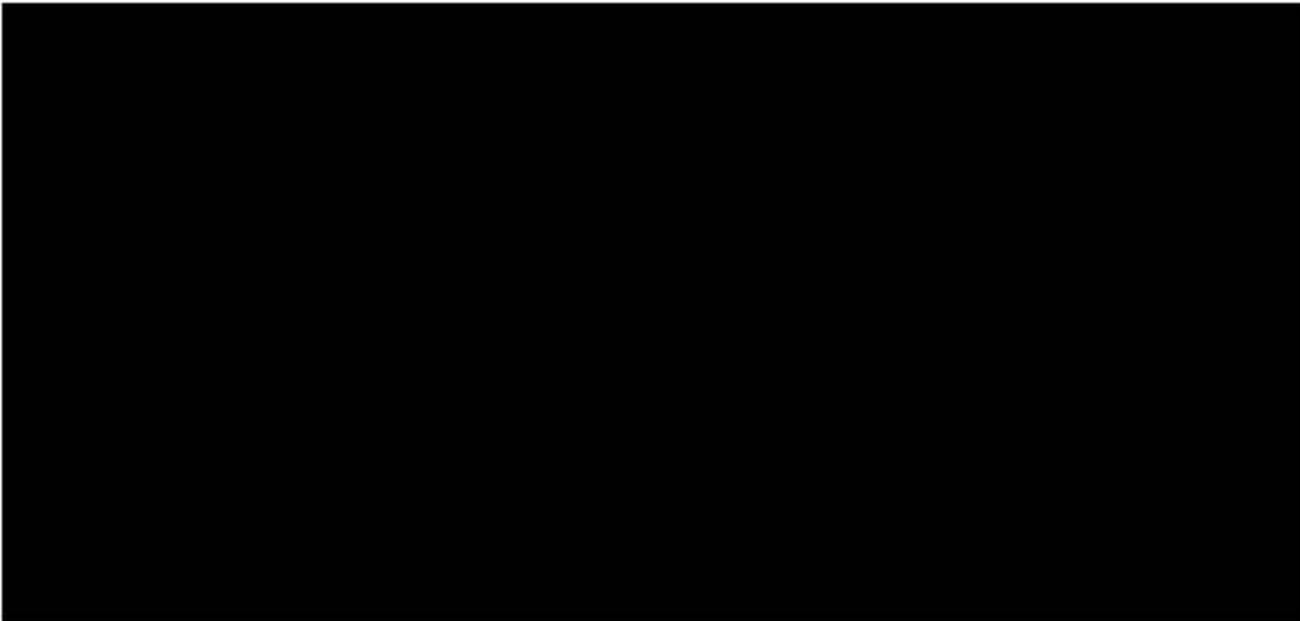


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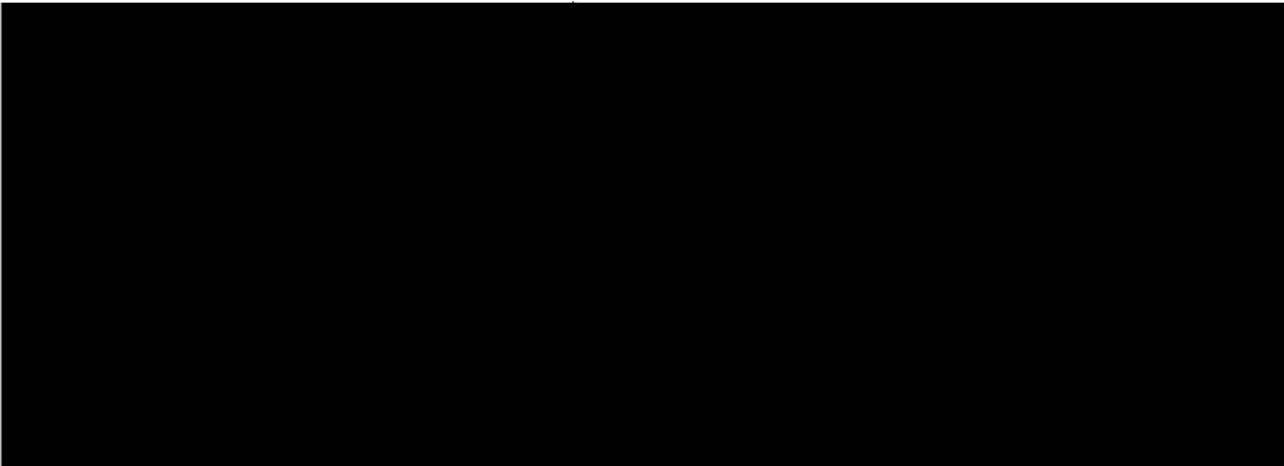
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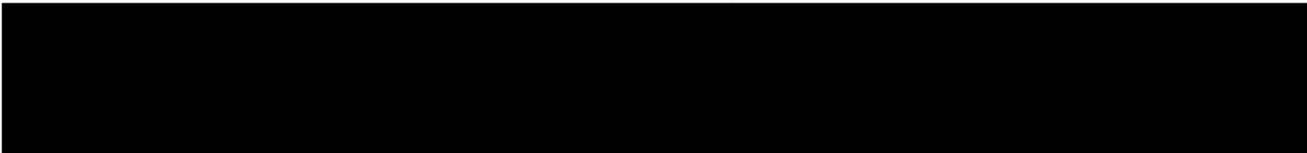
~~(U//FOUO)~~ Dr. James Mitchell (Witness #63)

~~(TS//ORCON//NOFORN)~~ Dr. Mitchell is a former SERE psychologist, who was contracted with the CIA to develop and implement its torture program based on the concept of “learned helplessness.” He is referred to throughout the Senate Intelligence Committee report as “Grayson Swigert.” He has spoken openly and publicly about his development of the CIA program, and his direct, personal involvement in waterboarding detainees, including in his published torture memoir *Enhanced Interrogation*. Dr. Mitchell has also been deposed in another torture case, *Salim v. Mitchell*, in federal court in Washington State.

