IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

GULED HASSAN DURAN (ISN 10023),	
Petitioner,	
v.	**Civil Action No. 16-2358 (RBW)**
DONALD J. TRUMP, President of the United States, *et al.*,	
Respondents.	

NOTICE OF ERRATA TO RESPONDENTS' COMBINED MEMORANDUM IN SUPPORT OF THEIR MOTION FOR AN EXCEPTION FROM DISCLOSURE PURSUANT TO SECTION I.D OF THE CASE MANAGEMENT ORDER AND IN OPPOSITION TO PETITIONER'S MOTION FOR DISCOVERY

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Respondents, by undersigned counsel, respectfully file this Notice of Errata in connection with their December 13, 2019 Combined Memorandum in Support of Motion for Exception and in Opposition to Petitioner's Motion to Compel. *See* ECF No. 78. Because of administrative constraints Respondents faced in transferring the Table of Authorities between Government computer systems, Respondents were unable to include the Table of Authorities in time for their December 13 filing. Respondents respectfully submit herewith the Table of Authorities, which is inserted immediately after the Table of Contents, in the attached pdf. copy of the December 13 filing.

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Dated: December 18, 2019

Respectfully submitted,

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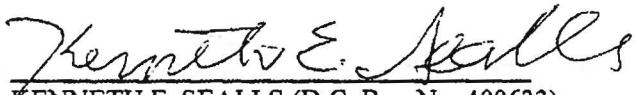

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INTRODUCTION

The Government has fulfilled its discovery obligations in this case by reviewing [redacted] thousands of documents and disclosing to Petitioner's counsel thousands of pages of information. Discussions between Department of Justice (DOJ) attorneys and counsel for Petitioner Guled Hassan Duran resulted in the Government conducting further searches for specific items and disclosing to Petitioner's counsel even more pages of information. The parties have conducted discovery under the Case Management Order (CMO), which limits discovery, absent further order of the Court, to exculpatory information and certain information [redacted] upon which the Government relies to justify his detention. Rather than seek additional discovery according to the more restrictive requirements of the CMO, Petitioner seeks it under the Due Process Clause. For example, Petitioner seeks information that he acknowledges is neither exculpatory nor otherwise responsive to the CMO but rather is merely, in Petitioner's view, "material" in some way to the case. Pet'r Mot. at 1, 2, 12. However, the Due Process Clause does not require that Petitioner receive the discovery he seeks and, in any event, does not apply to Petitioner—an alien unprivileged enemy combatant detained at Guantanamo Bay.

Petitioner's Motion for Discovery (Petitioner's Motion) seeks an order requiring the Government to produce several specific pieces of information that the Government did not locate in its searches. Thus, no such order is necessary: the CMO already requires the Government to produce any exculpatory information it may locate after the close of discovery. The Government has already conducted extremely thorough searches for the items Petitioner describes as "missing." If the Government does locate any of the requested items—assuming they exist at all and are in the Government's possession—it will produce the portions that are responsive to the CMO.

Additionally, the CMO allows the Government to seek an exception to disclosure of information it is required to produce under the CMO—whether that be one of the enumerated

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types of information, or information the Court has granted Petitioner leave to seek. The Government moves to withhold only two types of information responsive to the CMO; Petitioner seeks both: [redacted] As explained at length below and in the Government's *ex parte* submissions, disclosure of these items [redacted] Further, disclosure of neither [redacted] is necessary for meaningful habeas review. The Government has provided to the Court *ex parte* information that will allow it to evaluate [redacted] The Government has also provided information that definitively disproves Petitioner's allegation [redacted] Petitioner seeks additional information [redacted] But DOJ attorneys reviewed the [redacted] thousands of pages discovered by the many Government searches with the goal of locating exculpatory information [redacted] Indeed, DOJ attorneys found some instances of such information and produced them pursuant to the CMO. Petitioner neither points to inadequacies in the Government's searches nor provides evidence that the review was faulty. Petitioner also asserts that the redacted portions of two documents [redacted] contain additional exculpatory information. But again, Petitioner provides no basis for his implicit accusation that DOJ attorneys overlooked exculpatory information when they reviewed the two documents and produced information from them of the exact type Petitioner claims was not produced.

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Finally, Petitioner seeks the entire Senate Select Committee on Intelligence ("SSCI") Report concerning the CIA's former detention and interrogation program—a 6,700 page report with 38,000 footnotes [redacted] But the SSCI Report is a congressional record over which Congress has retained control. The Executive, therefore, cannot release any portion of it without the permission of Congress. Moreover, Petitioner's request for the entire report is overbroad, unlikely to produce evidence demonstrating that Petitioner's detention is unlawful, and would unfairly disrupt and unduly burden the Government. [redacted] Petitioner does not need the SSCI Report to obtain meaningful habeas review, and the burdens that an order to produce it would impose are extreme and unjustified.

For these reasons, the Government opposes Petitioner's Motion for discovery and moves for an exception to disclosure [redacted]

BACKGROUND

I. DESCRIPTION OF THIS MEMORANDUM AND ASSOCIATED DOCUMENTS

The Government's motion for an exception from disclosure pursuant to section I.D of the CMO (Government's Motion) and its accompanying proposed order is classified SECRET//NOFORN.[1] This Memorandum (Government's Memorandum) in opposition to Petitioner's Motion and in support of the Government's Motion is accompanied by a proposed order [redacted] the

[1] The dissemination marking "NOFORN" (or "NF"), which stands for "No Foreign Dissemination," means that the information can be disseminated only to eligible U.S. persons and cannot be disseminated or otherwise released to foreign nationals.

declaration of Department of Defense Deputy Associate General Counsel John B. Renehan (DOD Declaration, attached as Tab 2). The classification of the Government's Memorandum [redacted] is SECRET//ORCON/NOFORN.[2] The classification of the DOD Declaration is SECRET//NOFORN. The proposed order attached to this memorandum is UNCLASSIFIED.

The Government has also filed a supplement (Top Secret Supplement)[3] to this Memorandum that is classified at higher level than the memorandum and that Petitioner is cleared to see. The Government filed the Top Secret Supplement so that this Memorandum could be filed at the lower "SECRET//ORCON/NOFORN" level.

In addition, the Government has filed a supplement *in camera* and *ex parte* (Government's *Ex Parte* Supplement), which is accompanied by [redacted] as well as the Government's Motion for an Exception to Disclosure. [redacted]

[2] The dissemination marking "ORCON" (or "OC"), which stands for "Originator Controlled" information, means that the information cannot be further disseminated without authorization from the originating agency [redacted]

[3] The Top Secret Supplement contains classification markings other than simply "TOP SECRET," which are explained in the Top Secret Supplement.

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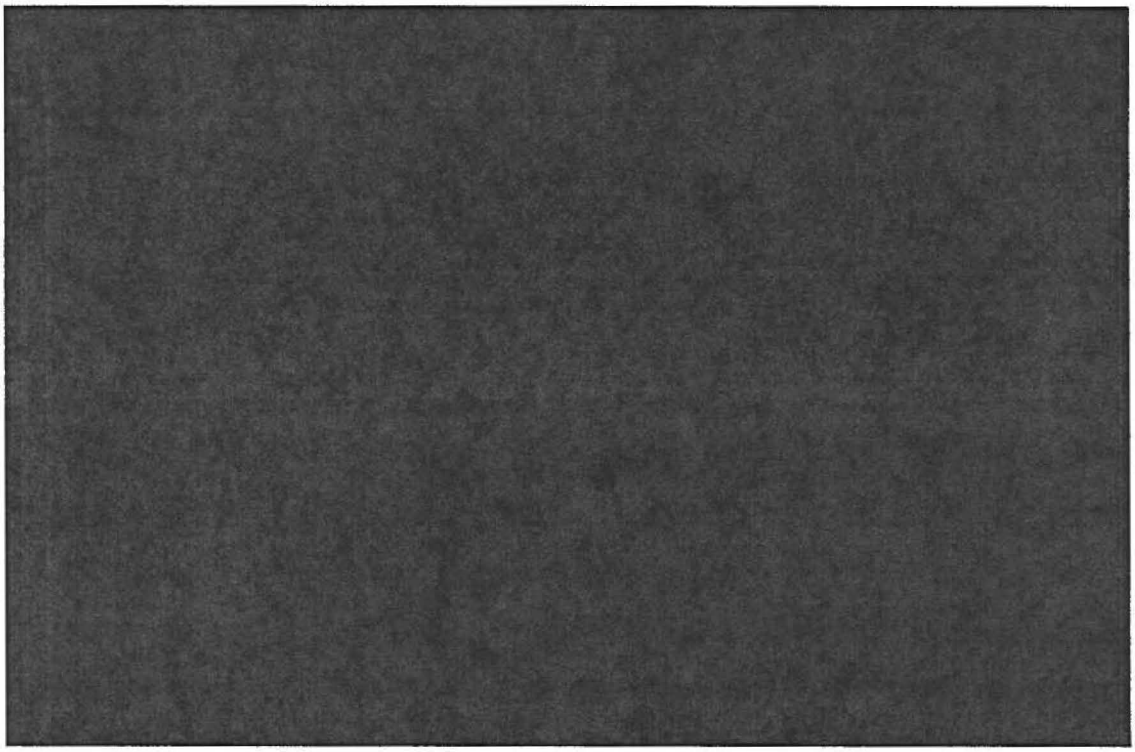

II. PROCEDURAL BACKGROUND

On November 30, 2016, Petitioner filed the petition for Writ of Habeas Corpus. *See* ECF No. 1. On May 10, 2017, Respondents filed their Factual Return. Respondents' Notice of Filing Factual Return (ECF No. 19). Pursuant to the Case Management Order ("CMO") entered on February 21, 2018, *see* ECF No. 39, Respondents filed numerous monthly status reports informing the Court of Respondents' review and production [redacted] of thousands of documents containing exculpatory information. *See* ECF Nos. 43, 44, 47, 49, 52, 55, 60, 62, 63. Following several meet and confers of counsel concerning production of exculpatory information, the Court on February 14, 2019 ordered the parties to file a joint status report identifying the outstanding discovery issues, and proposing if necessary a briefing schedule. *See* ECF No. 66. The parties filed joint status reports on March 13 and June 28, 2019, and proposed a briefing schedule for Petitioner's motion to compel discovery. *See* ECF Nos. 67, 70. On July 16, 2019, the Court set the briefing schedule, *see* ECF No. 71, and upon consideration of Respondents' Consent Motion

to modify the briefing schedule, *see* ECF No. 76, modified the briefing schedule on November 26, 2019. *See* ECF No. 77.

III. FACTUAL BACKGROUND

Petitioner is a Somali national currently detained at the United States Naval Station in Guantanamo Bay, Cuba. [redacted] Petitioner joined the al-Qaida-associated Somali jihadist organization al-Ittihad al-Islami [redacted]

In December 2003, Petitioner was shot in Mogadishu by would-be robbers, the bullet breaking his left arm near the elbow, lodging in his abdomen, and causing him to wear a colostomy bag. *See* September 20, 2018 Declaration of Pt'r, Ex. A to Pt'r's Mot. for Discovery, ¶¶ 3-4. Petitioner attests that the first doctor who treated him in Somalia for his abdominal wound said the resulting colostomy needed to be repaired within six months, or early May 2004. Pet'r's Decl. ¶ 85.

Until his capture on March 4, 2004, *see* Senate Select Intelligence Committee Report on the CIA's Detention and Interrogation Program (released December 3, 2014), ("SSCI Report") Executive Summary at 339, Petitioner [redacted]

[redacted] The SSCI Report concluded that there were no records that Petitioner was subjected to enhanced interrogation techniques. SSCI Report at 339.

ARGUMENT

I. LEGAL STANDARD

A. Case Management Order

The Court has established discovery procedures that provide Petitioner a fair opportunity to rebut Respondents' case for detention. *See* CMO § I.B.1, Exculpatory Evidence ("The government shall disclose to the petitioner all evidence in its possession that tends to undermine the information presented to support the government's justification for detaining the petitioner.") (citing *Boumediene v. Bush*, 553 U.S. 723, 786 (2008)). Under the CMO, Respondents are required to produce to Petitioner evidence related to "the process resulting in the petitioner's statements relied upon by the government . . . [,] to the petitioner's recantations of prior statements . . . [and] to the petitioner's medical condition at the time he made the statements." CMO § I.B.1. Respondents are required to "disclose to the petitioner all relevant exculpatory evidence without determining its materiality." *Id.* The Government is also required to disclose any documents and objects in the Government's possession upon which the Government relies to justify detention; all of Petitioner's statements, in whatever form, upon which the Government relies; and information about the circumstances in which such statements of Petitioner were made or adopted. CMO § I.C.2.[4]

The CMO does not require production of material not expressly set forth therein. For example, it does not require the production of everything Petitioner may assert is "material" to the case. Rather, it requires production of exculpatory evidence whether or not it is material, which includes information about Petitioner and other persons [redacted]

[4] The CMO also describes several places the Government must search for discoverable information. *See* § I.B.1 (stating that disclosure obligations include, but are not limited to, five distinct sets of evidence). Petitioner does not allege that there are other places the Government should have searched.

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[redacted] The required disclosure of three enumerated types of information related to statements by Petitioner upon which the Government relies do not include such information about statements given by other people, unless it is exculpatory. Most importantly, at this time, there is no other discovery Respondents are obliged to produce—although, in the interest of limiting the issues to be litigated, the Government has produced some material not required by the CMO.

If Petitioner seeks discovery beyond that described above, and the parties cannot resolve that issue, Petitioner must submit a written motion to the Court, which must:

> (1) be narrowly tailored, not open-ended;
>
> (2) specify the discovery sought;
>
> (3) explain why the request, if granted, is likely to produce evidence that demonstrates that the petitioner's detention is unlawful . . . and
>
> (4) explain why the requested discovery will enable the petitioner to rebut the factual basis for his detention without unfairly disrupting or unduly burdening the government. . .."

CMO Section I.C.3.

Accordingly, this section of the CMO, consistent with the approach in habeas cases generally, bars Petitioner from invoking the more lenient standards governing the scope of discovery in conventional civil actions. *Compare Harris v. Nelson*, 394 U.S. 286, 293-98 (1969) (rejecting "broad-ranging" civil discovery for habeas petitions) and *Bracy v. Gramley*, 520 U.S. 899, 904 (1997) (good cause required for discovery under Habeas Rule 6), *with* Fed. R. Civ. P. 26(b)(l) (allowing parties to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case ....)". Instead, a petitioner may propound only "narrowly tailored" requests that will not "unfairly disrupt[] or unduly burden[] the government" and that are "likely to produce evidence that demonstrates that the petitioner's detention is unlawful." ACMO § I.E.2. *Cf.* Habeas Rule 6(a) ("A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure

and may limit the extent of discovery."), 6(b) ("A party requesting discovery must provide reasons for the request."). For example, to establish good cause under Habeas Rule 6, a petitioner must make "specific allegations" that "if the facts are fully developed" he may be "entitled to relief." *Bracy*, 520 U.S. at 908-09 (internal quotation marks omitted).

In other words, Petitioner must show—not merely assert—that his specifically targeted request will bear fruit and, if produced, support his case. *Lave v. Dretke*, 416 F.3d 372, 381 (5th Cir. 2005) ("Conclusional allegations are insufficient to warrant discovery; the petitioner must set forth specific allegations of fact.") (internal quotation marks omitted); *Williams v. Bagley*, 380 F.3d 932, 974 (6th Cir. 2004) (holding that "[c]onclusory allegations are not enough to warrant discovery" in habeas proceedings).

Accordingly, Section I.C.3 of the CMO should be applied giving due regard to the requirement that discovery in these novel habeas proceedings must be "both prudent and incremental." *Hamdi v. Rumsfeld*, 542 U.S. 507, 539 (2004) (plurality op.); *accord Boumediene*, 553 U.S. at 770 (concluding that "habeas corpus procedures" may be "modified" to address "practical barriers"). As the controlling opinion in *Hamdi* made clear, the procedures and fact-finding mechanisms available to detainees should reflect their "'probable value' and the burdens they may impose on the military." *See* 542 U.S. at 533 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

Nowhere in his motion does Petitioner assert that has satisfied, or even mention, the requirements set forth Section I.C.3 of the CMO for further discovery. The Court should not permit Petitioner to seek discovery that exceeds the scope of Sections I.B.1 and I.C.2 of the CMO, as he has here, without satisfying the four requirements set forth in Section I.C.3.

