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February 2, 1981

MEMORANDUM FOR THE PRIME MINISTER

Strategic Questions
Relating to the Constitution

The primary purpose of this memorandum is to give you my views on the image you should project in relation to the constitutional issue as you face questions in the House this week. The secondary purpose is to briefly summarize the elements of constitutional strategy on which work is now being done by officials.

Your stance or image on the constitution

The weekend media, particularly the Toronto Globe and Mail and the CBC radio program Sunday morning, tried to create the impression that either you had deliberately misled them with regard to Mrs. Thatcher's commitment to you at your meeting last summer or, at least, that enough confusion about the precise nature of that commitment exists that it is not as firm as you had led the media to believe it was. This perception, combined with your very aggressive and hawkish responses to questions at last Friday's press conference have created the clear impression that we are running scared, that we are no longer in control of the constitutional train.

✓

a bit hard.

It is imperative that we correct this impression immediately. We need to show that we remain confident about the ultimate outcome of this endeavour, regardless of the obstacles that remain to be overcome. This image will result only if you are cool, calm and low-keyed in response to questions in the House. An excessively hawkish stance will not be effective. It will only further reinforce the perception that we have panicked and are on the run.

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Since we began this operation last October, we have successfully avoided a series of issues, all of which could have ultimately spelled disaster for the constitutional venture. For example, we got around the problem of whether or not the proceedings of the Joint Committee should be televised; we extended the committee deadline with the result that no one is claiming that we did not hear an adequate number of witnesses and that, in addition we now have a much better resolution that we would have had had we insisted on the December 9th deadline; the Charter of Rights now has fairly wide support, particularly from native groups, women's groups, handicapped organizations and the like; our manoeuvring last week managed to hold Mr. Broadbent's caucus (or at least most of it) for him.

Peoples

In short, despite all the attacks which have been made in an attempt to derail our strategy, the train is still on the track.

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In my opinion, we will similarly develop strategies to get us around the pitfalls in London, but it will be much harder to do this if our own supporters, particularly those in the caucus and the cabinet, think that you are uneasy or emotional about the London problem. If you continue to make public threats (e.g. we will call an election or a referendum on this issue, we will make a unilateral declaration of independence and break away from the Commonwealth etc.) then our own supporters will become terrified. Some of them are already uneasy as a result of your comments at your press conference last Friday.

We have repeatedly stated that Canadians, including members of our own team, become upset when the level of confrontation gets too high. They do not want to become involved in a major fight, particularly with the United Kingdom. While I recognize that this may eventually become necessary, we should not raise this issue until it becomes absolutely necessary to do so.

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I urge you therefore to try and defuse the current situation by taking a very low-key, non-confrontation approach with regard to Mrs. Thatcher and Westminster, and above all else, to once again become the cool, confident general whose troops are facing tough battles ahead but who will ultimately gain the victory he seeks. ✓

Strategic issues

There are two main strategies still required. The first will deal with the government's strategy in the House on the third stage of debate on the constitutional resolution, while the second will be our London strategy.

The basic issue related to the House is whether we will proceed with concurrence in a committee report or whether the full resolution will be placed on the floor of the House. I had a further conversation with Mr. MacEachen about this question on Friday night and he continues to be of the view that it would be far better to proceed with concurrence in a committee report provided that we are absolutely certain that this will constitute a legitimate form of a joint address to Her Majesty. s.23

Mr. Pinard, on the other hand, strongly favours proceeding with the full Resolution on the floor. The decision as to which of these alternatives will be chosen must be made at P&P tomorrow. ✓

As for the government's strategy for handling the debate once it is on the floor of the House, work on this is proceeding and I expect a short note on it for Thursday's cabinet, or next week's P&P.

The London strategy has two distinct parts. One part deals with the question of how to put pressure on the U.K. government (e.g. through a resolution passed at the Commonwealth heads of government meeting in Australia). This should be finished fairly shortly. The larger part of the London strategy is being developed this week. However, I do not intend to finalize until Michael Pitfield returns from London around the middle of next week. I therefore expect to send this to you on Friday February 13th for your weekend reading. ✗

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Finally, we have not lost sight of the fact that there are still two other cards which we can play if we have to. The first, the legal card, involves our taking a direct reference to the Supreme Court on the legality of the constitutional measure. Obviously no decision about playing this card will be taken until after the Manitoba court has handed down its decision. Indeed, even if we were to decide to make a reference to the Supreme Courts, my inclination at this point would be to refrain from doing so until the resolution had been passed by Parliament. However, if delay in Britain is inevitable so that the issue will not be dealt with by the British Parliament until some time next fall, then we may well conclude that the six months between April and October could be most effectively used by obtaining during that period a definitive ruling by the Supreme Court on the legality of the resolution.

The second, and most drastic, card which we could play if we are ultimately forced to do so would be to ~~adopt an opting-in clause for part or all of the Charter of Rights.~~ *ne* We know that if we did this the measure would sail easily through the U.K. Parliament and that provincial opposition to the measure in Canada would be considerably reduced (although obviously not completely eliminated). This remains the ultimate last resort and the card which would only be played with enormous reluctance. Nevertheless, pursuant to the memorandum I sent you after our meeting with Mr. Pym, I have done some thinking on this question and, when the time is appropriate, will write a short piece for you outlining the ways in which the Charter might be severed from the rest of the resolution and when this should be done, if it is to be done at all.

In summary, we still have cards to play and we are a long way from being beaten on our current game plan. This is a further reason why it would be not only dangerous, but wrong, to create the impression that things are out of control and that we are on the run. But only you can steady our own troops down.

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Two amendments which Mr. Chrétien will want to make

Mr. Chrétien phoned me yesterday to raise two issues with me. The first is one dealt with in a memorandum I gave you last week, namely changing the way in which a referendum is passed. The proposal is that a referendum could pass only if it received a majority in each of the four regions of Canada. If we do this, it means that the referendum passage rules are no longer the mirror image of the rules for intergovernmental agreement contained under the Victoria formula. That is, we are no longer directly substituting the will of the people in a province for the vote of the government of that province. However, it is easy to understand why the proposal for regional majorities has considerable appeal and, since I was the one who raised this issue originally several months ago, I continue to think it would be a desirable, although not essential, amendment. ?