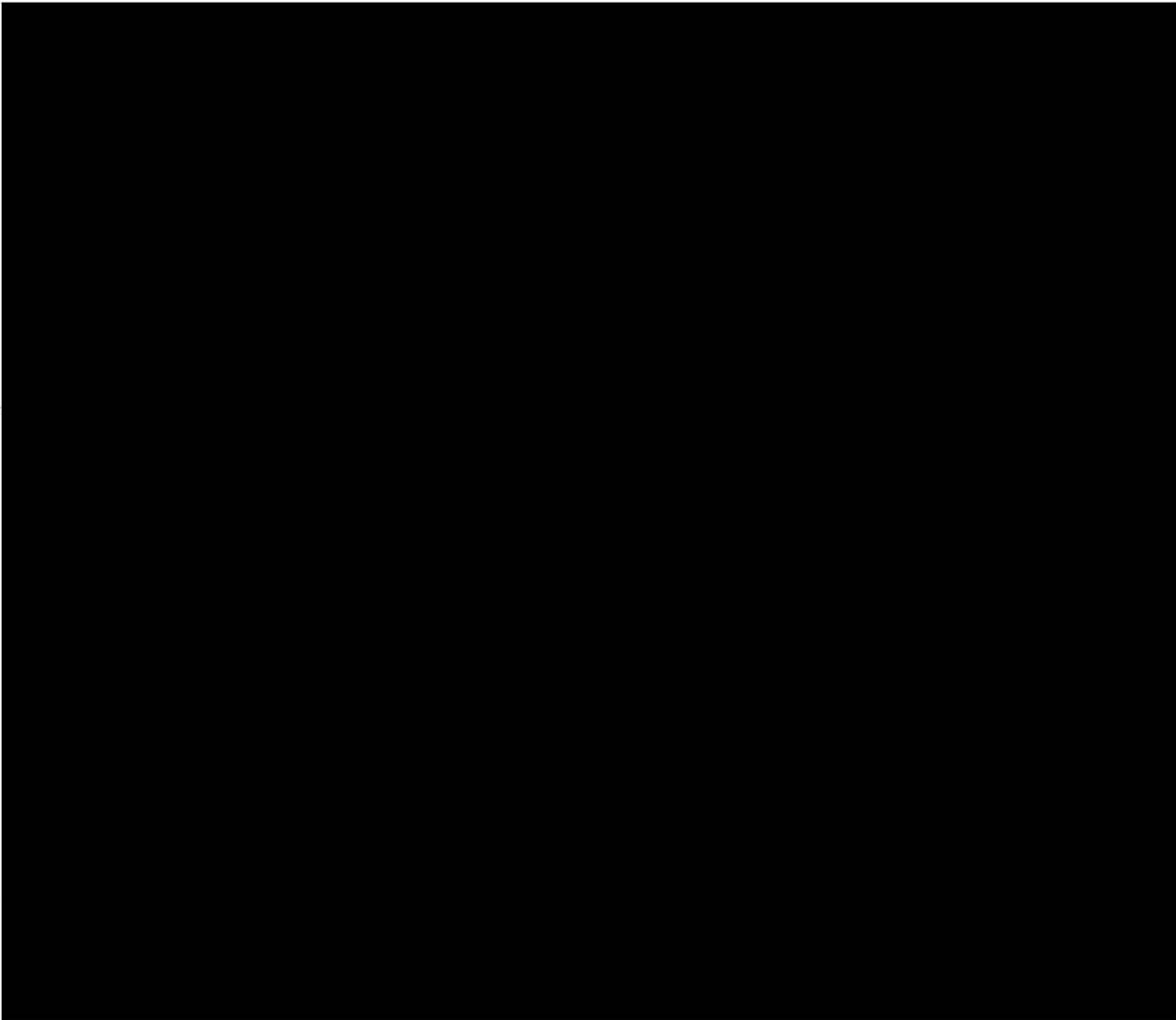


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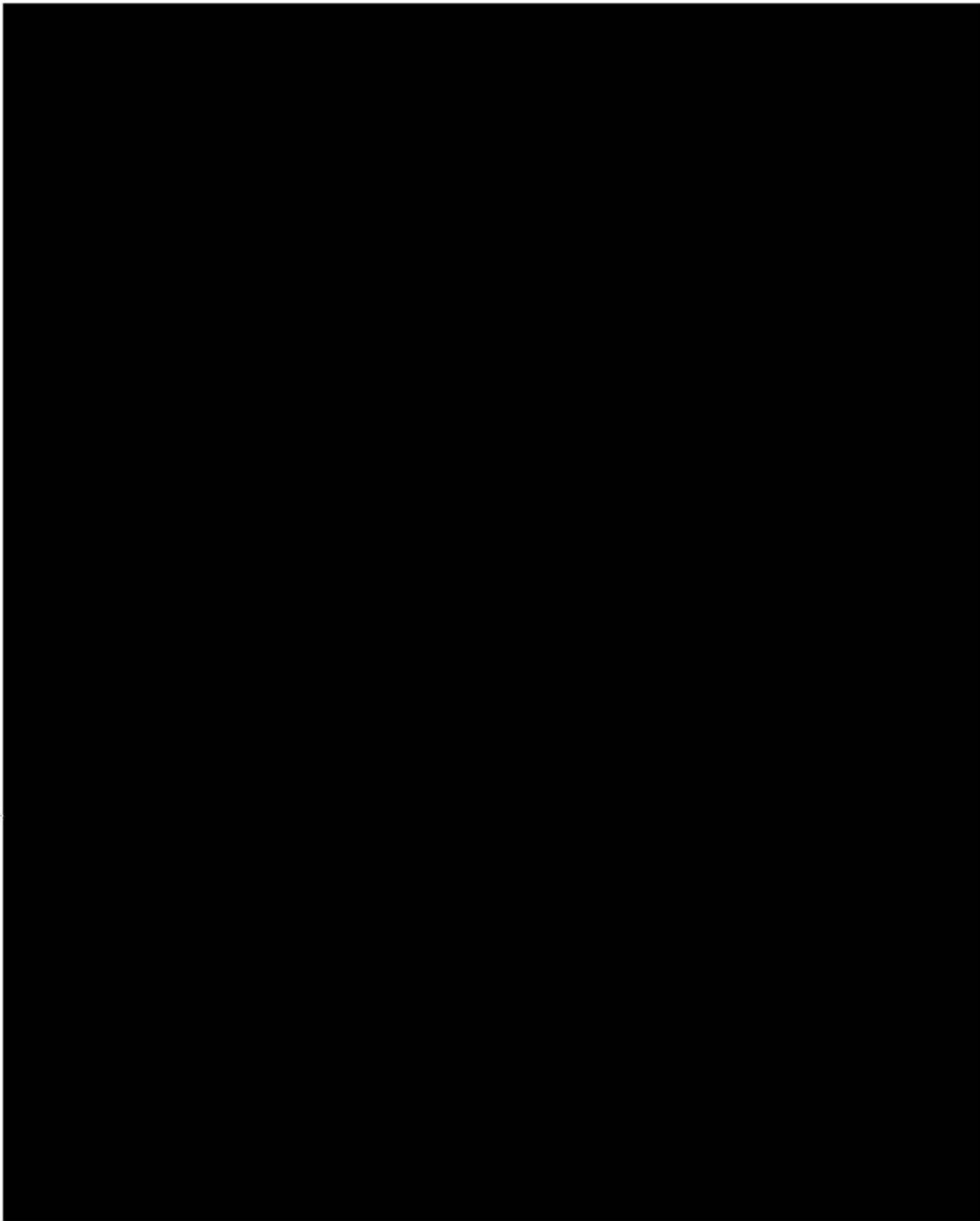


~~(U//FOUO)~~ The Defense anticipates based on his record of public remarks and his deposition in *Salim* that while he is not likely to appear for testimony voluntarily, Dr. Mitchell could be expected to testify fully and unapologetically if compelled. Dr. Mitchell's in-person testimony is essential, and likely to carry particular weight and credibility, because he is perhaps the most well-known individual who is connected to the CIA torture program.