B. Due Process

Pursuant to *Boumediene v. Bush*, Petitioner is entitled to a meaningful opportunity for review of the basis for his continuing detention. 553 U.S. at 779. *Boumediene* grounded that right in the Suspension Clause. *Id.* Subsequently, the Court of Appeals held that the Due

Process Clause of the Fifth Amendment did not apply to Guantanamo Bay detainees' attempt to obtain release into the United States, basing its reasoning on a line of Supreme Court precedent that "the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States." *Kiyemba v. Obama*, 555 F.3d 1022, 1026 (D.C. Cir. 2009), *vacated*, 559 U.S. 131, *judgment reinstated as amended*, 605 F.3d 1046 (D.C. Cir. 2010). Although the Court of Appeals' recent decision in *Qassim v. Trump*, 927 F.3d 522 (D.C. Cir. 2019), has clarified the scope of *Kiyemba's* holding, limiting it to substantive due process claims, that clarification does not affect this case.

In *Qassim*, the question on appeal was whether *Kiyemba* constituted binding precedent as to "whether Guantanamo detainees enjoy procedural due process protections under the Fifth Amendment (or any other constitutional source . . .)." 927 F.3d at 528. The panel answered "no," construing *Kiyemba*'s holding to apply only to "substantive due process claim[s] concerning the scope of the habeas remedy." *Id.*

There is a long list of Court of Appeals rulings describing what procedures apply to Guantanamo habeas claims, including rulings regarding the scope of discovery. *See, e.g., Al Odah v. United States*, 559 F.3d 539 (D.C. Cir. 2009) (permitting the Government to withhold material information from Petitioner's cleared counsel in certain circumstances); [redacted] The holding in *Qassim* did nothing to unsettle those cases. Although Petitioner may argue that those cases did not involve claims under the Due Process Clause, the cases remain binding on the Court. *See United States v. Torres*, 115 F.3d 1033, 1036 (D.C. Cir. 1997) (district courts are obligated to apply controlling Circuit precedent unless that precedent has been overruled by the Court of Appeals *en banc* or by the Supreme Court); *see also Rodriguez de Quijas v. Shearson/American Express, Inc*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling

its own decisions."). Consequently, Petitioner is not entitled to any discovery beyond that contemplated in the CMO.

Petitioner asserts that the Due Process and Suspension Clauses require disclosure of all material evidence, even evidence that "may not rise to the level where disclosure is required because the evidence is exculpatory." Not only is Petitioner's assertion directly contrary to the CMO in this case, but he provides no cases or analysis suggesting why the Due Process and Suspension Clauses require such an outcome. Pet'r Mot. at 15.

Because Petitioner provides no precedent or analysis to demonstrate that the CMO entered by the Court in this case fails to provide him meaningful process and review, this Court need not and, respectfully, should not decide whether the Due Process Clause extends procedural rights to Petitioner. "Under long-established principles of constitutional avoidance," this Court should "'avoid the premature adjudication of constitutional questions' and 'not pass on questions of constitutionality unless such adjudication is unavoidable[.]'" *Qassim*, 927 F.3d at 530 (quoting *Matal v. Tam*, 137 S. Ct. 1744, 1755 (2017)). Should the Court nevertheless reach that question, however, the Court should hold—consistent with controlling precedent—that due-process rights do not extend to Petitioner.

The Supreme Court's "rejection of extraterritorial application of the Fifth Amendment" has been "emphatic." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990). In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the Court held that enemy aliens tried by a military commission and imprisoned overseas could not seek writs of habeas corpus on the theory that their convictions had violated the Fifth Amendment. The Court explained that "[s]uch extraterritorial application . . . would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment." *Id.* at 784. Yet, "[n]ot one word can be cited. No decision of this Court supports such a view. None of the learned commentators on our Constitution has even hinted at it." *Id.* (citation omitted). The Supreme Court's holding in *Eisentrager* "establish[es]" that the "Fifth Amendment's protections" are "unavailable to aliens outside of our geographic

borders." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (citations omitted); *see also Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212–13 (1953) (alien detained at Ellis Island prior to legal entry into United States could "by habeas corpus test the validity of his exclusion," but he was not entitled to constitutional due-process rights).

Consistent with this unbroken line of precedent, the Court of Appeals has declined to extend the Due Process Clause to aliens "without property or presence" in the sovereign territory of the United States. *See, e.g., People's Mojahedin Org. of Iran v. Dep't of State*, 327 F.3d 1238, 1240-41 (D.C. Cir. 2003) (describing the D.C. Circuit's application of the property-or-presence test to determine whether various entities could invoke the Due Process Clause to challenge procedures related to their designation as foreign terrorist organizations); *accord Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004) (reiterating that "non-resident aliens who have insufficient contacts with the United States are not entitled to Fifth Amendment protections").

The principle that the Due Process Clause extends only to aliens who are present or own property in the United States precludes the Clause's extension to Petitioner, an alien unprivileged enemy combatant detained at Guantanamo Bay. Both the Supreme Court and the Court of Appeals have recognized that the U.S. Naval Station at Guantanamo Bay is not part of the sovereign territory of the United States. *Rasul v. Bush*, 542 U.S. 466, 471 (2004) (explaining that Cuba exercises "ultimate sovereignty" over the base); *Kiyemba*, 555 F.3d at 1026 n.9 (same). The Court of Appeals, therefore, has rejected substantive-due-process claims brought by Guantanamo detainees. 555 F.3d at 1026–27. And, in *Al-Madhwani v. Obama*, 642 F.3d 1071 (D.C. Cir. 2011), the Court of Appeals similarly declined to accept the "premise[]" that Guantanamo Bay detainees have a "constitutional right to due process," before concluding that even if they did, any procedural violation had been harmless. 642 F.3d at 1077. Because Petitioner is an alien with no presence in the United States, the Due Process Clause does not extend to him, and his procedural-due-process claims are foreclosed.

Qassim did not undermine the vitality of this property-or-presence test as applied to procedural-due-process claims brought by foreign entities or persons outside the United States.

Rather, there, the Court of Appeals declined to decide, or even to opine on, the merits of the petitioner's procedural-due-process claim, noting only that whether and what constitutional procedural protections might apply to Guantanamo-detainee habeas corpus petitions remained an open question. 927 F.3d at 530.

Any uncertainty in the Circuit's Guantanamo precedent is resolved, however, by the Supreme Court's categorical refusal to apply the Fifth Amendment extraterritorially, and by other precedent from this Circuit addressing that issue. First, *Eisentrager*—the Supreme Court's leading case, and indeed one directly addressing persons who had been detained as enemy aliens under the laws of war and tried by a military commission—rejected the petitioners' due-process claims unequivocally. And the Supreme Court has continued to characterize *Eisentrager's* holding broadly, never distinguishing between the Due Process Clause's substantive and procedural components. *Zadvydas*, 533 U.S. at 693; *Verdugo-Urquidez*, 494 U.S. at 269.

Second, while the D.C. Circuit's decisions in Guantanamo cases may not have resolved squarely the question of "what constitutional procedural protections apply" in this setting, *Qassim*, 927 F.3d at 530, the D.C. Circuit's application of *Eisentrager's* progeny, *United States v. Verdugo-Urquidez*, in *People's Mojahedin*, a case not addressed in *Qassim*, clearly resolves the question against Petitioner. In that case, two foreign entities challenged the State Department's decision to designate them as "foreign terrorist organizations" pursuant to 8 U.S.C. § 1189. 182 F.3d 18 (D.C. Cir. 1999). The entities asserted that, because the State Department had failed to "giv[e] them notice and opportunity to be heard," their designations violated procedural due process. *Id.* at 22. Relying on *Verdugo-Urquidez*, the Court of Appeals rejected the entities' constitutional claims. *Id.* The Court of Appeals explained that, because the Due Process Clause does not extend to aliens without property or presence in the United States, the entities "ha[d] no constitutional rights[] under the due process clause," that is, no procedural due process rights under the Constitution. *Id.*

Boumediene does not require a contrary result. *Boumediene* held only that the Suspension Clause "has full effect at Guantanamo Bay" in the specific context of law-of war

detainees who had been detained there for an extended period. 553 U.S. at 771. The Court admonished that its decision "[did] not address the content of the law that governs [the] detention" of Guantanamo detainees, *id.* at 798, and the D.C. Circuit—in assessing whether *Boumediene* could be read to have extended Fifth Amendment rights to Guantanamo Bay—recognized that the Supreme Court strictly circumscribed the reach of its holding. *See Rasul v. Myers*, 563 F.3d 527, 529 (2009) (*per curiam*). The D.C. Circuit noted "[t]he [Supreme] Court acknowledged that it had never before determined that the Constitution protected aliens detained abroad, and explicitly confined its constitutional holding 'only' to the extraterritorial reach of the Suspension Clause." *Id.* (quoting *Boumediene*, 553 U.S. at 795) (citation omitted).[5] The Court of Appeals further noted: "the Court in *Boumediene* disclaimed any intention to disturb existing law governing the extraterritorial reach of any other constitutional provisions, other than the Suspension Clause." *Id.* (citing *Eisentrager* and *Verdugo-Urquidez*). Thus, Petitioner's interpretation that *Boumediene* can support extending the extraterritorial scope of constitutional provisions other than the Suspension Clause is contrary to plain language of the Supreme Court's decision, as well as the D.C. Circuit's interpretation of the Supreme Court's guidance.

Also, the reasoning of *Boumediene* limits its holding to the Suspension Clause, reasoning that turned on the unique role of the Suspension Clause in the separation of powers. In particular, "[t]he broad historical narrative of the writ and its function" was "central to [the Supreme Court's] analysis." *Boumediene*, 553 U.S. at 746; *see also id.* at 742 ("the Framers deemed the writ to be an essential mechanism in the separation-of-powers scheme."). The Court explained that a brief account of the writ's history and origins shows that protection for the habeas privilege was "one of the few safeguards of liberty specified in a Constitution that, at the

[5] Notably, although the Supreme Court referred to the Constitution in discussing what process would be required under the Suspension Clause, the Court did not tie the source of those procedural protections directly to the Constitution. Rather, the Supreme Court was pointing out that its approach in the habeas setting was consistent with its approach in another setting, *i.e.*, that of due process: "The idea that the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings accords with our test for procedural adequacy in the due process context." 553 U.S. at 781. This comparison stops far short of grounding procedural habeas rights in other constitutional provisions in the sense of mandating direct application of the Due Process Clause.

outset, had no Bill of Rights. In the system conceived by the Framers, the writ had a centrality that must inform proper interpretation of the Suspension Clause." *Id.* at 739. Accordingly, *Boumediene's* standard for determining whether the Suspension Clause extends to detainees at Guantanamo Bay does not apply to the Due Process Clause and must instead be understood as limited to the Suspension Clause, in light of that Clause's centrality to the separation of powers.[6] Indeed, as noted above, the Court of Appeals has recognized that the Supreme Court "disclaimed any intention to disturb existing law" governing the reach of any other constitutional provisions. *Rasul*, 563 F.3d at 529.

Accordingly, Petitioner is not entitled to relief under the Due Process Clause.

II. THE GOVERNMENT CONDUCTED EXTENSIVE SEARCHES FOR INFORMATION THAT IS EXCULPATORY OR OTHERWISE RESPONSIVE TO THE CMO

Four Government agencies [redacted] FBI, DoD, and DOJ—conducted extensive searches for documents containing information relevant to this habeas case. In total, those searches returned [redacted] thousands of documents. DOJ attorneys reviewed these documents to identify those containing information that is exculpatory or otherwise responsive to the CMO.

In addition to the searches described below, the Government conducted several searches for specific information requested by Petitioner's counsel in discussions with Government counsel. The sections of this Memorandum addressing those specific requests describe those searches in more detail.

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[6] Provisions of the Bill of Rights, such as the Due Process Clause, typically secure non-jurisdictional, procedural and substantive rights and have never extended as a historical matter to enemy alien combatants detained overseas during wartime, who instead have received the procedural and substantive rights afforded by the laws of war. *See Eisentrager*, 339 U.S. 789 n.14; *see id.* at 784–85 ("No decision of this Court supports such a view" as to the Fifth Amendment); *Rasul*, 563 F.3d at 532 ("[T]here [is] no authority for—and ample authority against—plaintiffs' asserted rights," *i.e.*, extension of the Fifth and Eighth Amendments to detainees at Guantanamo Bay). Indeed, the Court of Appeals recognized "[t]he Suspension Clause protects only the fundamental character of habeas proceedings," noting that "any argument equating that fundamental character with all the accoutrements of habeas for domestic criminal defendants is highly suspect." *Al-Bihani v. Obama*, 590 F.3d 866, 876 (D.C. Cir. 2010); *see also id.* at 880 (explaining that habeas has never involved "a certain set of procedures, but rather the independent power of a judge to assess the action of the Executive").

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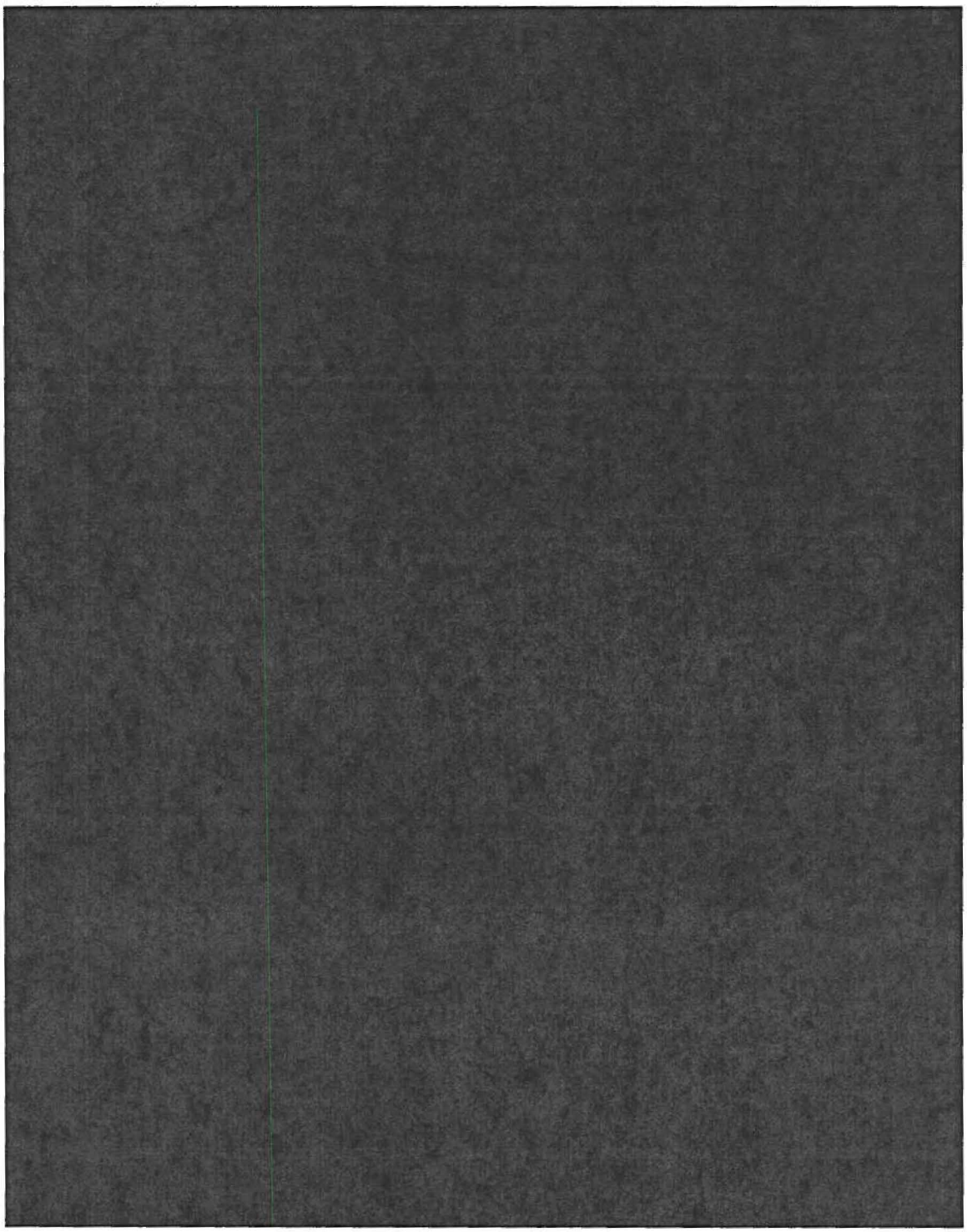
A. Government Searches



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[redacted]

2. DoD Searches

DoD conducted searches of the Joint Detainee Information Management System (JDIMS)[8] for information related to Petitioner [redacted] Joint Status Report at 6 (Feb. 1, 2018) (ECF No. 36). These searches of JDIMS were conducted using keywords [redacted] DoD provided the documents returned by these searches to DOJ attorneys, *id.*, who reviewed those documents to identify those that contained information that is exculpatory or otherwise responsive to the CMO. The DoD Declaration describes searches conducted for information requested in Petitioner's Motion. DoD Decl. ¶ 2. DoD conducted other searches for records that identified relevant documents; those searches are not at issue in here. In total, DoD's searches of JDIMS identified 5,000 documents, which were reviewed by DOJ attorneys assigned to this case to identify those containing information that is exculpatory or otherwise responsive to the CMO. Joint Status Report at 6 (Feb. 1, 2018).