The second issue which Mr. Chrétien will raise involves voluntarily adding to the resolution the commitment we gave Saskatchewan whereby a majority of provinces representing a majority of Canadians could prevent a referendum from being held. I would be opposed to agreeing to this amendment unless we get something in return. We have already made it difficult enough to call a referendum and I cannot see why we would make it more difficult unless by so doing we got the support of another provincial government. However, as you know, Mr. Chrétien continues to be strongly opposed to the referendum provision and hence he intends to raise this issue once again. ✓

Michael J.L. Kirby



February 2/81

WITH THE COMPLIMENTS
OF THE
DEPARTMENT
OF
EXTERNAL AFFAIRS

AVEC LES HOMMAGES
DU
MINISTÈRE
DES
AFFAIRES EXTÉRIEURES

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Messrs Pitfield, Kirby and Tassé

Delivered to Prime Minister and Minister
MacGuigan on Saturday evening.

George Anderson
Western European Div.

S E C R E T

COPY VI

Record of Key Indications of British
Government's Knowledge of and Commit-
ment to Federal Government's Patriation
Package

The Prime Minister's first concrete public state-
ment of his intentions regarding a new approach to breaking
the deadlock over constitutional patriation and amendment
were made in campaign speeches in Montreal on May 10, 1979 and
Toronto on May 11, 1979. The key passages of those speeches
are as follows:

Montreal:

"We are ready and willing to change the status
quo. We want to improve the Constitution. Every-
thing is negotiable with two exceptions: the
fundamental rights of citizens, which absolutely
must be protected in the Constitution, and
federalism itself"

"If we form the government, then in the 30 days
following the election we shall call a new session
of Parliament

But in the Throne Speech we shall also announce the
passage in the new parliamentary session of a
joint resolution of the Senate and the House of
Commons, to be sent to Great Britain requesting
that it amend the Statute of Westminster...."

"In this joint resolution of both Houses, we would
ask England to patriate the Constitution. The
resolution would also contain a number of provi-
sions that would be binding on the federal govern-
ment, pertaining to the protection of the funda-
mental rights of citizens, and the enshrining
of the Official Languages Act, which are within
our jurisdiction and to other matters on which
consensus has been reached with the provinces.
They might want us to include Family Law.

That is what will be announced in the Throne
Speech not more than thirty days after the
election. And not more than sixty days after
the election we shall call a federal-provincial
conference. Yet another one, and I hope the
last on this topic. A federal-provincial
in which the ten provinces and the federal

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government will try once more to agree on a formula for amending the Constitution, once it has been patriated. And if we agree, we will begin by uncorking the champagne, because it would be an extraordinary achievement. After that we would include the amending formula in the joint resolution to be adopted by both Houses, so that we will finally have succeeded in patriating the Constitution and giving ourselves the right to amend it ourselves in Canada. At the same time, we would have enshrined the fundamental rights of citizens, such as official languages and so on.

What happens if we don't reach agreement at the meeting to be held in sixty days?
But if agreement is not reached, what will happen? In that case the Constitution will be patriated and for a two-year period the amending formula will continue to be the same as the one the provinces say we now have. That is, that we cannot amend the Constitution without unanimity'"

"If after all that, by the end of the first or second year we saw that we were still as deadlocked as we were 52 years ago, then there will be an alternative formula, because after all we are not going to send the Constitution back to England. I don't know what the English would say if we did. As I said, there would be an alternative formula which would be based either on Toronto, or on a number of provinces representing some proportion of the population - that was the formula Quebec preferred in '70-71 - or on the main regions of the country. But a formula nonetheless which would require less than unanimity and which, in the last analysis, would make it possible to hold a national referendum, but one based on the main regions of the country"

Toronto:

"We are saying: elect us, give us a mandate, Canadian people. If we form the government, we will call Parliament within 30 days of the election. We will present our program in a speech from the Throne, which will deal with the economy and will deal with social matters and many of the things that we've talked about in this election, but we'll also deal with the patriation of the constitution. And we will say that we will present a joint address to both Houses of Parliament, a

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joint address to Westminster, adopted by both Houses of Parliament which will set in motion that patriation of the constitution. But we won't adopt that address, we'll just adopt the speech from the Throne, then we'll have a meeting of the ten premiers and the federal government and ministers of Justice or of federal-provincial affairs, whatever, and try and find, once again, a method of patriation and an amending formula. And if we find that method, in one more last effort, then we'll present this joint resolution, this joint address, in which we will tell Great Britain, well, here's how it should be done"

"Well, I'm trying to tell you now how it's going to taste, because if the provinces say no, then we will have the joint address and tell Westminster: well, you legislate this last time, send the constitution back to Canada. And what would the amending formula be? We say it would be unanimity for two years, because we don't want this to be arbitrary and arrogant, we'll have two more years to try and find a way of agreement"

"Finally, there is a fail-safe position, because what if the people of Canada don't like either of the formulas we are proposing to them, do we send the damn thing back to Great Britain - obviously that would be too ridiculous for words, so we have to have a fail-safe, a fall back position. And we are proposing - and that's debatable, it's open for discussion - we're proposing either something like the Victoria formula or the Toronto formula. But once again, with the possibility of a national referendum that the people would be able to say: you know, they haven't agreed again, so the people of Canada will vote or not vote for the formula"

"And I must interrupt my train of thought for a moment to tell you that in our joint address, we would put those basic guarantees that are under federal jurisdiction - we wouldn't take any power from the provinces and we wouldn't shift jurisdictions unless there was unanimous consent. But we would put into that new constitution which would be created by the British act of patriating, basic linguistic guarantees, particularly the French language legislation that has been working in Canada and the other basic human rights: equality of all Canadians to live in

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freedom and meet and think, to move from province, equality against discrimination on the basis of sex, colour, race or creed. These are all things we would put into the constitution, with a provision for the provinces opting into these basic provisions...."

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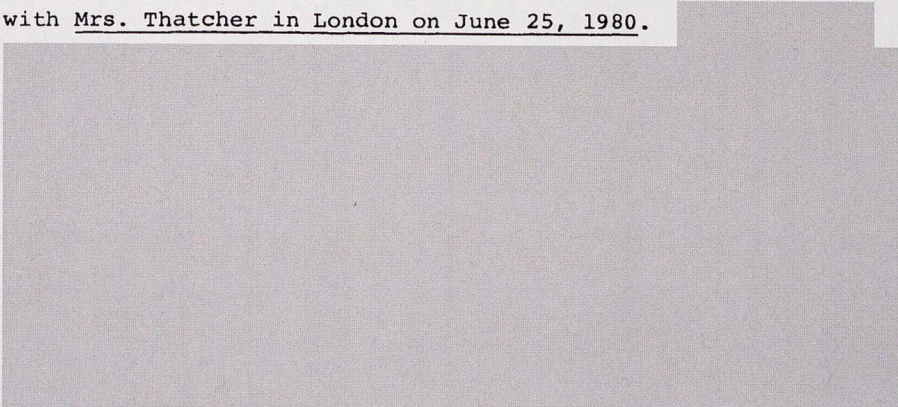
Subsequently, speaking to the House of Commons on May 21, 1980, the day after the Quebec referendum, the Prime Minister indicated the Government's determination to proceed with constitutional change.