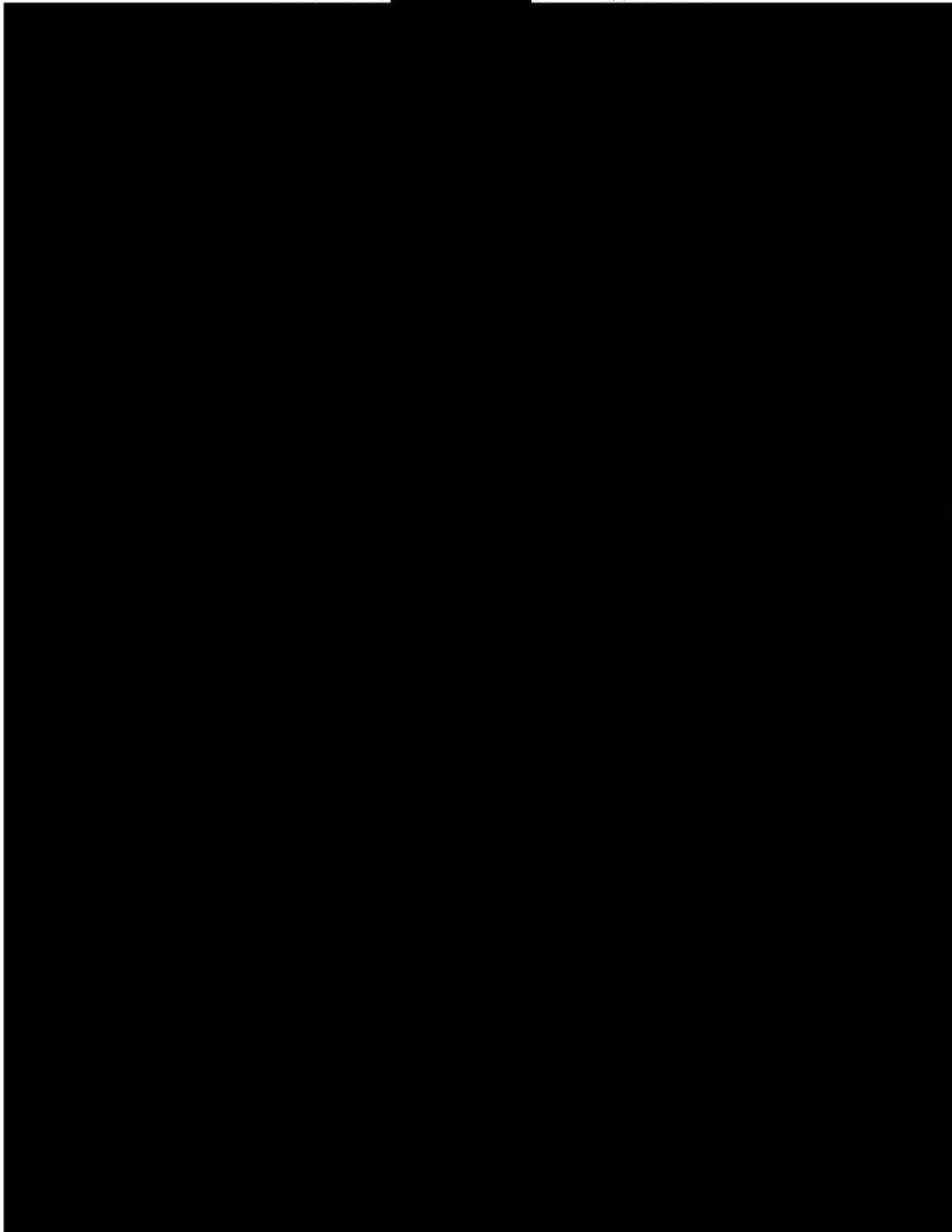
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