The Government also conferred with Petitioner's counsel and agreed to produce the following portions of Petitioner's GTMO medical record: records covering Petitioner's first six months at GTMO, records pertaining to a 2010 surgery performed on Petitioner at GTMO, and CT imagery of Petitioner generated at GTMO in 2018. These records were delivered to Petitioner's counsel and are not at issue in Petitioner's Motion for Discovery.

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DoD conducted further searches to locate other information that the addressed in their discovery discussion. These searches are described in the relevant sections below. In addition, for each type of information addressed in the parties' discovery discussion, DOJ attorneys conducted targeted keyword searches of the documents provided by DoD to ensure that the requested information had not been overlooked during DOJ's review.

3. FBI Searches

FBI personnel conducted extensive searches of its holdings for all information pertaining to Petitioner [redacted] The FBI adopted a three-pronged approach that was reasonably calculated to discover exculpatory information and other information that must be disclosed pursuant to the CMO while reducing the number of irrelevant documents needing review to a manageable number, as explained in Status Reports to the Court. *See* April 23, 2018 Status Report, ECF No. 44, at 2 ¶ 4. First, the FBI provided for review by DOJ counsel a set of documents identified in response [redacted] regarding Petitioner made by the Office of Military Commissions-Prosecution. *Id.* Second, the FBI made its investigative files for Petitioner [redacted] available for review by DOJ counsel. *Id.* Third, the FBI ran keyword searches in its SENTINEL database that were reasonably calculated to identify [redacted] *Id.*

The documents resulting from the FBI's searches were then provided to DOJ counsel, who reviewed them and identified those documents containing information that is exculpatory or otherwise responsive to the CMO. *See* September 27, 2018 Status Report, ECF No. 55, at 2 ¶ 4 (describing approximately 4,700 pages contained in the FBI investigative files for Petitioner [redacted] and approximately 3,600 documents identified by keyword searches of the FBI's Sentinel system for documents relating to Petitioner [redacted]). None of the FBI searches returned results matching information sought by Petitioner in his motion, except that which was disclosed to Petitioner's counsel during discovery. In addition, for each type of information

addressed in the parties' discovery discussion, DOJ attorneys conducted targeted keyword searches of the documents provided electronically by FBI to ensure that the requested information had not been overlooked during DOJ's review.

4. DOJ Searches

DOJ attorneys searched two sets of documents for information related to Petitioner [redacted] These searches were conducted using keywords [redacted] DOJ attorneys searched (1) the consolidated assemblage of information containing all materials reviewed by attorneys that have prepared Factual Returns in habeas cases for Guantanamo detainees, including information discovered in the subsequent litigation of those cases, and (2) the materials assembled by the Guantanamo Review Task Force established by Executive Order 13492. These searches returned more than 10,000 documents. DOJ attorneys reviewed those documents to identify those that contained information that is exculpatory or otherwise responsive to the CMO. In addition, for each type of information addressed in the parties' discovery discussions, including the information sought in Petitioner's Motion, DOJ attorneys conducted additional targeted keyword searches of the consolidated assemblage of information and the Guantanamo Review Task Force.

B. These Searches Did Not Locate Several of the Documents Petitioner Seeks

Petitioner seeks several items for which the Government searched but could not locate. Petitioner does not seek an order requesting additional searches, nor does he allege that the Government's searches were inadequate in some way. Rather, Petitioner seeks an "order mandating the production of these materials, should they be located in the future." No such order is necessary, because Section I.B.2 of the CMO already requires the Government to disclose additional information responsive to the CMO that it may discover. The Government is

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well aware of this obligation and has repeatedly demonstrated its good faith in complying with this and other provisions of the CMO.

Guleed001. Petitioner seeks an FBI letterhead memorandum with the filename *Guleed001*. Pet'r Mot. at 24. This document is referenced in another letterhead memorandum memorializing an FBI interview of Petitioner on January 31, 2007, which describes *Guleed001* as memorializing allegations Petitioner made to the FBI in that same interview that he had been "threatened with torture during previous interviews." None of the searches described above, which returned [redacted] thousands of documents for review, located *Guleed001*. *See* [redacted]; DoD Decl. ¶ 7 (describing JDIMS keyword search for information related to Petitioner that would have included *Guleed001* had it been present in JDIMS). If they had, DOJ attorneys would have identified them during their review and had them produced. Further, the FBI conducted separate searches for a copy of *Guleed001*. The FBI searched SENTINEL and relevant paper investigatory files for *Guleed001*, but was unable to locate it. The FBI, however, did locate the notes taken by FBI agents during the January 31, 2007 interview. These notes reflect the substance of Petitioner's statements during that interview, including his allegations of mistreatment. These notes have been produced to Petitioner's counsel.

Photographs and Videos Depicting Petitioner's Wound. Petitioner seeks photographs of Petitioner and his wound that he alleges were taken at a hospital in March 2004 [redacted] Pet'r Mot. at 24. He also seeks video of the surgical procedure that Petitioner underwent in or around April 2006 and of interviews taken in the days before and after that procedure.[11] *Id.* at 24-25. [redacted]

[11] Petitioner's Motion identifies [redacted] The Government neither confirms nor denies [redacted]

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III. THE GOVERNMENT HAS PROPERLY WITHHELD LIMITED INFORMATION THAT IS RESPONSIVE TO THE CMO

The Government seeks to withhold two categories of information responsive to the CMO and that were redacted in documents disclosed to Petitioner's counsel: (1) [redacted] and (2) [redacted] *See* §§ III.C & V, *infra*. As explained below and in more detail in the *Ex Parte* Supplement, this information is not material, its disclosure to Petitioner's counsel is not necessary for meaningful habeas review, and/or a substitute for it has been provided to Petitioner's counsel that suffices to provide the Petitioner with the meaningful opportunity required by *Boumediene*. [redacted]

The key case that is applied by this Court in deciding Respondents' *ex parte* motions for exception for disclosure pursuant to section I.D of the CMO is *Al Odah v. United States*, 559 F.3d 539 (D.C. Cir. 2009). In *Al Odah*, the Court of Appeals reviewed a district court order requiring the disclosure of classified information contained in factual returns filed in 2004. 559 F.3d at 543. Certain classified information in the returns was presented to the district court *ex parte*, but had been redacted by the Government from the copies of the returns provided to petitioner's counsel. *Id.* The district court in *Al Odah* ruled that the redacted material must be turned over on the ground that it was "'relevant to the merits of this litigation.'" *Id.*

The Court of Appeals reversed, concluding that a habeas court exercising its authority to "'conduct a meaningful review of both the cause for detention and the Executive's power to detain,'" *id.* at 545 (quoting *Boumediene v. Bush*, 553 U.S. at 783), may not impose or enforce obligations on the Government regarding the disclosure of classified information without first determining (1) that "the information is both relevant *and material*," *id.* at 544 (emphasis in original), (2) that "access by petitioner's counsel . . . is necessary to facilitate [meaningful habeas] review," *id.* at 545, and (3) "that alternatives to disclosure would not effectively substitute for unredacted access," *id.* at 547. *See also id.* at 548 (concluding "that the habeas

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court should proceed by determining whether the classified information is material and counsel's access to it is necessary to facilitate meaningful review, and whether no alternatives to access would suffice to provide the detainee with the meaningful opportunity required by *Boumediene*"). *Al Odah* identified three main areas of materiality; such information must be either "[i]nformation that is exculpatory, that undermines the reliability of other purportedly inculpatory evidence, or that names potential witnesses capable of providing material evidence." *Al Odah*, 559 F.3d at 546.

A. The Government Has Provided, or Will Soon Provide Adequate Substitutes for Certain [redacted] Information

[redacted] the Government redacted certain information [redacted] To mitigate the potential for such harm while "facilitate[ing] [meaningful habeas] review," *Al Odah*, 559 F.3d at 545, the Government has, or will soon, provide information that "effectively substitute[s] for unredacted access." *Id.* at 547. Those substitutes take two forms.

First, the Government has provided Petitioner's counsel with substitute documents, each disclosing, [redacted] where [redacted] occur in documents disclosed to Petitioner before February 1, 2019. Petitioner has not argued in his motion or while conferring with Government counsel that these types of substitutes are inadequate. *See* Pet'r Mot. at 11, n.17 (listing [redacted] reports disclosed to Petitioner's counsel on February 1, 2019 [redacted] and not addressing substitutes provided for documents disclosed earlier).[12] The Government anticipates that it will be able to

[12] Petitioner states that the documents produced in discovery for which he seeks [redacted] information include "but are not limited to" the documents disclosed on February 1, 2019. Pet'r Mot. at 18. Petitioner has not provided any hint, in his Motion or while conferring with Government counsel as to which other documents might be at issue here and, therefore, has not satisfied the CMO's requirement that Petitioner "specify the discovery sought." CMO § I.C.3(2).

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produce, on or before January 31, 2020, substitutes of the same type for the February 1, 2019 disclosures that require them. Second, the Government will provide, by no later than January 31, 2020, [redacted] the information [redacted] requested by Petitioner for each exhibit in the Factual Return upon which the Government relies. [redacted]

B. The Government Must Withhold [redacted]

These substitutes [redacted] will provide almost everything that Petitioner has requested [redacted]

The withholding [redacted] has been repeatedly authorized by the courts. The Court may rely upon the *ex parte* [redacted] information in assessing the reliability of the information in the exhibits relied upon by Respondents, without requiring disclosure to Petitioner's counsel of this [redacted] information. Indeed, the Court of Appeals, applying the *Al Odah* framework, has endorsed this type of process, ultimately involving *ex parte* consideration by the Court of [redacted] information where necessary. [redacted]

The Government would need Petitioner to identify the specific disclosures at issue before being able to respond to the broad assertion [redacted]

[redacted]

Such an approach of *ex parte* review of [redacted] information by the Court taken with Respondents' disclosure to Petitioner's counsel of information [redacted] "'constitutes an effective substitute for unredacted access' that 'ensures [the petitioner] the meaningful review of both the cause for detention and the Executive's power to detain' required by *Boumediene* [*v. Bush*, 553 U.S. 723 (2008)]."[13] [redacted]

Were the Court not able to review and consider such [redacted] information *ex parte*, these proceedings would fail to take account of the important national security interests [redacted]

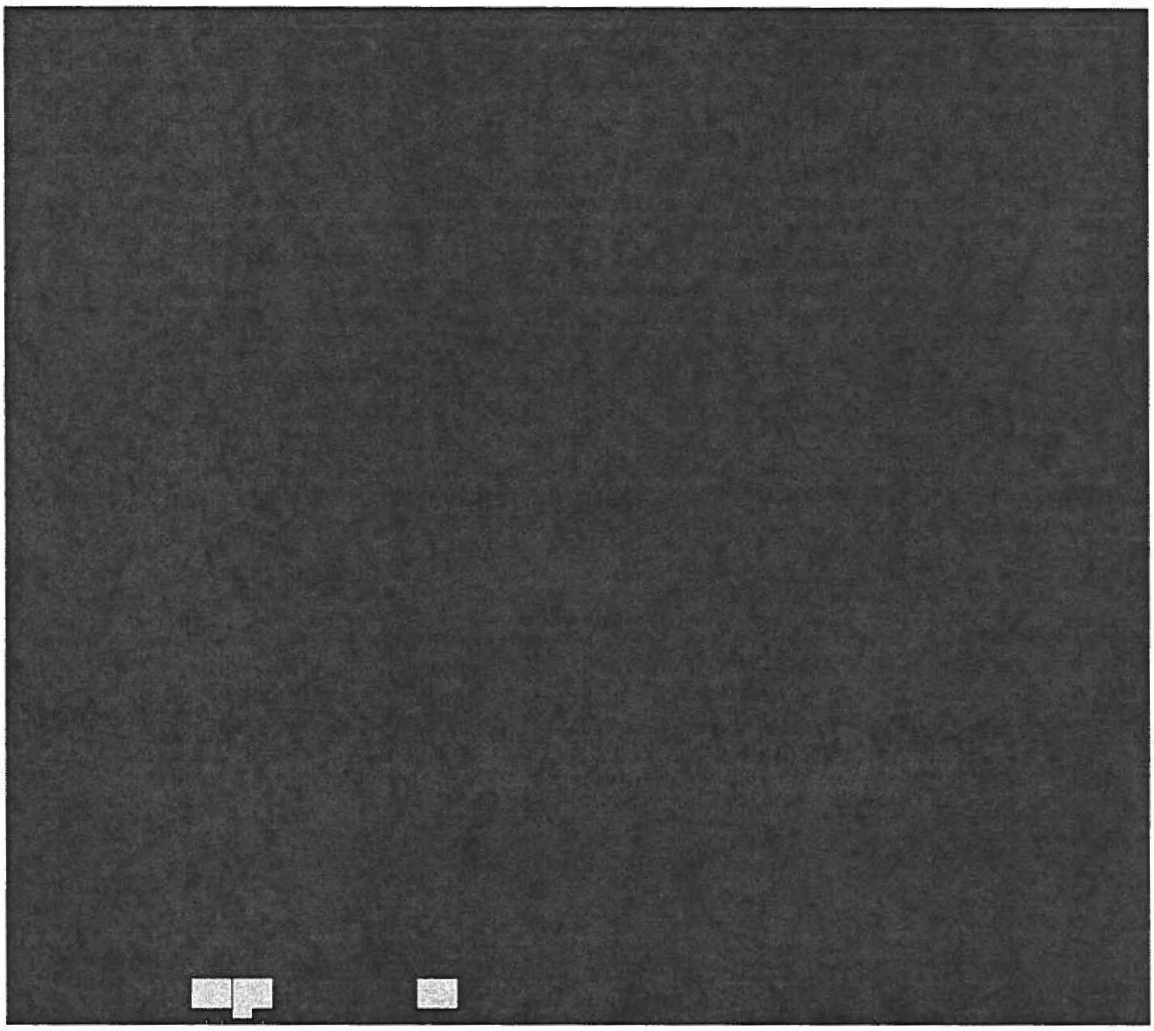
[13] As the Court of Appeals explained in *Latif v. Obama*, 666 F.3d 746, 749 n.1 (D.C. Cir. 2011), a "'meaningful opportunity to demonstrate' the unlawfulness of ... detention" under *Boumediene* means:

> that Guantanamo detainees must have "the means to supplement the record on review," and that the court conducting habeas proceedings must have authority (1) "to assess the sufficiency of the Government's evidence against the detainee"; (2) "to admit and consider relevant exculpatory evidence"; (3) "to make a determination in light of the relevant law and facts"; and (4) "to formulate and issue appropriate orders for relief, including if necessary, an order directing the prisoner's release ...."

Accordingly, the Government moves, pursuant to Section I.D of the CMO, for an exception to disclosure [redacted]

C. **The Government Must Withhold** [redacted]

[redacted]



Accordingly, the Government moves, pursuant to Section I.D of the CMO, for an exception to disclosure [redacted] upon which the Government relies.