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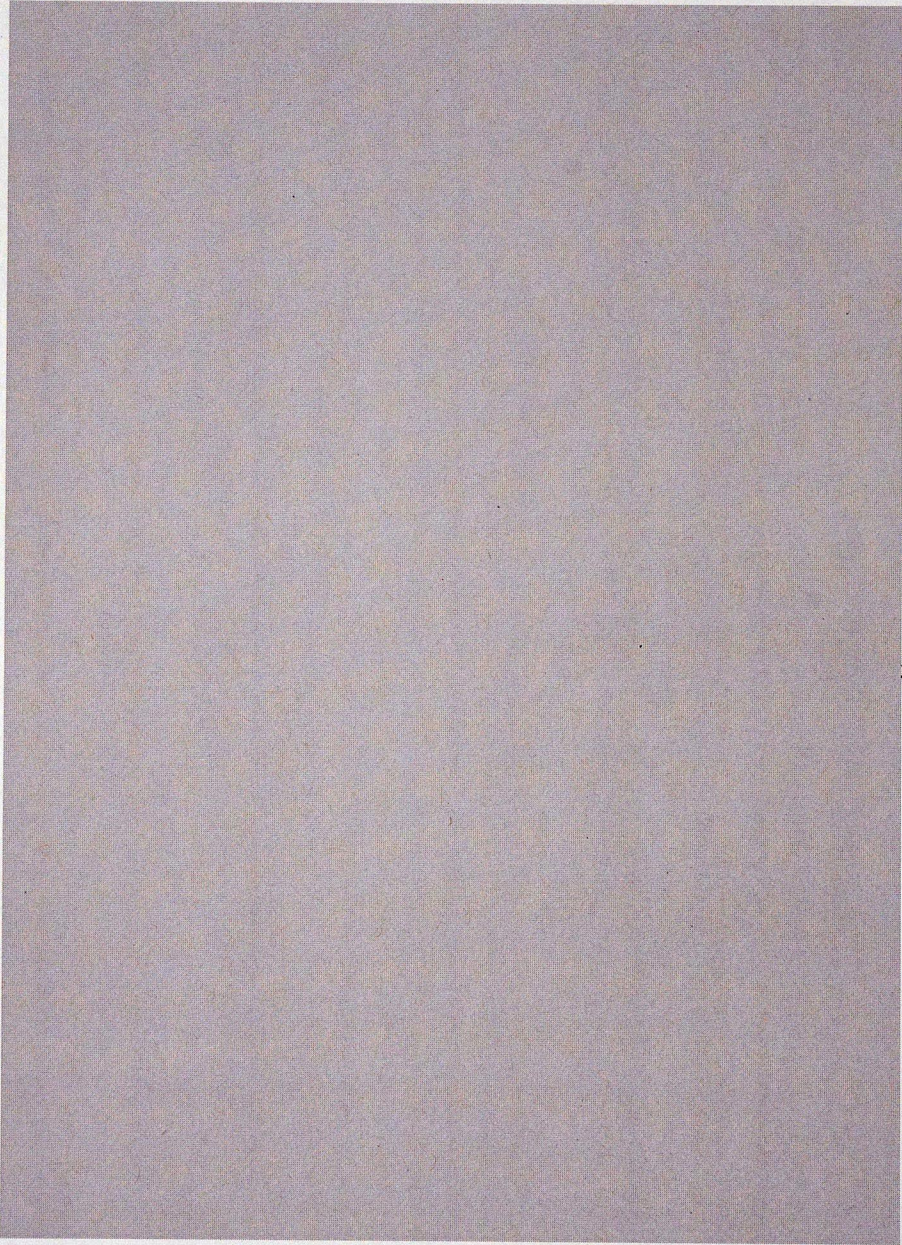
"De notre côté, nous ne posons d'autres préables au changement que les deux que j'ai énoncés à Québec dès janvier 1977.

D'abord, que le Canada continue d'être une véritable fédération, soit un Etat dont la Constitution établit un Parlement fédéral avec des pouvoirs réels, s'appliquant sur le territoire de chaque province. Ensuite, qu'une charte des droits et libertés fondamentales soit insérée dans la nouvelle constitution et que cette charte s'étende à l'aspect collectif de ces droits comme la langue...."

It was against this background that Mr. Trudeau met with Mrs. Thatcher in London on June 25, 1980.



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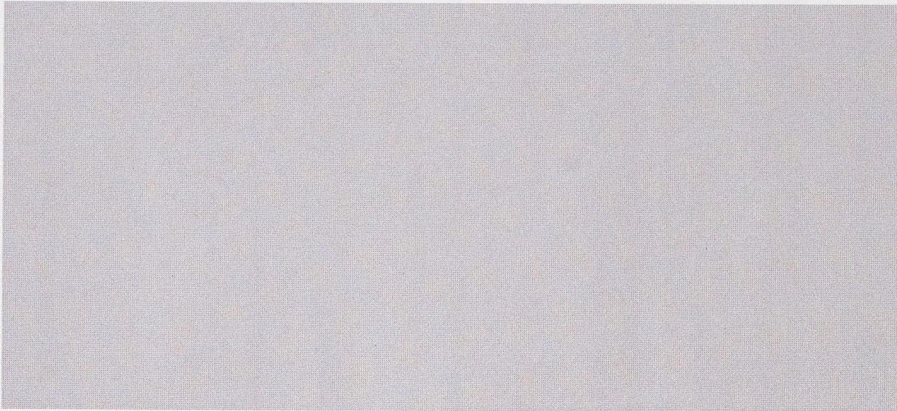