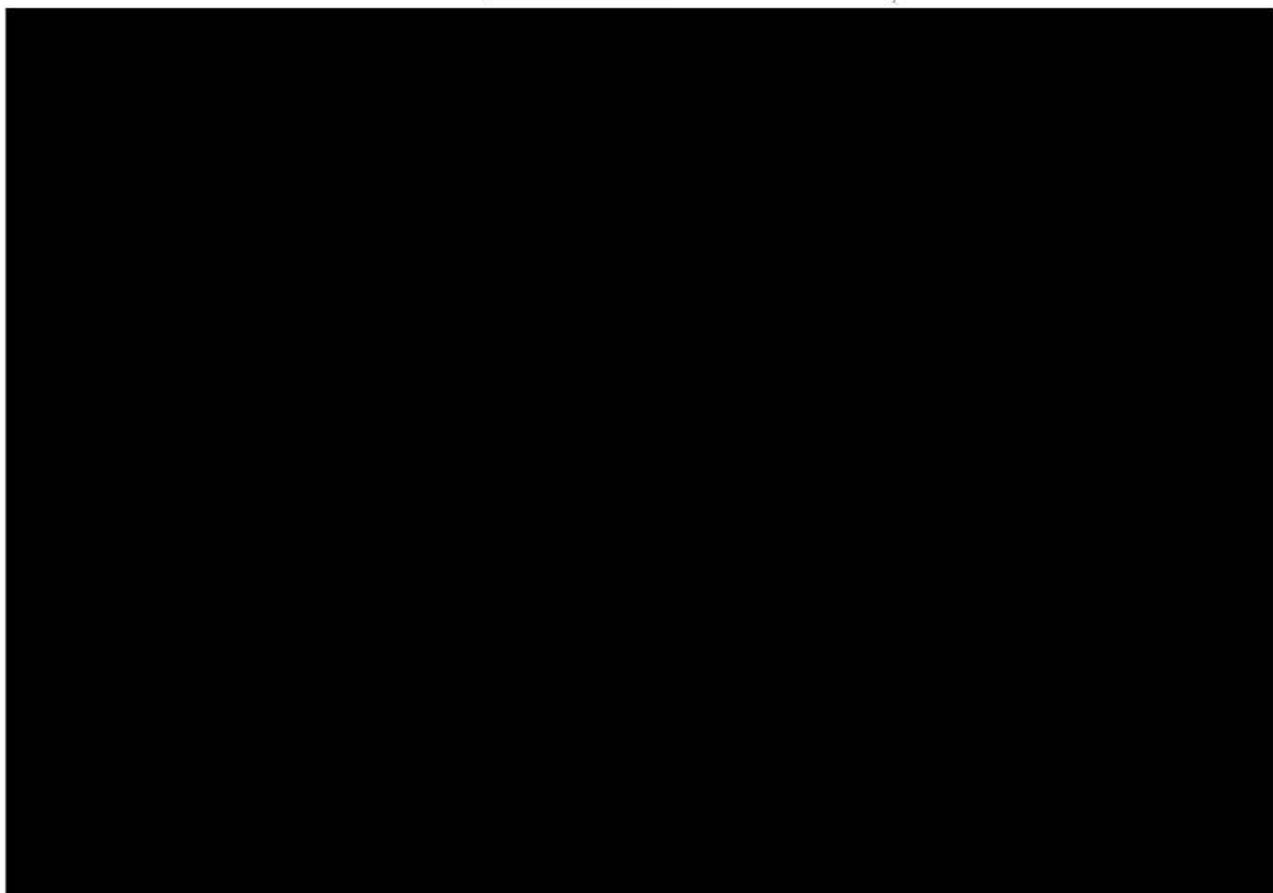
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~~(U)~~ ATTACHMENT F