IV. THE GOVERNMENT HAS PROVIDED EVIDENCE [redacted]

[redacted]

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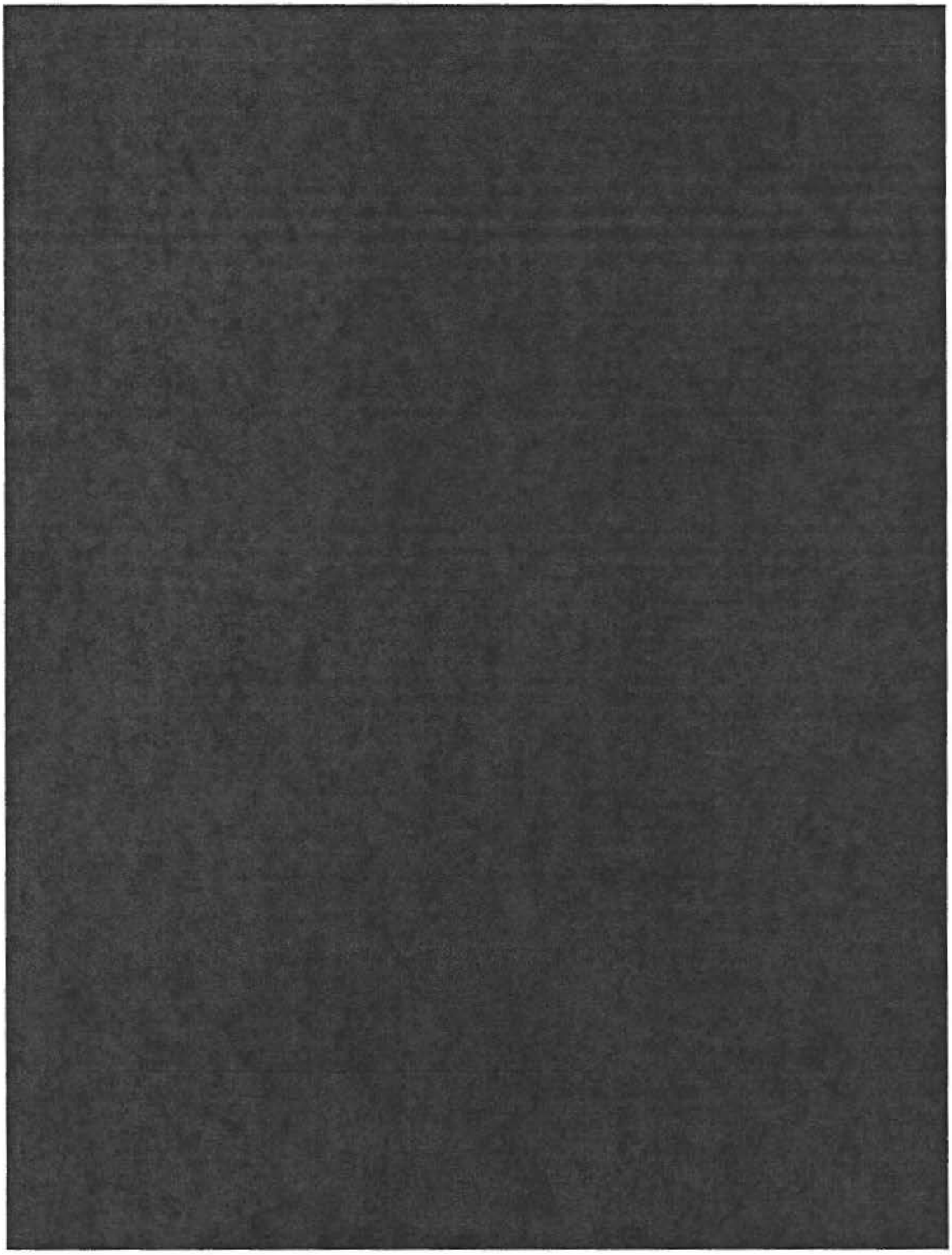

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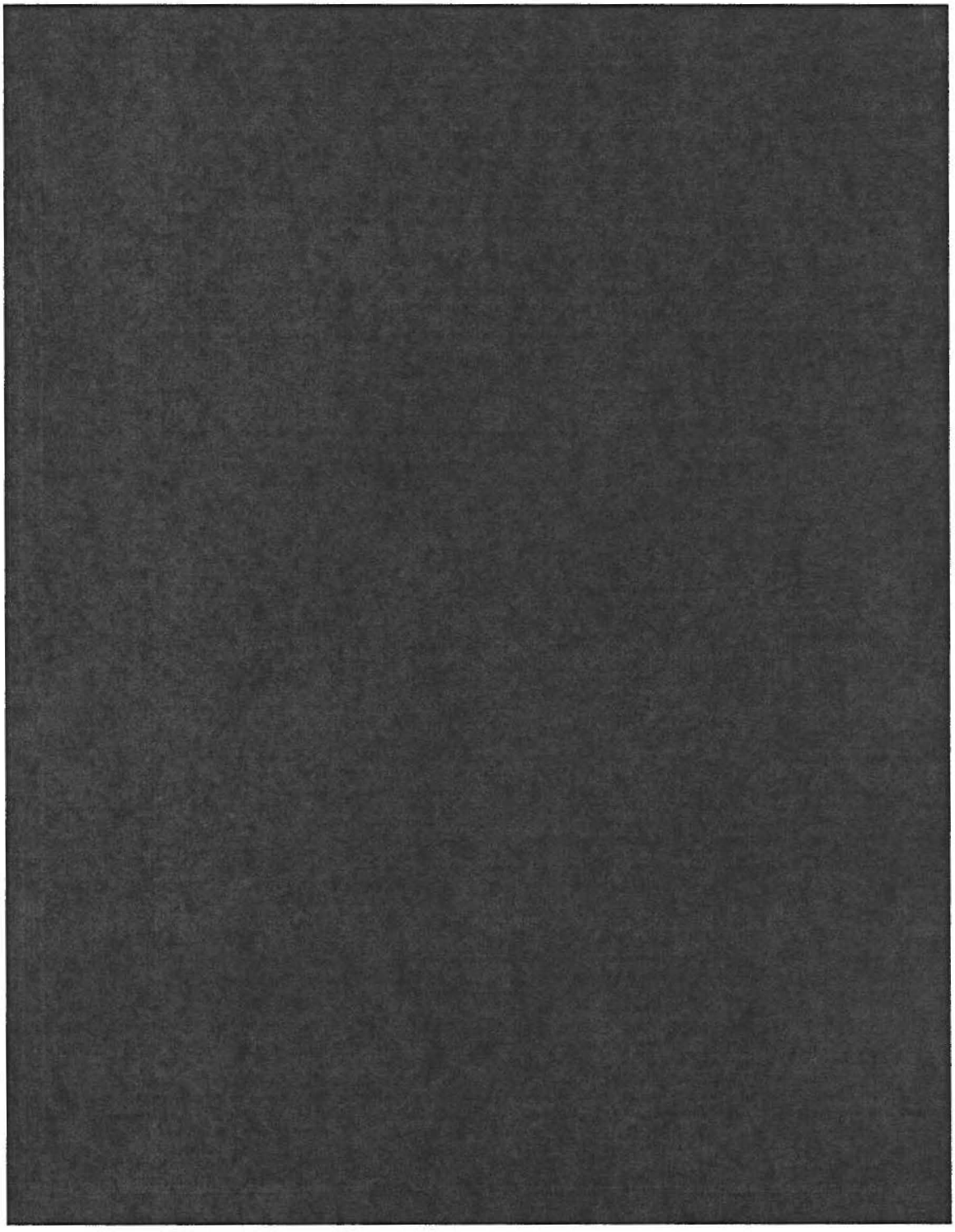

[redacted]

V. THE REDACTED PORTIONS OF [redacted] AND [redacted] DO NOT CONTAIN INFORMATION RESPONSIVE TO THE CMO

Petitioner asks the Court to order the Government to produce unredacted copies of two documents produced during discovery, entitled [redacted] and [redacted] Pet'r Mot. at 22 (redacted copies of the documents available at *id.* Exs. J, K). Rather than explaining why this request, if granted, "is likely to produce evidence that demonstrates that the petitioner's detention is unlawful," CMO § I.C.3, Petitioner simply "*submits* that the redacted portions of these documents, which are lengthy, likely include additional exculpatory evidence [redacted] Pet'r Mot. at 22 (emphasis added). Petitioner's Motion contains no analysis or evidence demonstrating or even merely speculating why Petitioner thinks that additional information [redacted] might exist under the redactions. *See* Pet'r Mot. at 22, § VI.A (containing no explanation as to the basis for Petitioner's submission that exculpatory information was redacted).

DOJ attorneys reviewed these documents and identified those portions that contain information that is exculpatory or otherwise responsive to the CMO, [redacted] The reviewing attorneys were familiar with the CMO. At several status conferences in this case, DOJ attorneys stated to both the Court and Petitioner's counsel that the Government considered information [redacted] to be responsive to [redacted]

[redacted] the CMO. As Petitioner acknowledges, the Government left unredacted information [redacted] Petitioner does not explain why DOJ attorneys would produce only some of this information in these two documents and leave the rest redacted and not subject to a motion to except disclosure under Section § I.D of the CMO.[16]

In light of the conclusion by DOJ attorneys that the redacted information is not responsive to the CMO, Petitioner's bald speculation is not a "specific, colorable claim" that the redacted information is exculpatory. *See Darbi v. Obama*, 680 F.Supp.2d 7, 11 (D.D.C. 2009). Absent such a specific, colorable claim, the Court should not order either disclosure or *ex parte* review of unredacted copies of [redacted] and [redacted] [redacted] *Id.*

Finally, Petitioner seeks all redacted information in the two documents, without assessment of whether the redacted information is exculpatory or otherwise discoverable under the CMO. [redacted] Petitioner, in his requests, has not addressed the requirements for additional discovery set forth in Section I.C.3 of the CMO. Petitioner's overbroad request for such [redacted] information regardless of whether it is exculpatory should, therefore, be denied.

VI. THE COURT SHOULD NOT ORDER PRODUCTION OF THE SSCI REPORT

Petitioner's request for an order that Respondents produce the entirety of the Senate Select Committee on Intelligence ("SSCI") Report concerning the CIA's former detention and

[16] If any such information had been redacted from these two documents after DOJ's request to produce them, the Government would be moving for an exception to disclosure of that information. No such motion is necessary because no redactions of such information were made in the documents.

interrogation program, *see* Pet'r's Mot. at 22, should be denied in its entirety, for the following reasons.

A. Respondents Cannot Comply With Petitioner's Request for the SSCI Report

The Government cannot comply with this discovery request. As recognized by the Court of Appeals, the full report prepared by the SSCI is a congressional record subject to congressional control (and so, as pertinent there, not required to be disclosed by the Executive Branch under the Freedom of Information Act). *ACLU v. CIA*, 823 F.3d 655, 667-68 (D.C. Cir. 2016). In so holding, the Court of Appeals noted the clear evidence of Congress's intent to retain control over the report. In particular, the court found dispositive a June 2, 2009, letter from the Senate Committee Chairman and Vice-Chairman to the Director of the CIA, in which Congress manifested its clear intent to control the document:

> Any documents generated on [a network drive reserved for the Committee's use] as well as **any other notes, documents, draft and final recommendations, reports or other materials** generated by Committee staff or Members, are the property of the Committee. . .. These documents **remain congressional records in their entirety and disposition and control over these records, even after the completion of the Committee's review, lies exclusively with the Committee.** As such, **these records are not CIA records** under the Freedom of Information Act **or any other law** . . . . If the CIA receives any request or demand for access to these records from outside the CIA under the Freedom of Information Act **or any other authority**, the CIA will immediately notify the Committee and will **respond to the request or demand based upon the understanding that these are congressional, not CIA, records**. [823 F.3d at 659-60 (quoting Ltr. from D. Feinstein, Chairman, Senate Select Comm. On Intel, & C. Bond, Vice Chairman, Senate Select Comm. On Intel, to L. Panetta, Dir. CIA (June 2, 2009) at 6 (emphasis added)].

Thus, the SSCI Report is a "document[], . . . report[] or other material[] generated by Committee staff or Members" that "remain congressional records in their entirety[,] and disposition and control over these records, even after the completion of the Committee's review, lies exclusively with the Committee." And while the Committee has voted to release a declassified, redacted version of the Executive Summary and Findings and Conclusions

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("Executive Summary"),[17] it has not voted to release the SSCI Report, which remains classified. 823 F.3d at 660 (noting that the Committee released only the declassified redacted version of the Executive Summary); *see also* Press Release, United States Senator Dianne Feinstein, Intelligence Committee Votes to Declassify Portions of CIA Study (Apr. 3, 2014) (available at www.feinstein.senate.gov/public/index.cfm/press-releases?ID=DE39366B-D66D-4F3E-8948-B6F8EC4BAB24) (noting that the Committee had voted to send the Executive Summary to the President for declassification review, and that until that process was complete and "that portion of the report is released" by the Committee, it will remain classified). Thus, because the full SSCI Report remains a Congressional record over which Congress has manifested its desire to maintain control, the Executive may not release any portions thereof without the permission of Congress. For as the D.C. Circuit has explained, "[i]f ... Congress has manifested its own intent to retain control, then the agency—by definition—cannot lawfully 'control' the documents." *United We Stand Am. Inc. v. I.R.S.*, 359 F.3d 595, 600, 603 (D.C. Cir. 2004) (citation omitted) (Freedom of Information Act case identifying the four factors the D.C. Circuit usually analyzes to determine whether an agency exercises sufficient control over requested records to render them agency records).[18] The congressional intent to control the SSCI Report is further demonstrated in Senate Committee Chairman Richard Burr's 2015 demand that "all copies of the full and final [SSCI] report in the possession of the Executive Branch be returned immediately to the Committee." *ACLU v. CIA*, 823 F.3d at 661.[19]

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[17] The Executive Summary is publicly available on the SSCI's website, at: https://www.intelligence.senate.gov/sites/default/files/publications/CRPT-113srpt288.pdf.

[18] The four *United We Stand* factors are:

> (1) the intent of the document's creator to retain or relinquish control over the records; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which agency personnel have read or relied upon the document; and (4) the degree to which the document was integrated into the agency's record system or files.

United We Stand Am. Inc. v. I.R.S., 359 F.3d at 599.

[19] DOJ counsel are informed that the Executive Branch agreed to return to the SSCI copies of the final Report, except insofar as it was necessary to retain some copies to comply with court preservation orders and statutory requirements.

The Court should not require Respondents to release the SSCI Report because to do so would cause an undue burden to the Executive Branch. Although Petitioner seeks access here through habeas discovery rather than under FOIA, that does not compel a different result. The Executive Branch's mere possession of the SSCI Report is insufficient to justify a judicial order compelling the release of the document. For to do so would place an undue burden on the relations between two coordinate branches of Government. *See ACLU v. CIA*, 823 F.3d at 662 (noting that "special policy considerations" apply requiring deference to Congress's intent to control its documents it shares with an agency) (citing cases); *see also Goland v. CIA*, 607 F.2d 339, 347 (D.C. Cir. 1978) (rejecting FOIA claim for congressional transcript provided to the CIA pursuant to Congress's oversight authority to prevent judicial infringement of that relationship). Because release of the SSCI Report would cause an undue burden on the relations between the Executive Branch and Congress, Petitioner's request should be denied.

B. Even if Respondents Could Comply With the Request for the SSCI Report, the Request Should be Denied Because it is Overbroad, Unlikely to Produce Evidence Demonstrating that Petitioner's Detention is Unlawful, and it Unfairly Disrupts and Unduly Burdens the Government

Pursuant to CMO Section I.C.3, a motion to compel discovery shall, among other things:

> (1) be narrowly tailored, not open-ended; . . . (3) explain why the request, if granted, is likely to produce evidence that demonstrates that the petitioner's detention is unlawful . . . and (4) explain why the requested discovery will enable the petitioner to rebut the factual basis for his detention without unfairly disrupting or unduly burdening the government. . .."

With respect to his motion to compel production of the SSCI Report, Petitioner fails on all three of the above-mentioned requirements, regardless of the additional arguments set out above. His request for the SSCI Report should, therefore, be denied.