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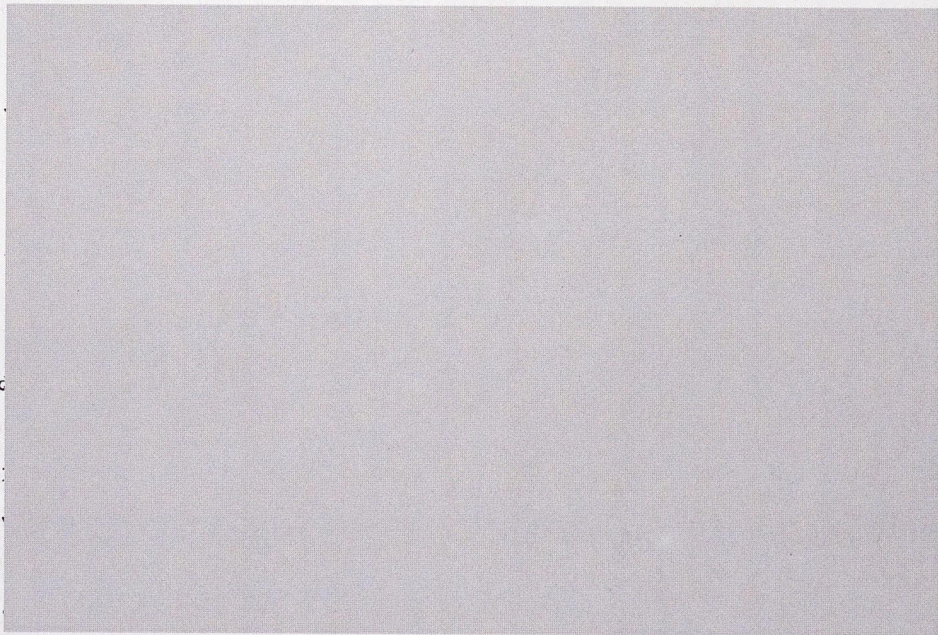
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The next official contact was between Lord Carrington
and Mr. MacGuigan at the United Nations in New York on September
23, 1980.



On October 6, Mr. MacGuigan and Mr. Roberts met

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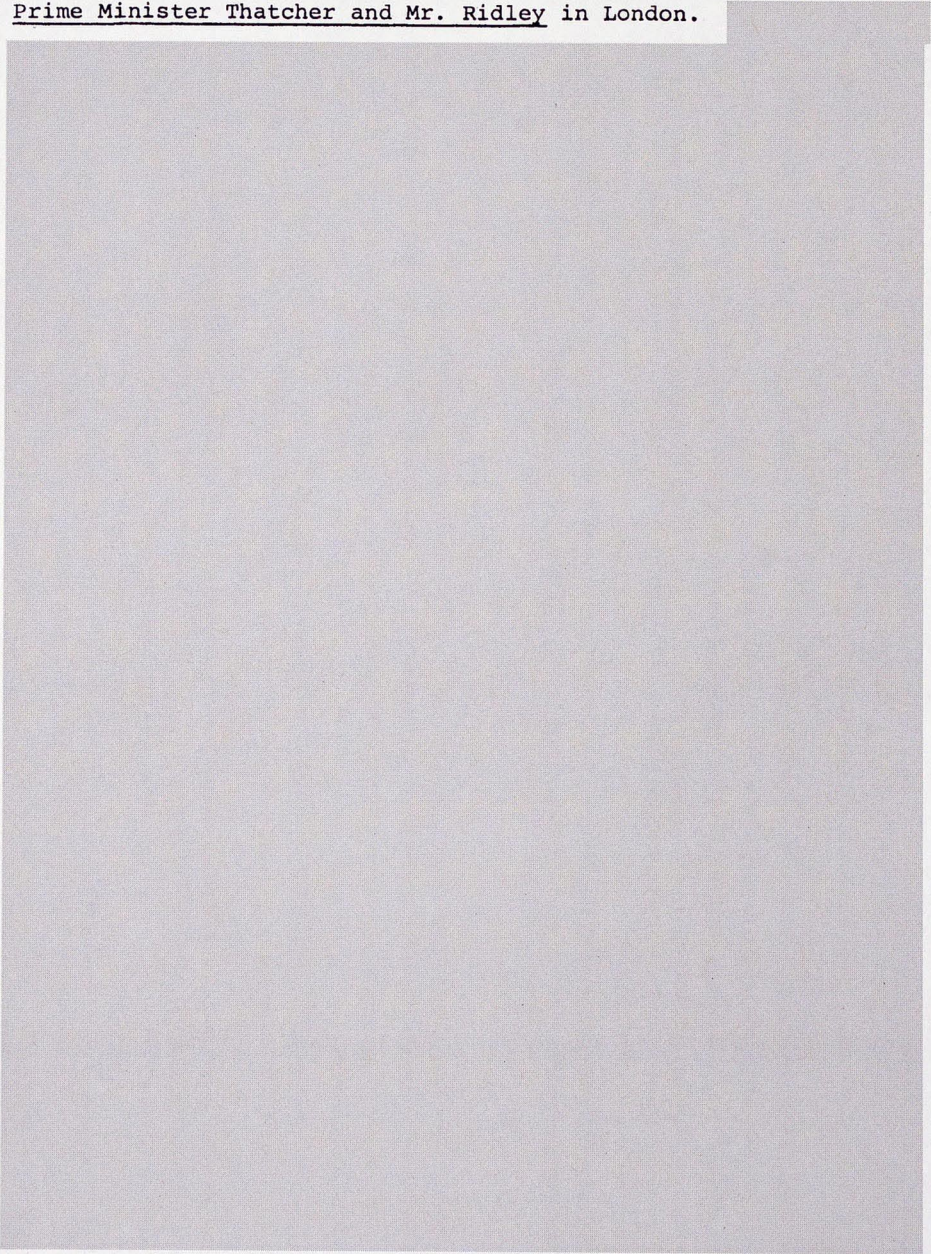
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Prime Minister Thatcher and Mr. Ridley in London.