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DEPARTMENT OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
4800 MARK CENTER DRIVE
ALEXANDRIA, VA 22304-2100

February 22, 2019

MEMORANDUM FOR MS. KATYA JESTIN, DEFENSE COUNSEL

SUBJECT: Defense Request for the Appointment and Funding of Dr. [REDACTED] as an
Expert Witness – *U.S. v. Majid Khan*

I reviewed carefully your request, which is dated February 15, 2019, for the appointment and funding of Dr. [REDACTED] as a defense expert witness in the field of forensic psychiatry. For the reasons set forth below, your request is approved.

Your request for Dr. [REDACTED] as an expert witness falls under the provisions of your "Offer for a Pretrial Agreement" (Pretrial Agreement) of February 12, 2012, the terms of which were accepted by a prior Convening Authority on February 15, 2012. The agreement was accepted by the Military Judge on February 29, 2012, and, that same day, in accordance with his pleas, Mr. Khan was found guilty of the charged offenses. Under paragraph 23 of the Pretrial Agreement, you agree not to seek to retain or present at a pre-sentencing hearing more than two expert consultants or witnesses at Government expense. While my decision on your request for Mr. Steven Kleinman is pending your compliance with the Commission's order in AE 026E for the filing of appropriate waivers, this request for Dr. [REDACTED] constitutes one of the two expert consultants or witnesses.

Rule for Military Commissions 703(d) establishes the procedure for requesting expert witnesses and requires the requesting party to provide notice to the non-requesting party. This process helps me to evaluate the need for the expert assistance sought, and to determine whether alternatives are preferable so as to avoid wasteful expenditures. You provided the Government a copy of this request on February 15, 2019. Accordingly, I will consider the substance of your request to determine whether the expert witness is necessary.