First, Petitioner's discovery request is overbroad. *See* Pet'r's Mot. at 22 ("Petitioner requests that the Court order production of a full and unredacted copy of the SSCI report on the CIA torture program."). This request for the entirety of the SSCI Report is not tailored at all, as it seeks carte blanche production of the Report whose sheer size lends itself to a 500-page

Executive *Summary* (emphasis added).[20] Petitioner claims he needs the SSCI Report because it contains information about him, [redacted] *See* Pet'r's Mot. at 22-23. [redacted] For Petitioner to seek discovery of [redacted] runs afoul of the CMO's discovery guidance and is wildly overbroad.

Second, Petitioner has not, as required by the CMO, explained how the SSCI Report would likely show that he is detained unlawfully, or that it would allow him to rebut the factual basis for his detention. In that regard, the unclassified, publicly available version of the Executive Summary expressly states that there are no records that indicate Petitioner was subjected to enhanced interrogation techniques while he was in CIA custody. *See* Executive Summary at 339. [redacted]

Added to Petitioner's failure to explain how the SSCI Report would allow him to demonstrate the unlawfulness of his detention or to rebut the factual basis for his detention, is his failure to explain why his request for the SSCI Report would not unfairly disrupt and unduly burden the government. As an initial matter, his request unfairly disrupts and unduly burdens the Government because it places an undue burden on the relations between the Executive Branch and Congress. *See ACLU v. CIA* 823 F.3d at 62 ("special policy considerations" apply requiring deference to Congress's intent to control its documents it shares with an agency) (citing cases); *see also Goland v. CIA* 607 F.2d at 339 (rejecting FOIA claim for congressional transcript

[20] *See supra*, note 17.

[redacted]

provided to the CIA pursuant to Congress's oversight authority to prevent judicial infringement of that relationship.)

The unfair disruption and undue burden upon the Government is illustrated by the reasoning of the D.C. Circuit which determined that the SSCI Report is a congressional record. The D.C. Circuit found it "[o]bvious[]" that because Congress initiated the creation of the SSCI Report with a "clear statement that the '*documents remain congressional records in their entirety and disposition and control over these records, even after the completion of the Committee's review, lies exclusively with the Committee,*'" and added that "'*these records are not CIA records under the Freedom of Information Act or any other law,*' then congressional intent to maintain exclusive control of the documents is clear." *ACLU v. CIA*, 823 F.3d at 664 (emphasis in original). The Court of Appeals continued: "congressional intent can only be overcome if the record reveals that Congress subsequently acted to vitiate the intent to maintain exclusive control over the documents that was manifested at the time of the documents' creation." *Id.*

This initial conclusion by the D.C. Circuit is supported by all of the information in the record. The CIA was directed not to integrate the records from the segregated drive into its records filing system, or to disseminate, copy, or use them for any purpose without prior authorization from the Committee. *Id.* And SSCI requested that in response to a FOIA request seeking these records, the CIA should respond based on an understanding that the documents are congressional, not CIA, records. *Id.*

These admonitions are analogous to the Joint Committee on Taxation's confidentiality request in *United We Stand America Am. Inc. v. I.R.S.*, 359 F.3d at 600-01, a FOIA case in which the D.C. Circuit found a sufficient indication of congressional intent to retain control over a letter requesting documents from the IRS such that the FOIA demand was rejected for production of the document. *Id.* (letter stated: "This document is a Congressional record and is entrusted to the Internal Revenue Service for your use only. This document may not be disclosed without the prior approval of the Joint Committee.").

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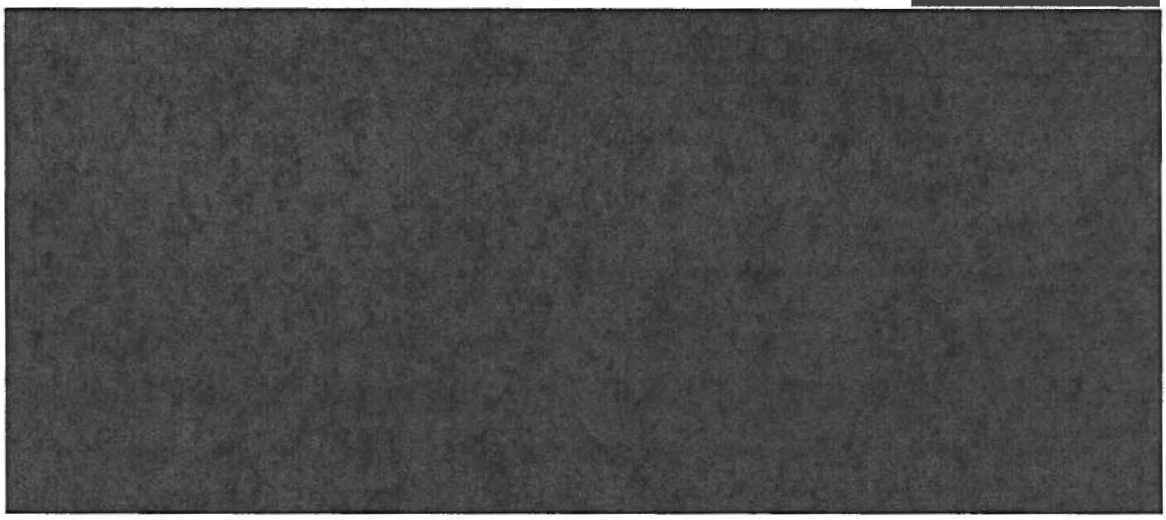
In addition, there is simply no need for production of the SSCI Report.



In sum, Petitioner's request for the SSCI Report—if granted—would place an undue burden on the Government's relationship with Congress. Moreover, the request is wildly overbroad. Additionally, Petitioner has not explained how the SSCI Report would likely show that he is detained unlawfully, or that it would allow him to rebut the factual basis for his detention. Finally, to produce the Report would unfairly disrupt and unduly burden the Government. For these reasons, the Court should deny Petitioner's request for the SSCI Report.

CONCLUSION

For the reasons provided above, in [redacted] accompanying this memorandum, in the *Ex Parte* Supplement, and in [redacted] accompanying the *Ex Parte* Supplement, Respondents' respectfully request that the Court grant their Motion for an Exception to Disclosure and deny Petitioner's Motion for Discovery.

Dated: December 13, 2019

Respectfully Submitted.

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Attorneys for Respondents

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GULED HASSAN DURAN (ISN 10023),

Petitioner,

v.

DONALD J. TRUMP,
President of the United States, *et al.*,

Respondents.

Civil Action No. 1:16-cv-2358 (RBW)

PROPOSED ORDER

Having considered Petitioner's motion for discovery and all subsequent briefing, it is hereby

ORDERED that Petitioner's motion is **DENIED**.

SO ORDERED this _____ day of _____, 2020.

REGGIE B. WALTON
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Guled Hassan Duran (ISN 10023), Petitioner, v. DONALD J. TRUMP, *et al.*, Respondents.	Civil Action No. 16-2358 (RBW)

[redacted]

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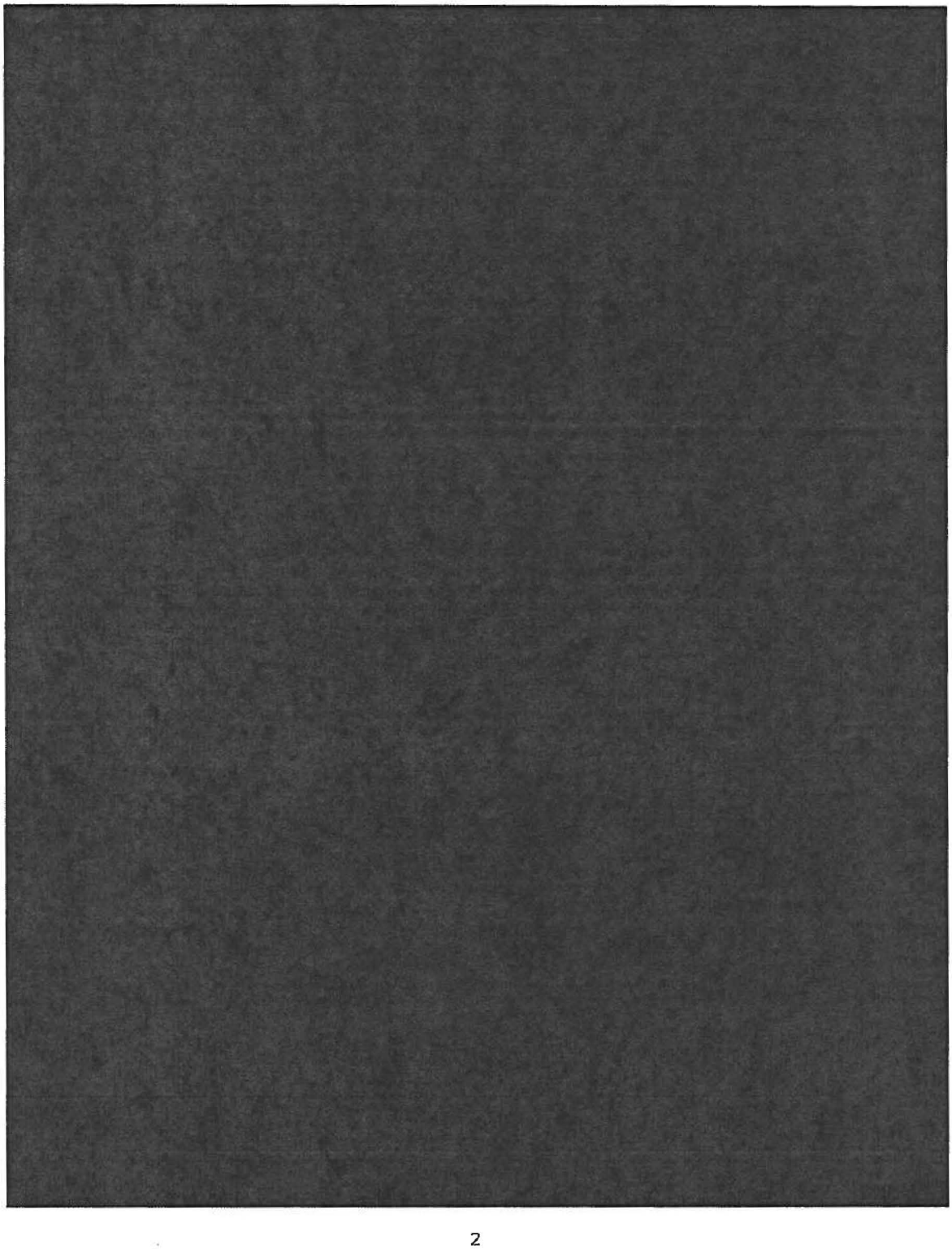

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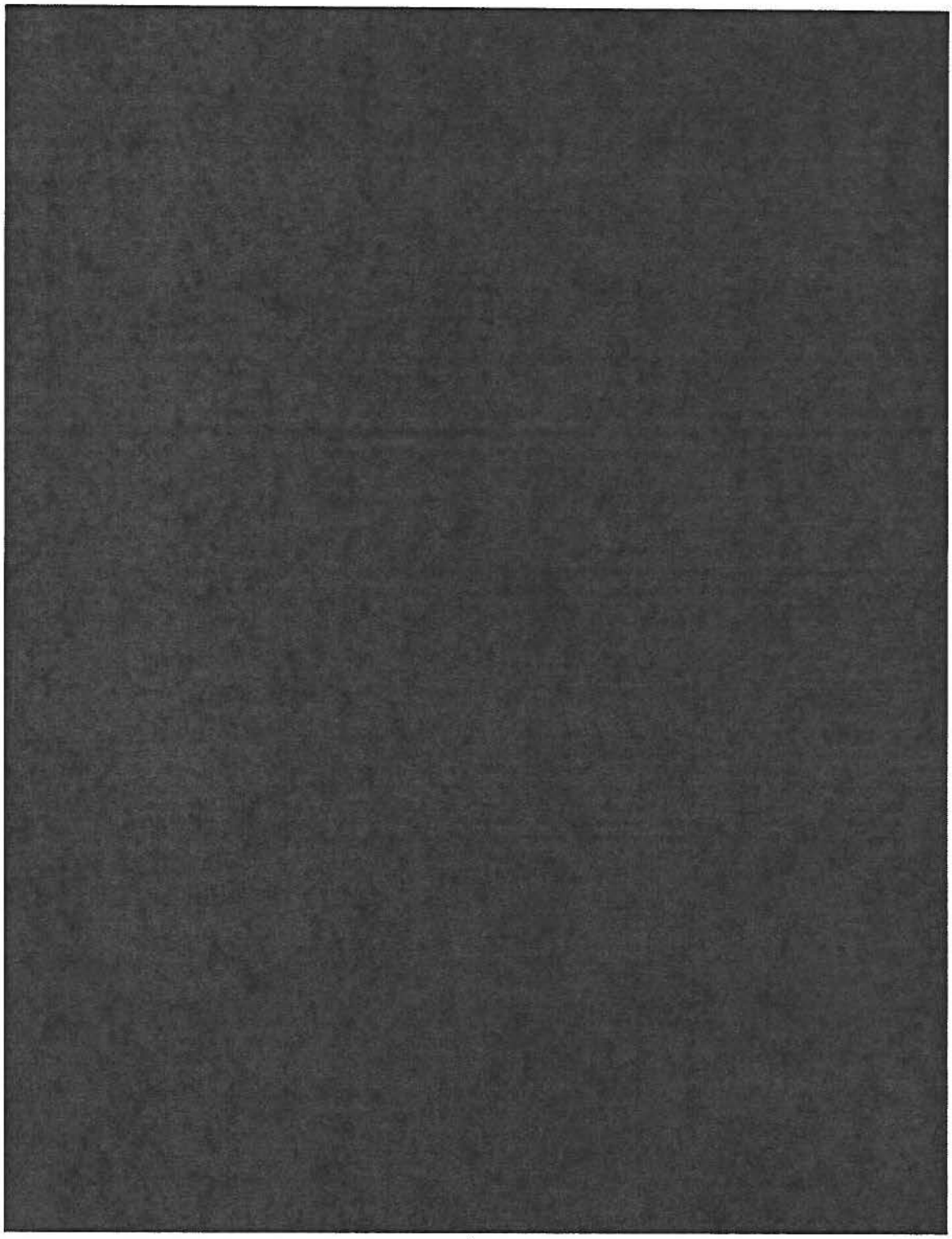

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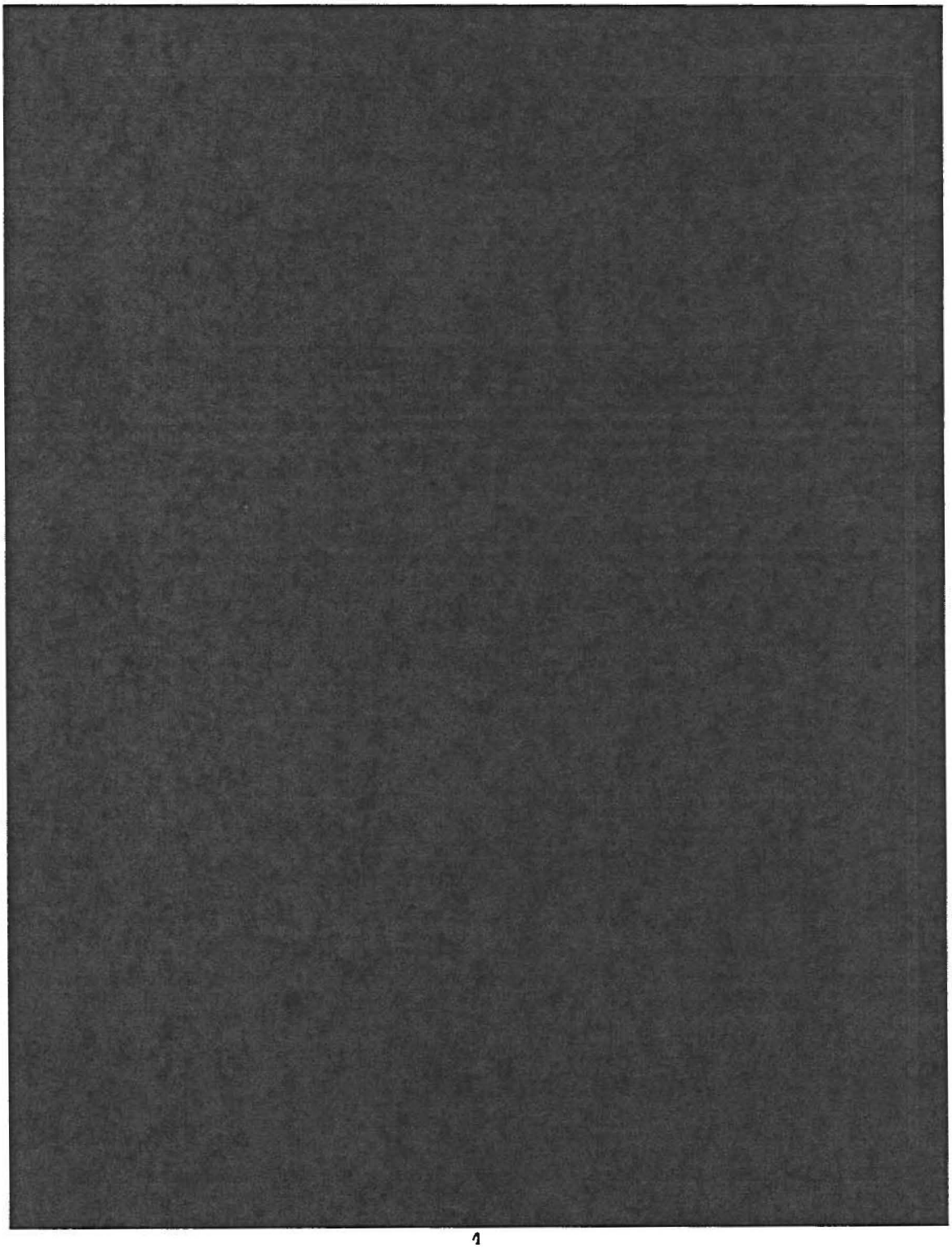