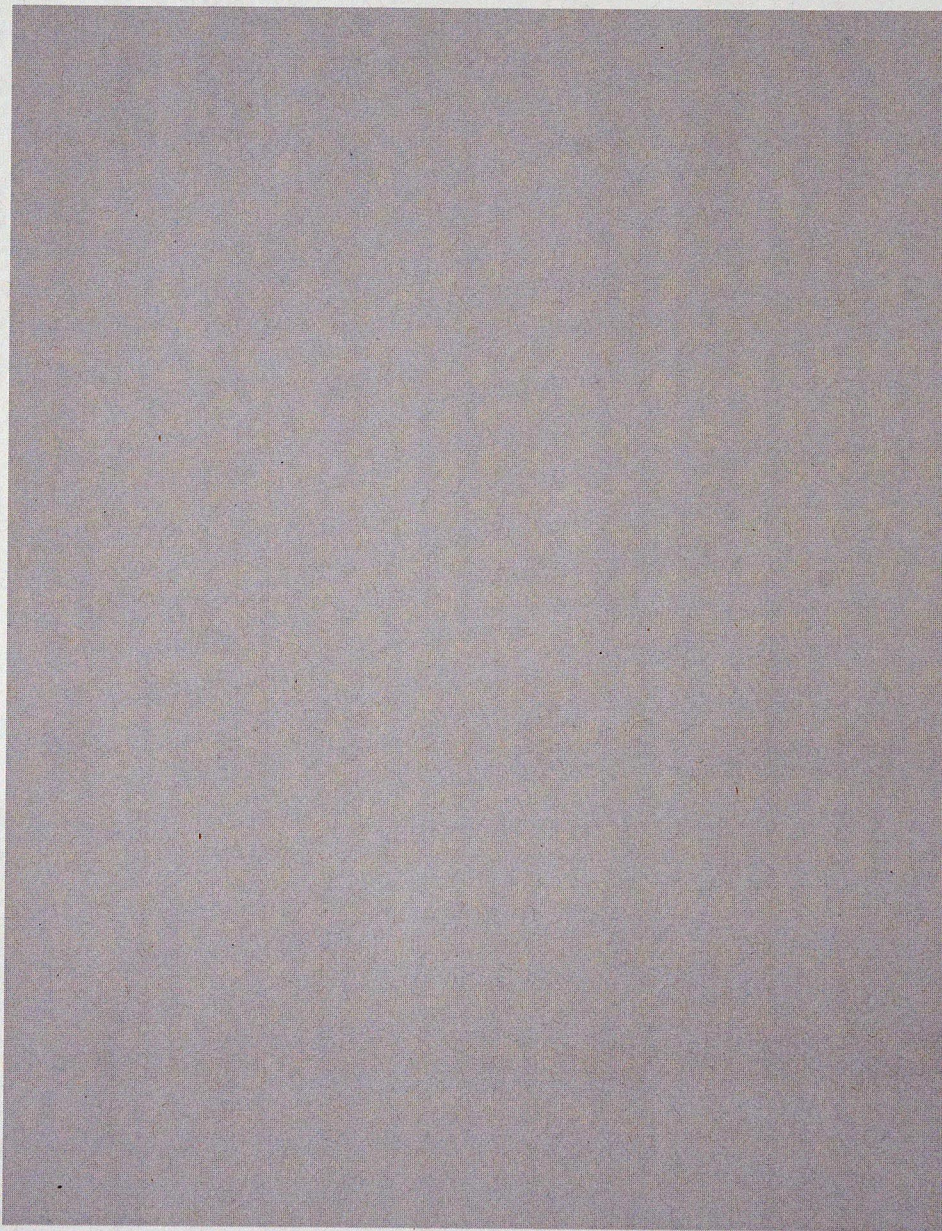
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S E C R E T