An accused is entitled to the employment of an expert, provided that he or she can demonstrate the necessity for the expert assistance. *See Ake v. Oklahoma*, 470 U.S. 68 (1985). As the *Ake* Court explained, an indigent defendant is entitled to access "the raw materials integral to the building of an effective defense." *Id.* at 77. The *Ake* Court noted that an indigent defendant is not constitutionally entitled to "all the assistance that his wealthier counterpart might buy," but that "fundamental fairness entitles indigent defendants to an adequate opportunity to present their claims fairly within the adversary system." *Id.* Military courts have embraced this rule in a series of opinions spanning decades. *See United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005); *United States v. Ndanyi*, 45 M.J. 315, 319 (C.A.A.F. 1996); *United States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1994); *United States v. Robinson*, 39 M.J. 88, 89 (C.M.A. 1994); *United States v. Garries*, 22 M.J. 288, 291 (C.M.A. 1986); *United States v. Cannon*, 74 M.J. 746, 750-52 (A.C.C.A. 2015) ("If the defense demonstrates that expert assistance is relevant and necessary, then an expert shall be employed at government expense to assist the defense.").

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To demonstrate necessity, an accused must show something more than a mere possibility of assistance from a requested expert. An accused must show that there exists a reasonable probability both that the expert would be of assistance to the defense and that denial of the expert assistance would result in a fundamentally unfair trial. See *United States v. Gunkle*, 55 M.J. 26, 31 (C.A.A.F. 2001); *United States v. Robinson*, 39 M.J. 88, 89 (C.M.A. 1994). In demonstrating the necessity for expert assistance, the defense must show: (1) why the expert assistance is needed; (2) what the expert assistance would accomplish for the accused; and (3) why the defense counsel is unable to gather and present the evidence that the expert assistance would be able to develop. See *Gunkle*, 55 M.J. at 32; *Gonzalez*, 39 M.J. at 461.

In this request, you incorporate the justification provided in your August 1, 2018, request for Dr. [REDACTED] as an expert consultant, and you state that, if appointed, he would assist the defense in explaining how and why individuals like Mr. Khan become involved in Al Qaeda and terrorist activities, and he would offer an assessment of Mr. Khan's potential for recidivism or future dangerousness. You also proffer that Dr. [REDACTED] will testify in support of an impending motion for pretrial punishment credit. The Military Commissions Act of 2009 states that the provisions of the UCMJ (chapter 47, U.S. Code Title 10) are applicable only "to the extent provided by the terms of such provisions, or by this chapter," and "many of the provisions of chapter 47 of this title are by their terms inapplicable to military commissions." 10 U.S.C. §§ 948b(d)(2), 948b(e). Specifically, Article 13 of the UCMJ and Rule for Court-Martial 305, pertaining to pretrial punishment, do not apply to Mr. Khan, as he was detained pursuant to the law of war. See 10 U.S.C. § 948b(e); 10 U.S.C. § 813. Additionally, your impending motion seems directly inconsistent with paragraph 11 of the Pretrial Agreement, which states that once his guilty plea is accepted, Mr. Khan will not initiate any legal claims against the United States Government regarding his capture, detention, or confinement conditions prior to the plea. Consequently, Dr. [REDACTED] is not approved to testify in support of any motion for pretrial punishment credit.

I will note that for the reasons stated in your request, I find that you have demonstrated the necessity for an expert witness in forensic psychiatry since there is at least a reasonable probability a witness with that expertise would provide valuable mitigation evidence for Mr. Khan's sentencing hearing. Accordingly, I approve the appointment and funding of Dr. [REDACTED] as an expert witness. Accordingly, I authorize expert fees for Dr. [REDACTED] at the rate of \$500.00 per hour for up to 100 hours, totaling no more than \$50,000.00. The terms of this authorization are in the attached Memorandum of Agreement.

Please note that my approval of the appointment and funding for Dr. [REDACTED] does not constitute authorization for him to travel. Travel must be approved on a case-by-case basis, in accordance with the terms of the Memorandum of Agreement, which requires a showing of necessity for each proposed trip. In accordance with the Joint Travel Regulations, the following must be included in each official travel request before it can be approved: location(s) of travel, dates of travel, purpose of travel, and an explanation of why alternative means of communication cannot be used.