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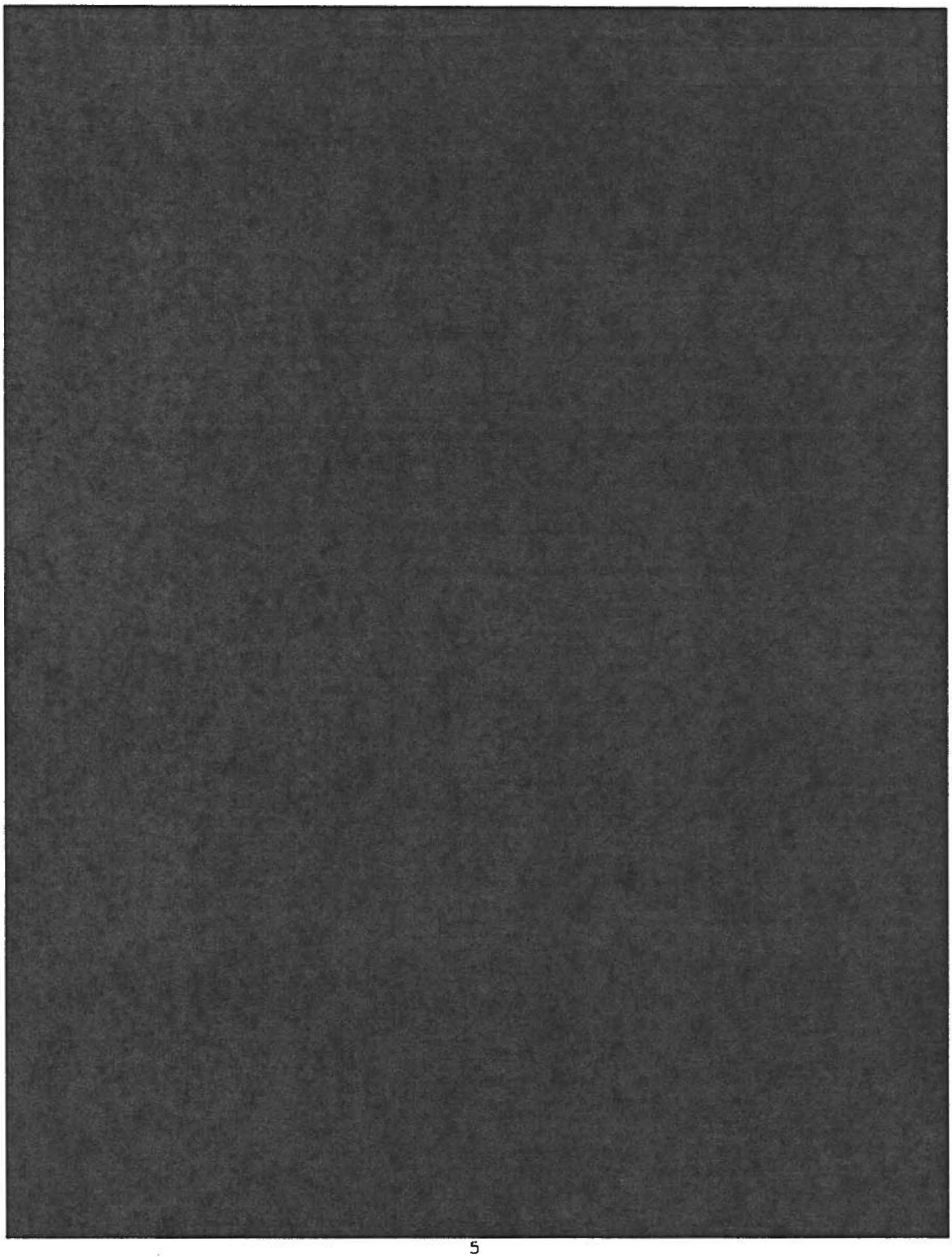

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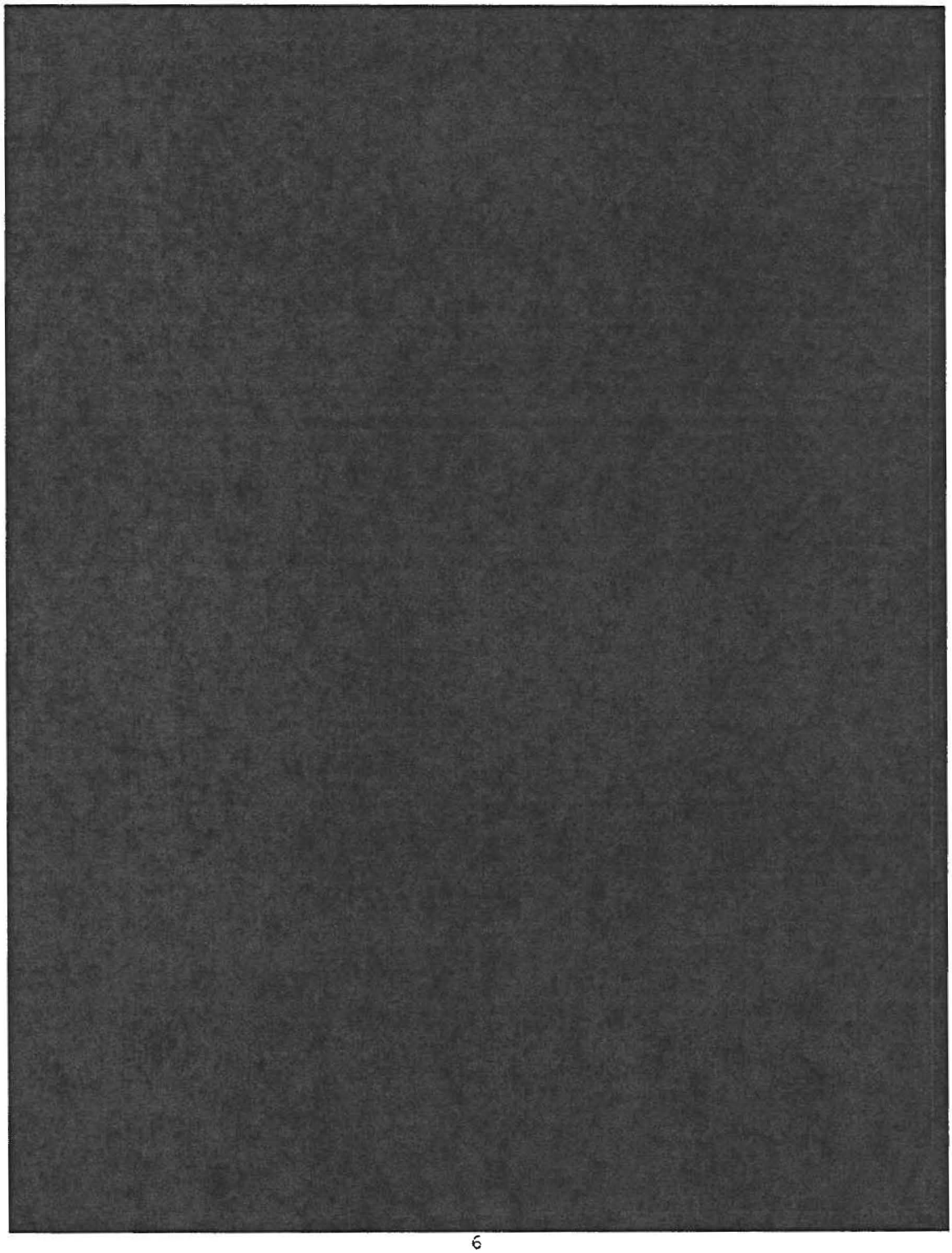

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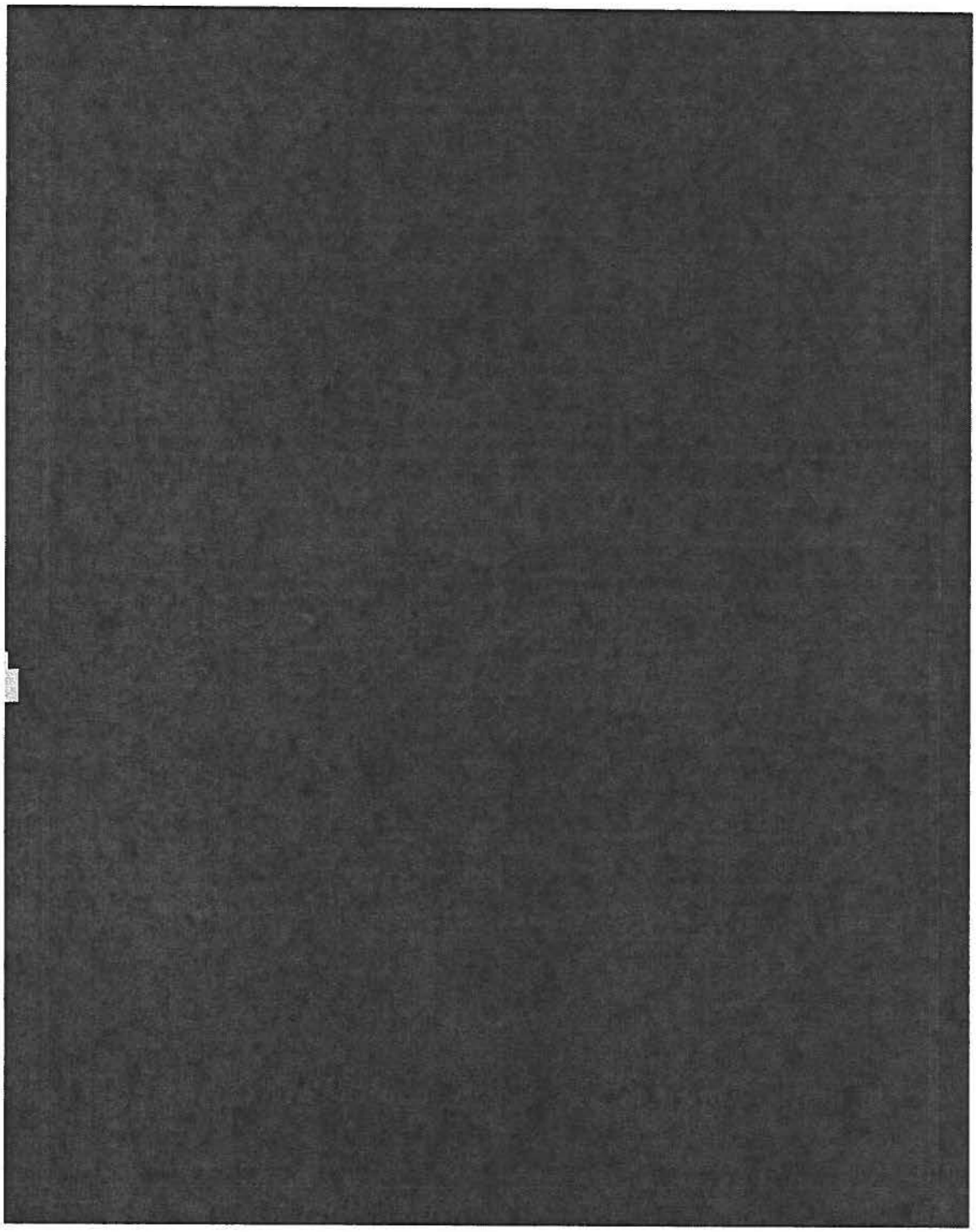

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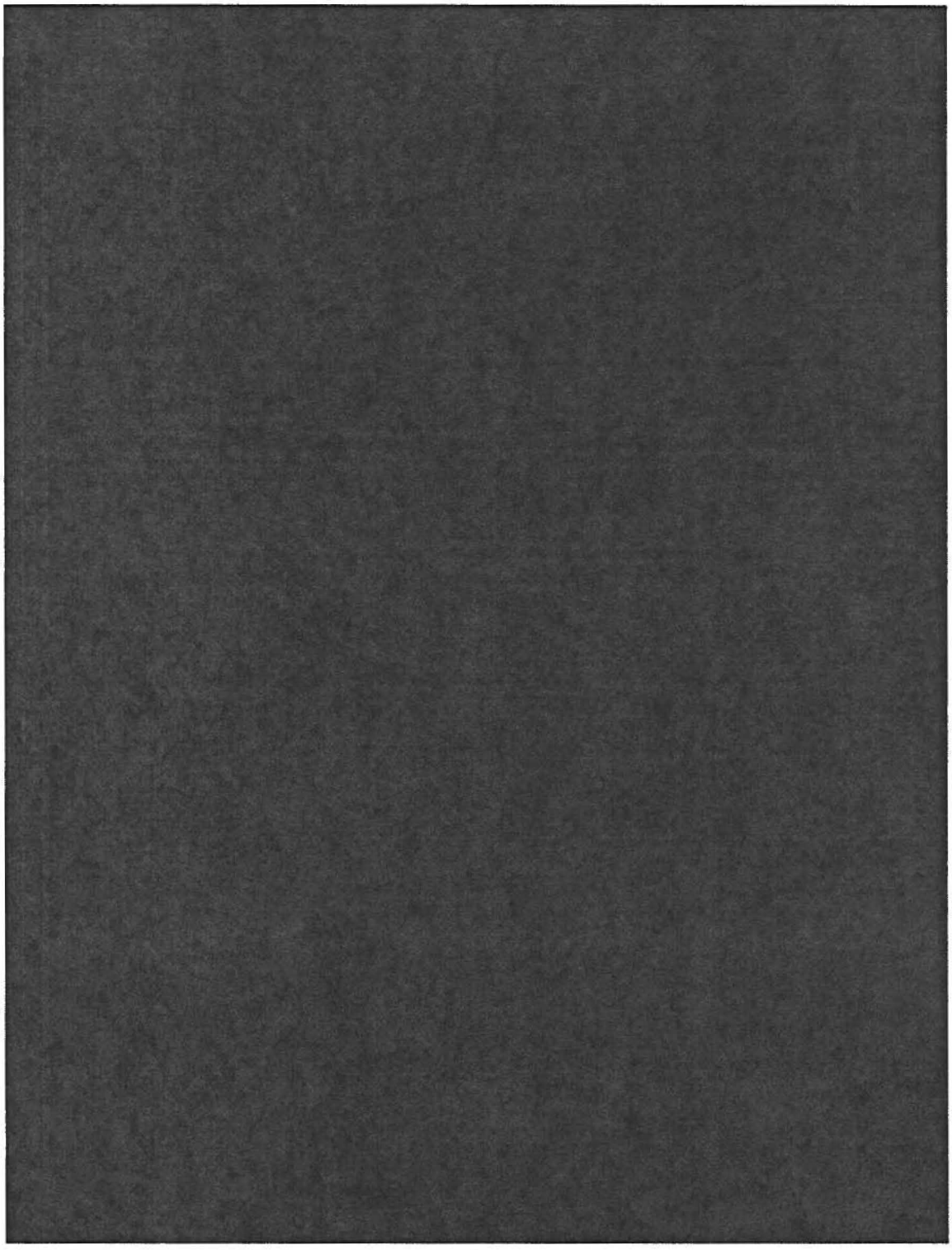