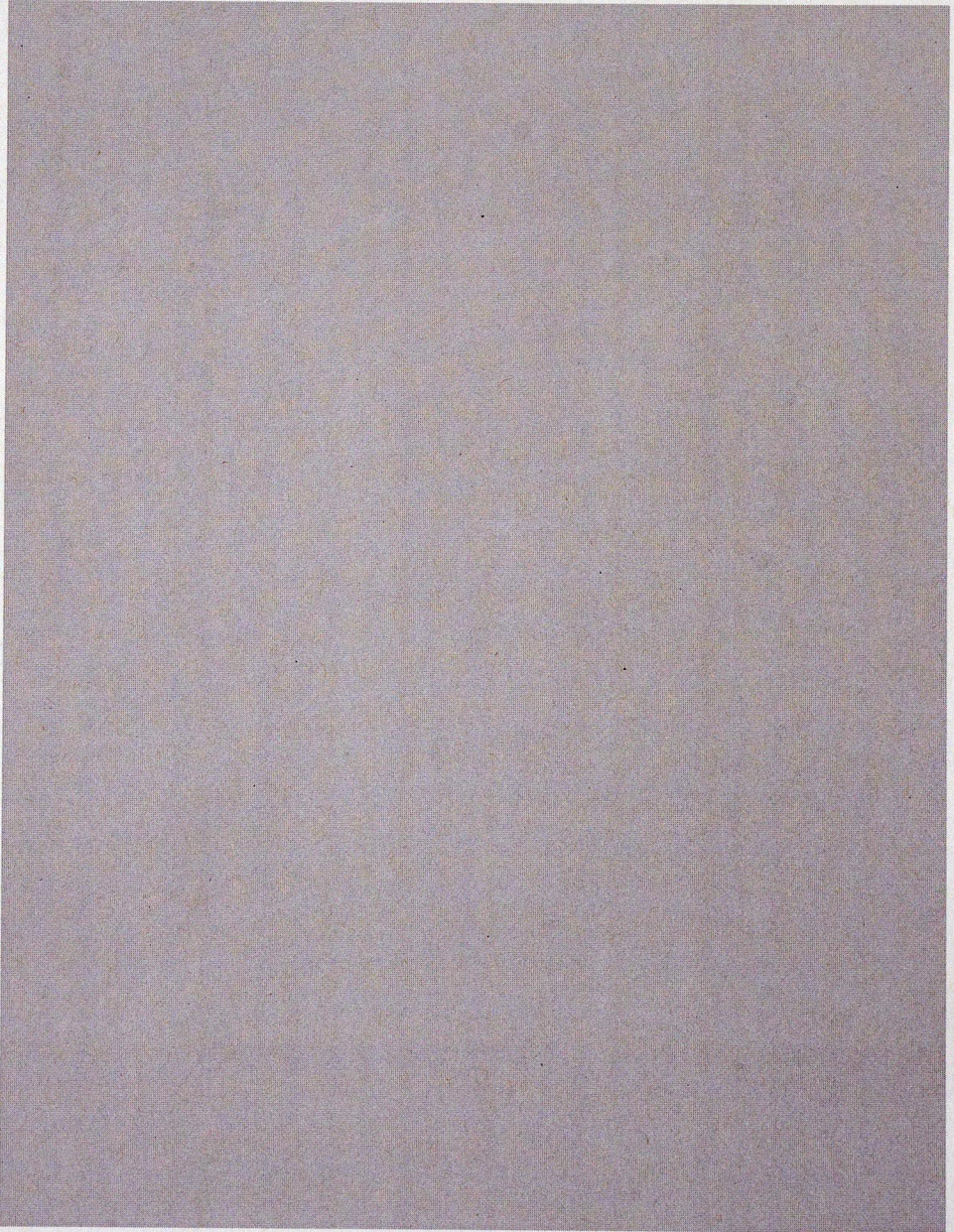
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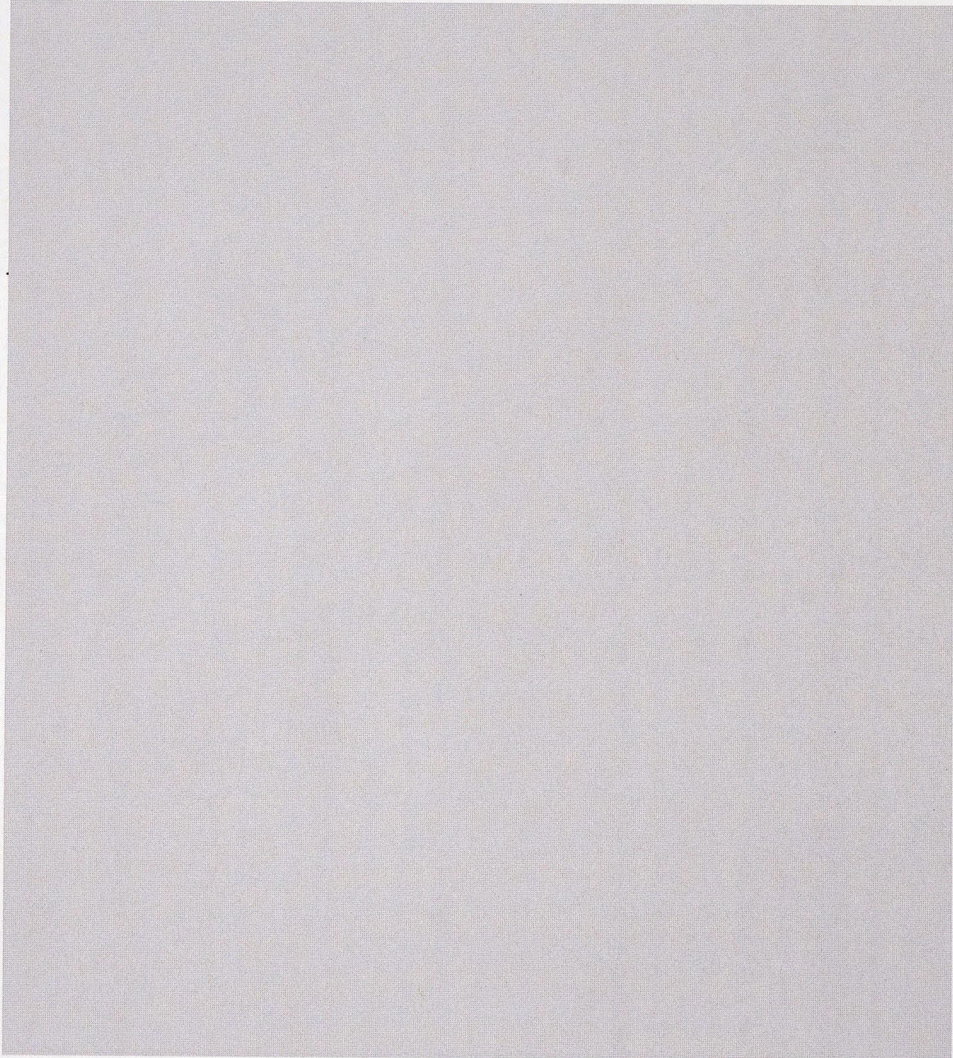


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On November 7, Prime Minister Trudeau was asked
at a press conference whether he had or would or was consi-
dering dropping the Charter of Rights from the Constitutional
package. He replied:

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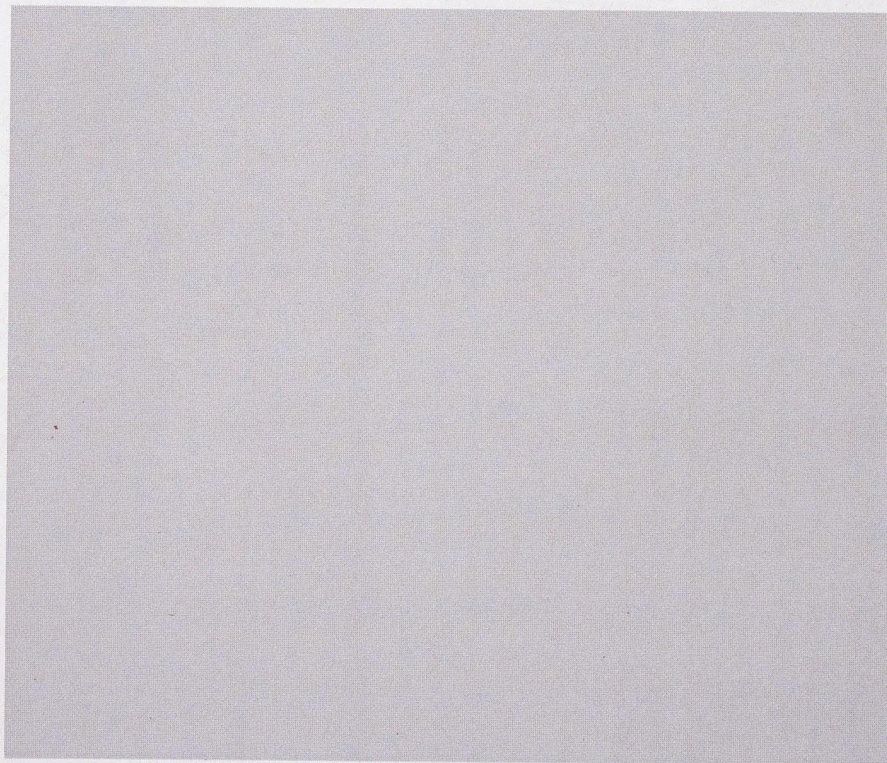
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"The past tense is that yes, I considered a movement without the Charter of Rights, but as far as the present and future are concerned the answer is no. The Charter of Rights is in our resolution. I have had considerable discussion over it in cabinet and caucus as to whether it should be added or not, and we decided to add it for reasons that I explained at some length at press conferences and elsewhere.