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Per Chapter 13-9, Regulation for Trial by Military Commission (2011), please have Dr. [REDACTED] sign and return to my office the attached Memorandum of Agreement before he begins any work on this case.

Melinda L. Perritano
Melinda L. Perritano
Convening Authority
For Military Commissions

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MEMORANDUM OF AGREEMENT
WITH EXPERT WITNESS (Dr. [REDACTED])

1. Dr. [REDACTED] is hereby retained as an expert witness, with special expertise in the field of forensic psychology, to assist defense counsel on behalf of Mr. Majid Khan in the military commission case of *United States v. Majid Khan*.
2. Dr. [REDACTED] acknowledges, understands, and agrees to all the terms contained in this Memorandum of Agreement. Dr. [REDACTED] further agrees to the following:
 - a. To assist defense counsel as a witness for the purpose of testifying about why Mr. Khan became involved with Al Qaeda; to testify about Mr. Khan's risk of recidivism or future dangerousness; and to offer his expert opinion on whether Mr. Khan suffers from any mental health issues resulting from his detention.
 - b. To review, as may be necessary, files, reports, records, and documents, necessary to testify about the areas listed above in subparagraph a. However, nothing in this memorandum of agreement allows Dr. [REDACTED] to review, possess, or retain, any document, file, record, or report not within the security clearance level of Dr. [REDACTED].
 - c. To submit an invoice for services rendered within thirty (30) days of the performance of the expert services, as directed by the Office of Military Commissions Contracting Officer's Representative (COR).
 - d. To submit the following information: locations of travel, dates of travel, purpose of travel, and an explanation why he cannot use an alternate means of communication to accomplish his duties, and a completed Invitational Travel Worksheet to the Chief Defense Counsel, who will certify that the travel complies with the JTR. The Chief Defense Counsel will provide the certification to the Office of the Chief Defense Counsel Admin/Travel section, who will draft an ITO and send it, along with the certification of the Chief Defense Counsel, to the OMC Travel and Transportation Section for approval in accordance with the JTR for each Invitation Travel Order he requires.
 - e. To submit a Government travel voucher for payment of travel expenses incurred, following the instructions provided with said travel voucher. Expert fees are not authorized for travel time.
 - f. To certify that the fee charged for his services as an expert witness are not greater than his normal professional rate for such services.

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[REDACTED]

**MEMORANDUM OF AGREEMENT
WITH EXPERT WITNESS (Dr. [REDACTED])**

3. The Government agrees to the following:
- a. To pay Dr. [REDACTED] an expert fee of \$500.00 per hour for up to 100 hours when professional advice, services, and testimony are rendered. Payment will be made up to a maximum of \$50,000.00 (100 hours at \$500.00 per hour) for expert fees. This authorization currently expires on April 14, 2019, the end of the performance period of the contract used to provide the necessary payments to experts unless an option to extend the contract is exercised or the contract is renewed. If the option to extend the contract is exercised, or the contract is renewed, defense counsel will be notified that you may continue to perform your duties under this authorization after April 14, 2019.
 - b. Compensation for in-court testimony is authorized under this Memorandum of Agreement.
 - c. To approve and issue Invitational Travel Orders in accordance with the JTR when travel is necessary for Dr. [REDACTED] to perform his duties. The Government agrees to pay actual travel costs, either coach air travel or mileage in accordance with the JTR. The Government also agrees to pay per diem for meals, and the lesser of actual cost of lodging of the Government local lodging rate, including payment for all travel days, in accordance with the JTR. Expert fees are not authorized for travel time.
 - d. Payment under this agreement has been approved by the Convening Authority, Office of Military Commissions, and the balance will be paid by the United States Government.

Office of the Convening Authority/ Date

Expert Witness Date

[REDACTED]