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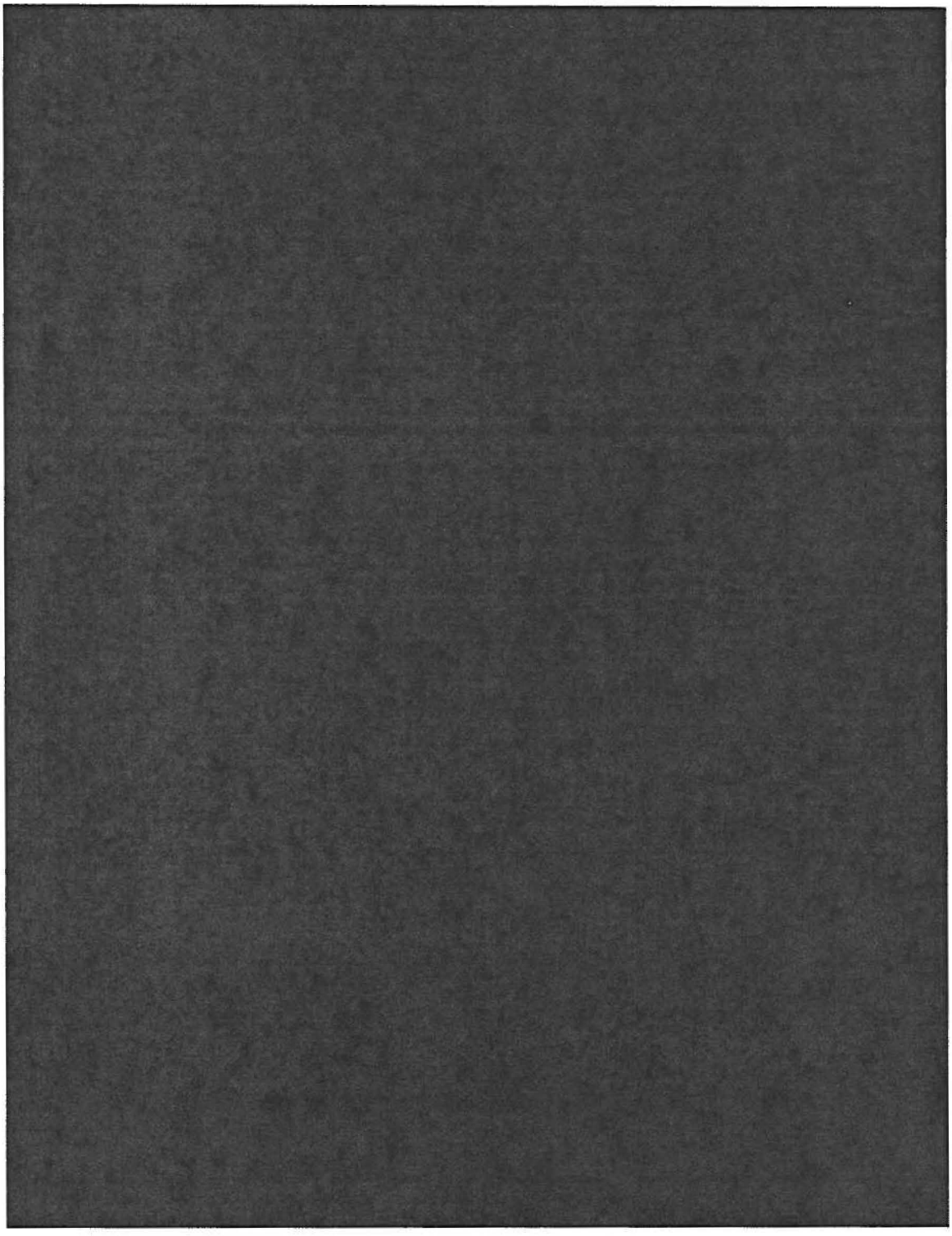

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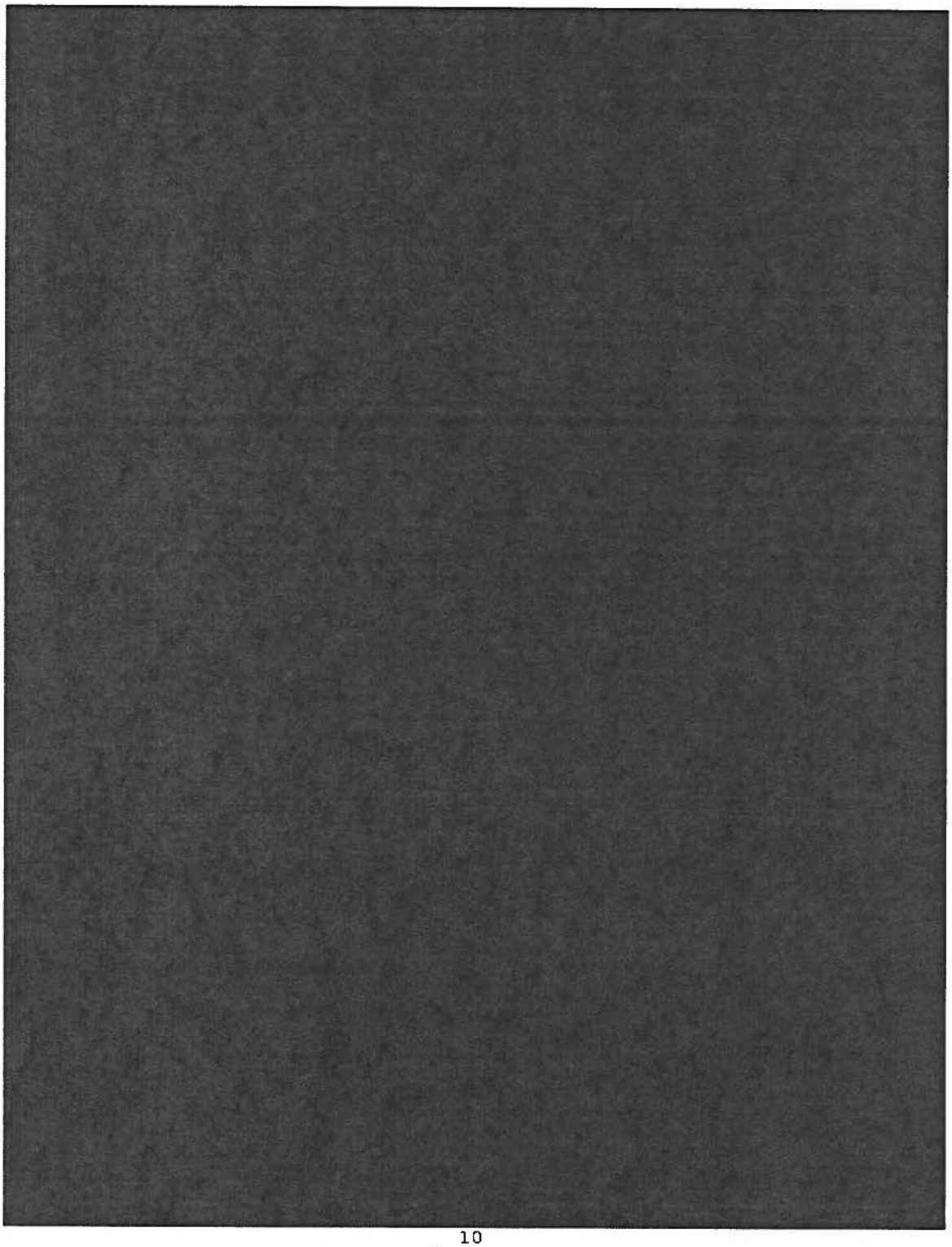

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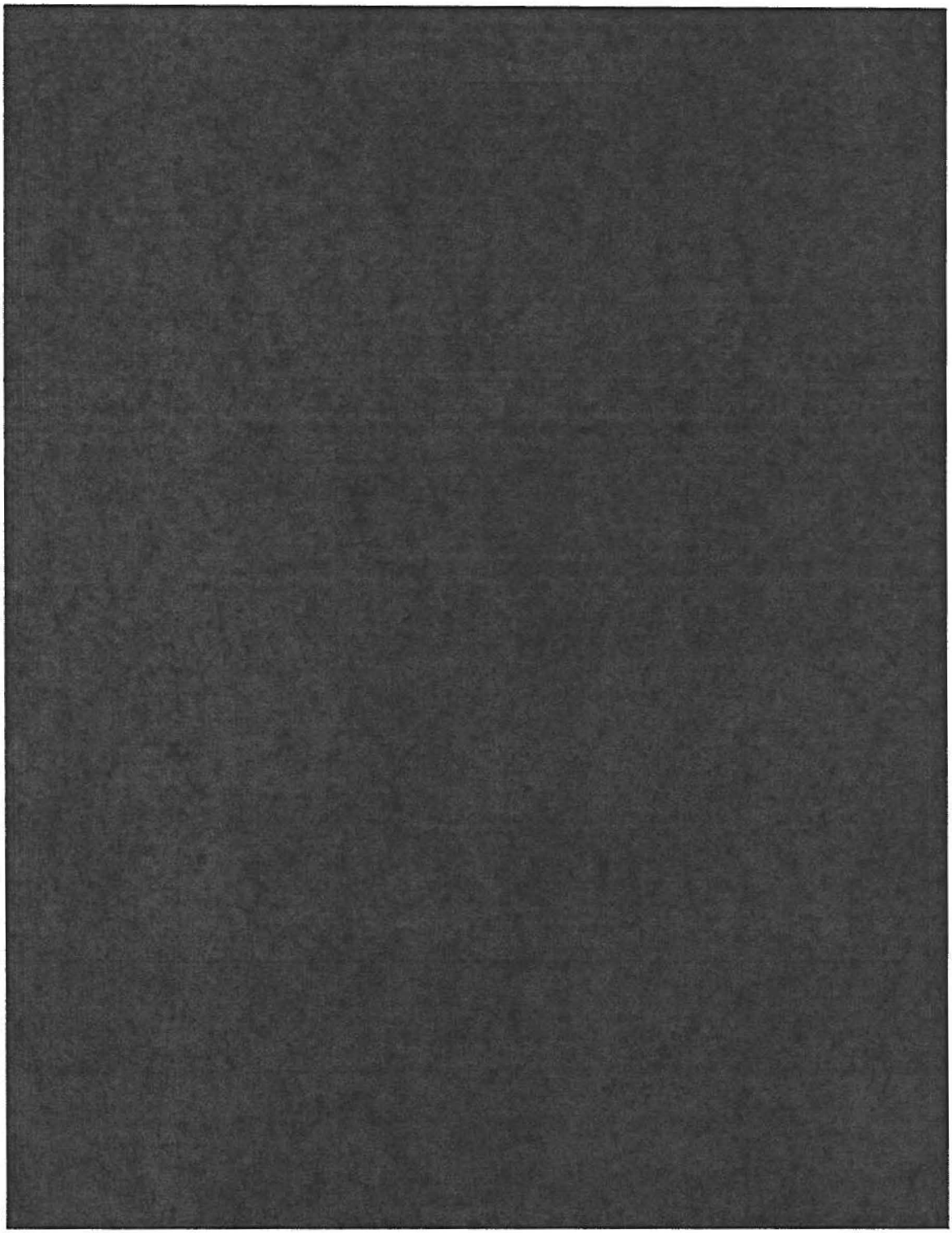

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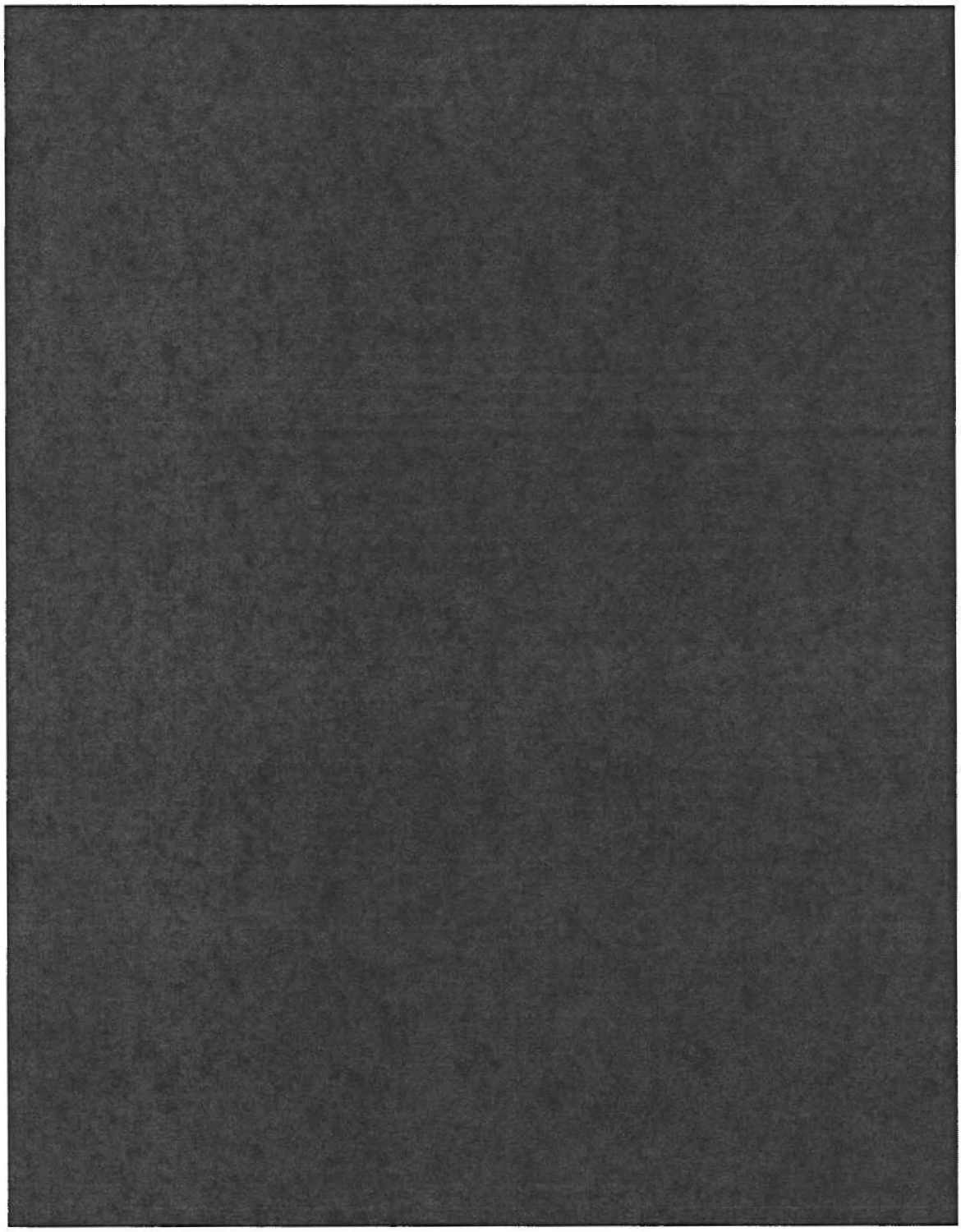