I am convinced that there would never be an entrenched Charter of Rights. Particularly there would never be entrenched educational language rights if it weren't done now by the national Parliament the last time, as it were, that we had a possibility of proceeding in this way to amend the Constitution."



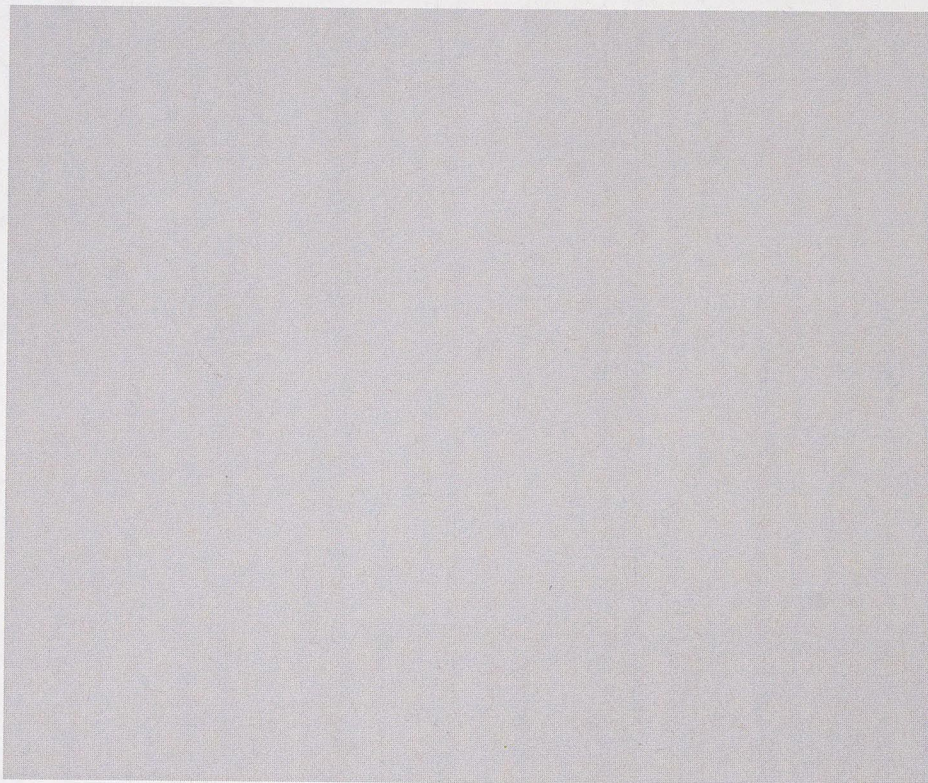
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On December 9, Mrs. Thatcher participated in
the following exchange in the UK House of Commons:

PM Thatcher:

"I have no plans to meet Mr. Pierre Trudeau,
Prime Minister of Canada, to discuss the
patriation of the British North America Acts.

(Mr. George Foulkes - South Ayshire, Labour)

"Does she not realize that we are on a collision
course with Canada. Will she tell Mr. Trudeau
that changes in the Canadian Constitution should
be decided over there. He should abandon uni-
lateral action."

Mrs. Thatcher: " We have as yet received no
request from Canada. When a request comes, we
shall try to deal with it as expeditiously as

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possible and in accordance with precedent."

(Mr. Jonathan Aitken-Thamet East, Conservative)

"It has been reported all over Canada that the British Government has given Mr. Trudeau some sort of commitment that it will push this 59 clause bill through the House of Commons as quickly as possible. Can she confirm or deny those reports. Constitutional issues of this complexity must surely be decided no by Government but Parliament as a whole."

(Mrs. Thatcher) "I know of no 59 clause Bill. On 14 previous occasions this House has been asked to deal with a request from the federally elected Parliament of Canada. It has done so in accordance with well-established precedent, bearing in mind that we are an elected parliament and that the federal parliament of Canada is a similarly elected parliament, when we receive the request, we shall try to deal with it as soon as we can."

(Mr. Bruce George-Walsall, South, Labour) "Many advisers outside the Foreign office have argued that unless there is unanimity among the provincial parliaments, or near unanimity, the Canadian Prime Minister should not proceed and we should not acquiesce. If we do we shall be reneging on constitutional obligations not only to the provinces but to the native people of Canada - people who were there 15,000 years before France or Europe ever realized that Canada existed."

(Mrs. Thatcher): "If we receive a request I believe we have we have to deal with it in accordance with the statute which governs it, in accordance with precedent and in accordance with the fact that it is received from a fully democratically elected parliament and would be a request from a fully democratically elected parliament to a similar democratically elected parliament."

(Mr. Robin Maxwell - Hyslop - Tiverton, Conservative)

"The only elected body that can make representation on behalf of the Canadian people to another Commonwealth Government such as our own, is the federal government of Canada. Provincial administrations cannot have any locus standi vis-a-vis the government or parliament of the U.K."

(Mrs. Thatcher) "I believe we can only receive a request under the relevant statute from the federal parliament of Canada."

