

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION**

UNITED STATES OF AMERICA

v.

THOMAS ANDREWS DRAKE,

Defendant.

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Case No. RDB 10 CR 1081

JOINT MOTION TO EXCLUDE TIME

The United States of America, by and through William M. Welch II, Senior Litigation Counsel, and John P. Pearson, Trial Attorney, Public Integrity Section, Criminal Division, United States Department of Justice, and defendant Thomas Drake, by and through his attorneys James Wyda, Federal Public Defender, District of Maryland, and Deborah L. Boardman, Assistant Federal Public Defender, hereby move this Court to enter an Order finding a period of excludable delay based upon “the ends of justice” outweighing “the best interests of the public and the defendant in a speedy trial.”

This Order and the Court’s attendant findings should issue pursuant to 18 U.S.C. §3161(h)(7)(A) and (7)(B)(i), (ii), and (iv), and should cover the time frame from the date of arraignment, April 23, 2010, through and including the trial date, which is scheduled to commence on October 18, 2010.

In support of this motion, the parties proffer the following facts, which, if adopted by this Court, would support a factual finding for excludable delay based upon “the ends of justice” outweighing “the best interests of the public and the defendant in a speedy trial” as required by 18 U.S.C. §3161(h)(7)(A):

1. The Indictment issued on April 14, 2010;
2. The prosecution of this case will involve classified documents. Accordingly, it is necessary that counsel for defendant Drake receive the proper security clearances in order to review the classified documents in this case. Until counsel for defendant Drake receives those security clearances, the United States cannot discharge its discovery obligations as it relates to the classified documents.
3. The defense of this case may involve classified documents. Once again, counsel for defendant Drake needs to obtain the proper security clearances in order to review the classified materials in this case and determine what, if any, additional classified materials may need to be requested from the United States. Until counsel for defendant Drake receives those security clearances, counsel for defendant Drake cannot begin to evaluate the evidence in this case.
4. Counsel for defendant Drake has been in contact with the United States Department of Justice's Litigation Security Group¹ to begin the process of obtaining the necessary security clearances. Although the Litigation Security group will act as expeditiously as possible, it is anticipated that the necessary security clearances, which will require background investigations, will take at least four weeks, if not more.

¹Although a component of the U.S. Department of Justice, the Litigation Security Group serves in a neutral capacity in litigation and provides advice and guidance to the court, defense counsel, and the prosecution regarding the proper handling of classified information. Security specialists with the Litigation Security Group in effect are detailed to the federal court to assist with security matters, including obtaining security clearances for defense counsel and court personnel.

5. The indictment raises complex factual and legal issues and novel questions of law relating to, among other things, the retention of classified materials. Moreover, the pre-indictment investigation in this case spanned more than two years. Counsel for the defendant was not involved in the pre-indictment investigation and was not appointed until after the indictment issued.
6. Pursuant to 18 U.S.C. §3161(h)(7)(B)(i), a continuance is essential to allow the case to proceed. Absent a continuance, and given the classified documents involved in this case, the United States will not be able to discharge its discovery obligations in a timely manner, and the defendant cannot investigate this case and prepare for trial, resulting in a miscarriage of justice for both parties.
7. Pursuant to 18 § 3161(h)(7)(b)(ii), a continuance is essential to allow counsel for the defendant ample time to investigate the case and to research and explore the complex legal and factual issues and novel questions of law. Absent a continuance, counsel for the defendant will not have adequate time to prepare for trial.
8. Alternatively, pursuant to 18 U.S.C. §3161(h)(7)(B)(iv), a continuance is essential to allow the United States and the defendant “the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.” Once again, given the classified documents involved in this case and the need for security clearances, the United States cannot discharge its discovery obligations in a timely manner, and the defendant cannot investigate this case and prepare for trial, even with the exercise of due diligence, without a continuance in this matter.

9. Based upon the foregoing, pursuant to Title 18, United States Code, Section 3161(h)(7)(A), the ends of justice served by not fixing a trial date within the time limits established by the Speedy Trial Act outweigh the best interest of the defendants and the public in a speedy trial.

WHEREFORE, the parties move this Court for an Order finding that the failure to grant a continuance and the concomitant exclusion from the Speedy Trial Act in this case would result in a miscarriage of justice and deny the parties reasonable time necessary for effective preparation, taking into account the exercise of due diligence. *See*, 18 U.S.C. § 3161(h)(7)(B)(i), (ii), and (iv).

A copy of a proposed order has been attached.

Respectfully submitted this 29th day of April, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that I have caused an electronic copy of the *Motion to Exclude Time* to be served via ECF upon James Wyda and Deborah L. Boardman, counsel for defendant Drake.

/s/ William M. Welch II
Senior Litigation Counsel
United States Department of Justice