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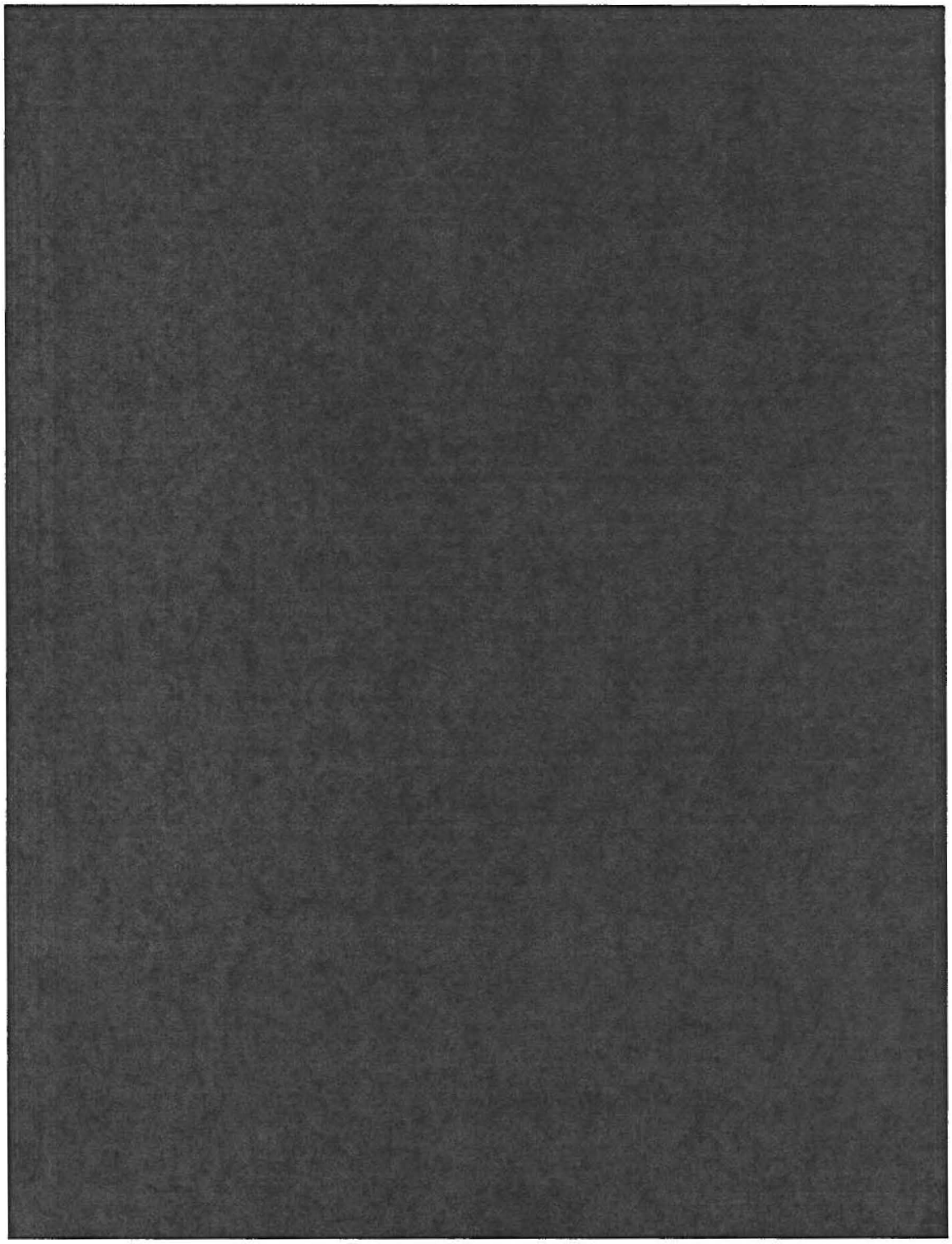

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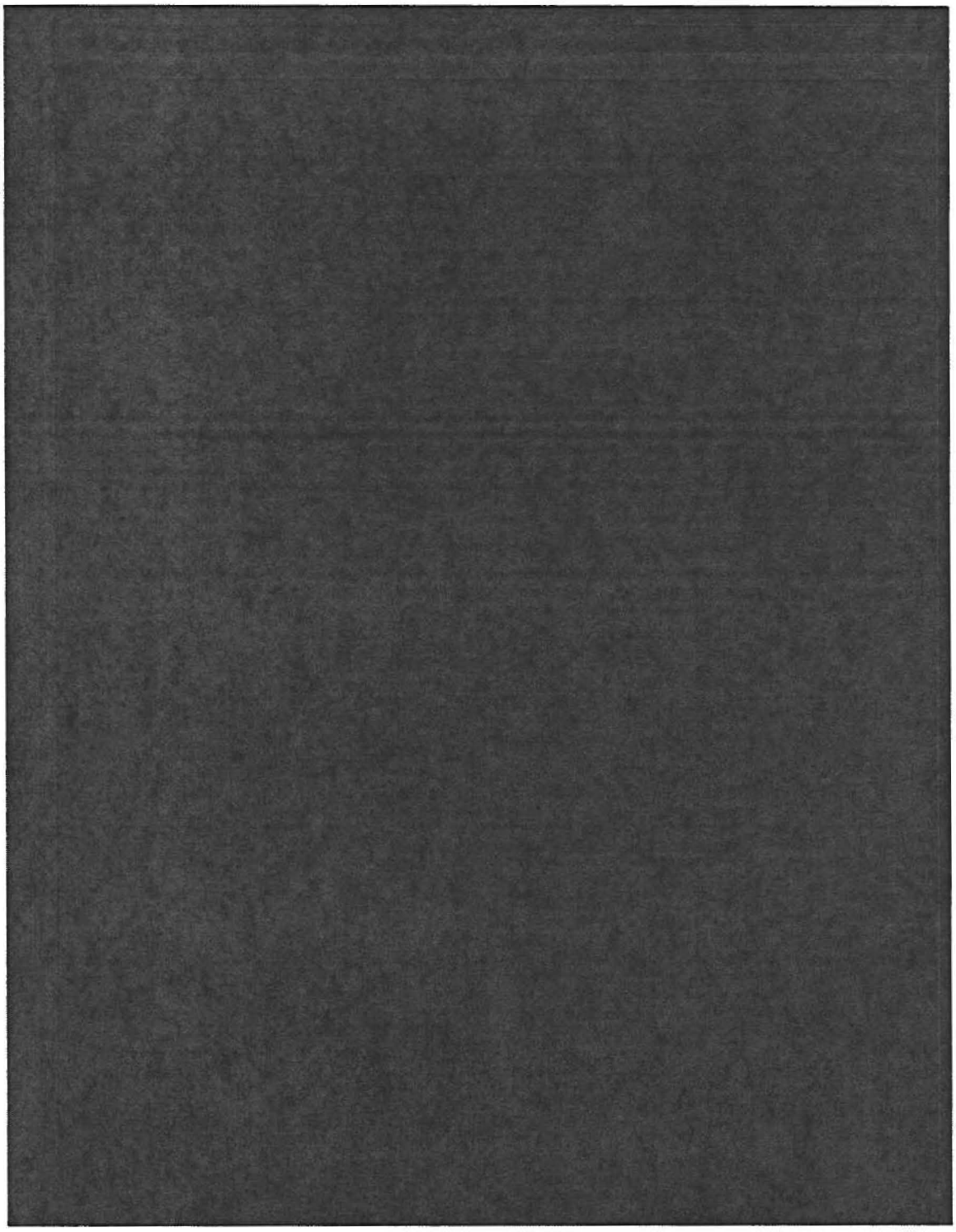

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GULED HASSAN DURAN (ISN 10023), Petitioner, v. DONALD J. TRUMP, President of the United States, *et al.*, Respondents.	Civil Action No. 16-2358 (RBW)

DECLARATION OF JOHN B. RENEHAN

JOHN B. RENEHAN hereby declares, pursuant to 28 U.S.C. § 1746, as follows:

1. I am an Associate Deputy General Counsel in the Office of General Counsel of the United States Department of Defense ("DoD"). I provide legal counsel to DoD leadership concerning the Guantanamo Bay habeas corpus litigation pending in the Federal District Court for the District of Columbia; my duties include initiating requests for documents and information from DoD components and combatant commands, and providing responsive documents and information to Department of Justice attorneys assigned to this litigation. Unless otherwise indicated, the statements in this declaration are based upon personal knowledge and information obtained by me in the course of my official duties.

2. I make this declaration in support of the Government's Opposition to Petitioner's Motion for Discovery. The purpose of this declaration is to describe specific material that could not be located by DoD, as well as the steps taken in an effort to locate that specific material as required by the Government's discovery obligations under the Case Management Order (CMO).

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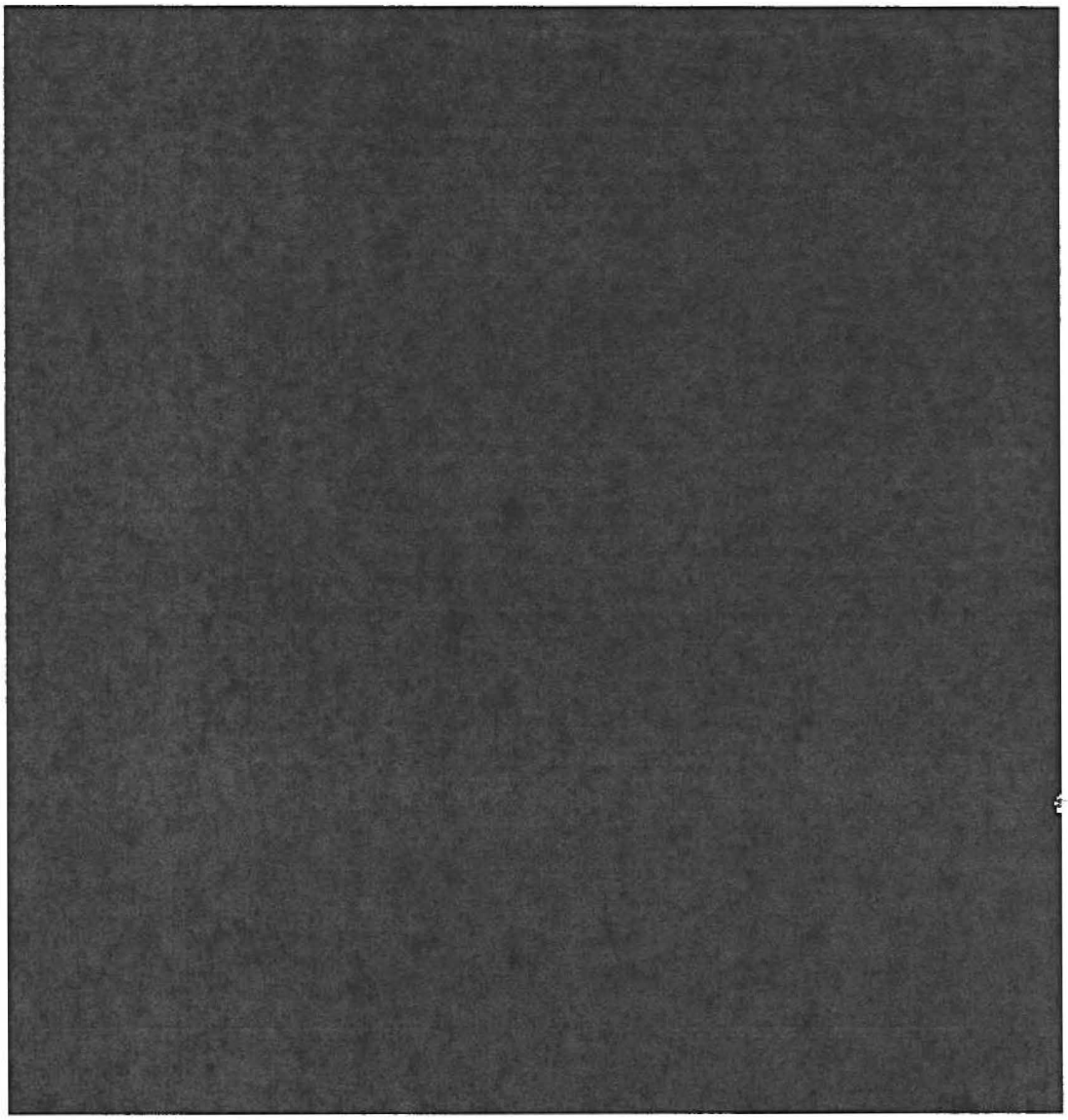
discovery agreements made in conferral with Petitioner's counsel, or requests by Petitioner in his Motion for Discovery, filed September 30, 2019. In his Motion for Discovery, Petitioner describes additional materials and information he is seeking from the Government. DoD's efforts to identify, locate, and retrieve the requested materials and information, and the results of these efforts, are described as follows.



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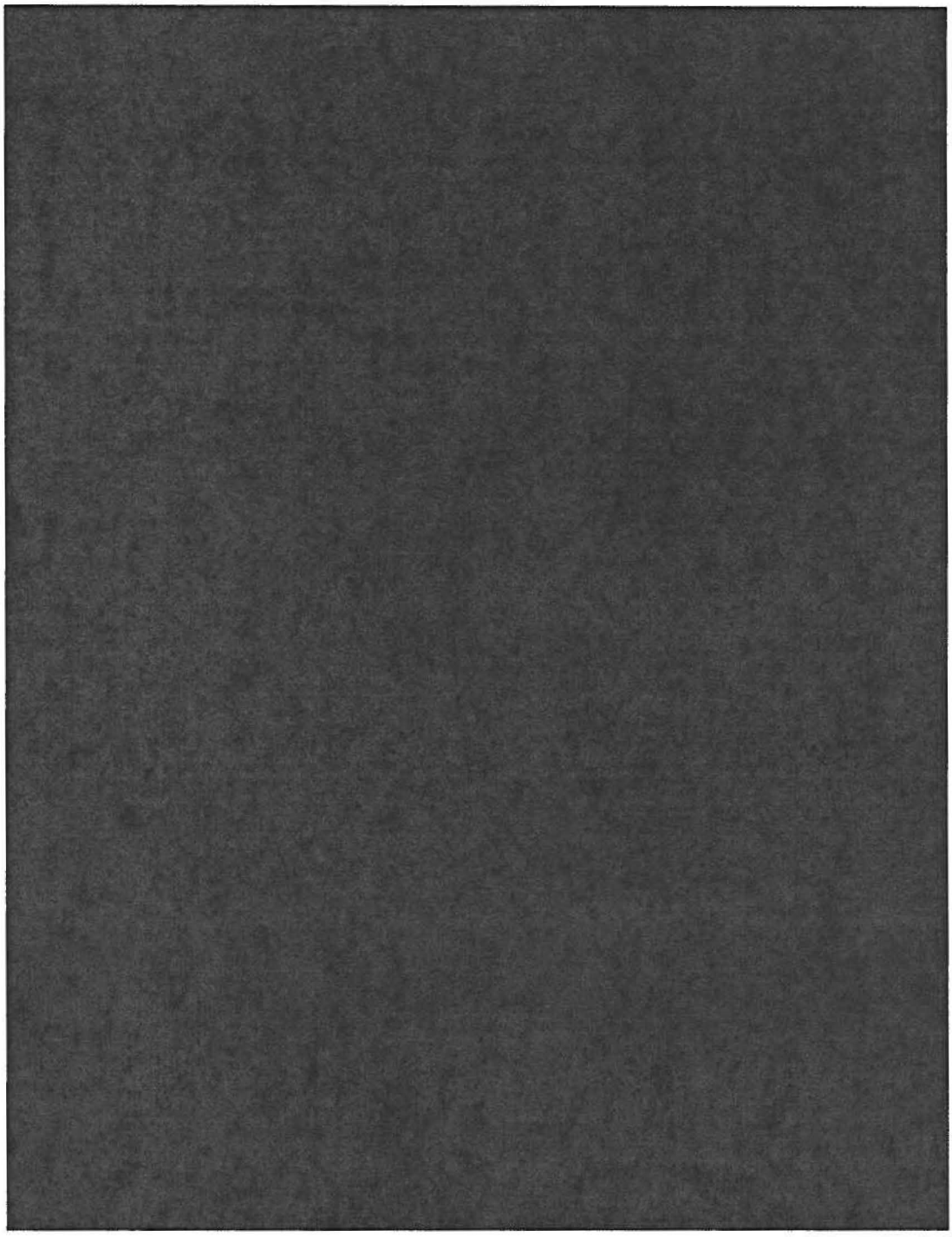

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7. 'Guleed001' document: Petitioner's Motion for Discovery requests "the FBI document entitled 'Guleed001,' dated January 31, 2007, which memorialized allegations that Petitioner made to the FBI 'clean team.'" Pet'r Mot. § VII at 24. This document is itself referenced in ISN 10023 LHM (January 31, 2007), which has previously been produced to Petitioner's counsel. DoD requested that JTF-GTMO search JDIMS for responsive material on Petitioner. This search was conducted using keywords [redacted] DoD provided the documents returned by this search to Justice Department attorneys for their review. The 'Guleed001' document was not found during that review.

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on DECEMBER 12, 2019.

John B. Renehan
Department of Defense

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UNCLASSIFIED//FOR PUBLIC RELEASE