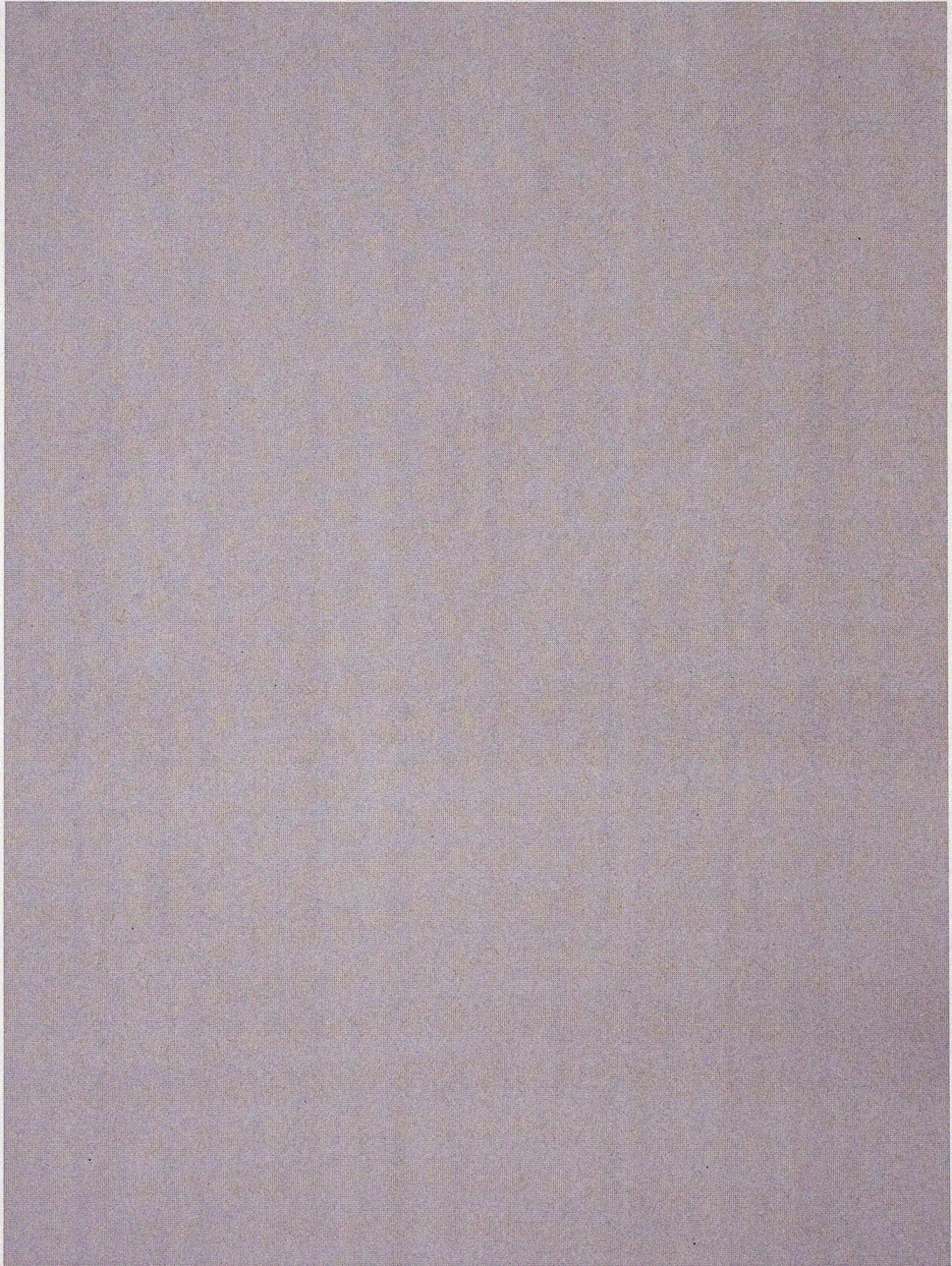
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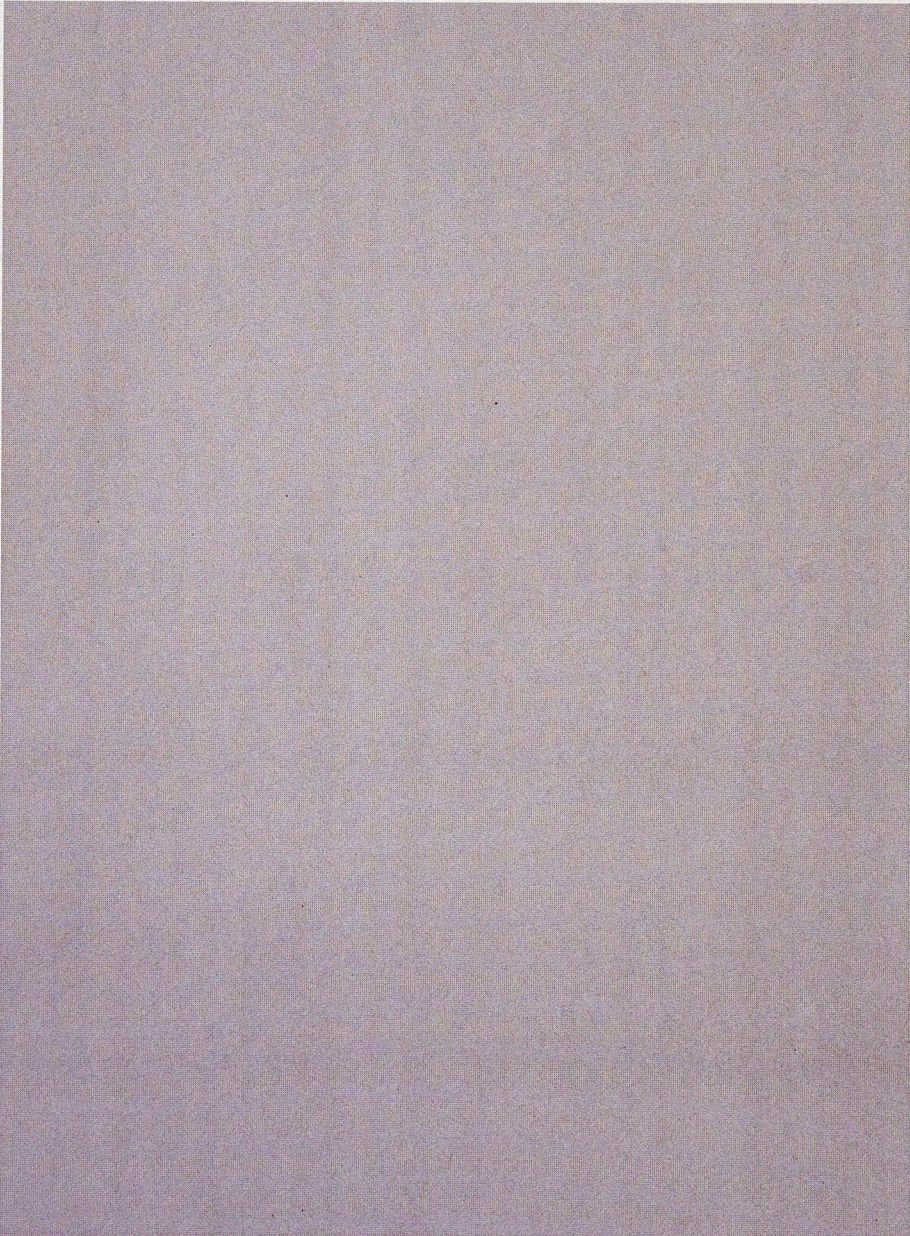
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