UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA v. BENJAMIN GRABINSKI Defendant.	Case No. 1:25-cr-19

ORDER

In this case, Benjamin Grabinski is charged by indictment with Destruction of Property Used by Foreign Governments—in violation of 18 U.S.C. § 970(a)—and Arson—in violation of 18 U.S.C. § 844(i). Before the Court is the Government's motion for pretrial detention pursuant to 18 U.S.C. § 3142(e)(3)(C) and § 3142(f)(1)(A), both of which apply to a case involving an offense listed in 18 U.S.C. § 2332b(g)(5)(B) with a maximum term of imprisonment exceeding 10 years.[1]

During the hearing on February 4, 2025, the Court denied the Government's motion and ordered Mr. Grabinski released on certain conditions. The Court provided its rationale on the record, and this order supplements the Court's decision.

Backdrop

The Government's detention memorandum describes the underlying offense conduct giving rise to the indictment as follows:

> On May 29, 2022, Defendant Benjamin Grabinski threw rocks at the Embassy of the People's Republic of China (the "PRC Embassy"), and shouted: "Next time, it's going to be a firebomb." Mr. Grabinski kept his promise. Eleven days later, on June 9, 2022, Mr. Grabinski returned with a homemade Molotov cocktail. Mr. Grabinski tried unsuccessfully to light it before throwing the device into the PRC Embassy.

[1] The Arson charge under 18 U.S.C. § 844(i) fits this bill.

This case does not arrive on a blank slate. Mr. Grabinski was previously indicted on the same charges in Case No. 22-cr-221, but Judge Richard J. Leon recently dismissed that case without prejudice on speedy-trial grounds. *See United States v. Grabinski*, No. 22-cr-221, Dkt. 56, Mem. Opinion (Jan. 14, 2025). At that time, Mr. Grabinski was released from custody.

The Government re-indicted Mr. Grabinski on the same charges on January 16, 2025, at which time a new warrant was issued for his arrest. According to counsel, the same day that Mr. Grabinski learned about the new indictment and the warrant, he self-surrendered to the U.S. Marshals Service. At Mr. Grabinski's initial appearance, the Government orally moved for his pretrial detention, and the Court set a hearing date of January 27, 2025. Subsequently, at defense counsel's request, the Court continued the hearing to February 4, 2025, at which time it heard argument from counsel and considered the briefs of both sides.

Although only tangentially relevant to the pretrial detention issues presently before the Court, the undersigned raised during the hearing—and all counsel agreed—that no judicial officer ever ruled on the issue of Mr. Grabinski's pretrial detention in the prior case. At his first appearance in that case on June 10, 2022, the Government moved for pretrial detention, but any ruling was deferred pending a competency evaluation. And thereafter, for reasons that are neither fully evident nor fully attributable to any party, there was never a ruling on pretrial detention in keeping with the Bail Reform Act factors that would govern that determination. Nevertheless, Mr. Grabinski remained in custody during the entire pendency of the prior case, meaning that except for a few days in January 2025——after his first case was dismissed and Mr. Grabinski was briefly released—he has been continuously detained for about 32 months, since June 2022.

Legal Standards

Through the Bail Reform Act, Congress expressed a presumption that an individual should be released pending trial unless the court finds "that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. § 3142(e); *United States v. Salerno*, 481 U.S. 739, 755 (1987).

In cases involving certain offenses or charges, however, the Act imposes a rebuttable presumption that no condition or combination of conditions will reasonably assure the defendant's appearance and safety of the community. Here, as the Government correctly argues—and as the defense concedes—this case implicates such a presumption under 18 U.S.C. § 3142(e)(3)(C) because Mr. Grabinski is charged with an offense listed in 18 U.S.C. § 2332b(g)(5)(B), for which the maximum term of imprisonment exceeds 10 years—Arson in violation of 18 U.S.C. § 844(i).

"The presumption creates a burden of *production* on the defendant to offer some credible evidence contrary to the statutory presumption, but it does not shift the burden of *persuasion*, which remains with the government." *United States v. Boykins*, 316 F. Supp. 3d 434, 436 (D.D.C. 2018) (emphases added) (citing *United States v. Taylor*, 289 F. Supp. 3d 55, 63 (D.D.C. 2018). "While the burden of production may not be heavy," *United States v. Lee*, 195 F. Supp. 3d 120, 125 (D.D.C. 2016), the defendant must proffer at least some evidence or basis to conclude that the case falls outside of the statutory presumption that Congress saw fit to create for this type of offense. And even when "contrary evidence or credible proffers are offered, the presumption remains as a factor to be considered by the Court amongst others in determining whether the defendant should be detained." *United States v. Ali*, 793 F. Supp. 2d 386, 388 (D.D.C. 2011).

Ultimately, the Court's decision here turns on whether "the defendant is a flight risk or a danger to the community." *United States v. Munchel*, 991 F.3d 1273, 1279 (D.C. Cir. 2021). Risk

of flight must be shown by a *preponderance of the evidence*, whereas dangerousness to the community must be shown by *clear and convincing evidence. Id.* at 1279-80; *Vasquez-Benitez*, 919 F.3d 546, 551 (D.C. Cir. 2019); *United States v. Xulam*, 84 F.3d 441, 443 (D.C. Cir. 1996).

In determining whether the government has met that burden of persuasion, the statute requires the Court to consider certain factors outlined in Section 3142(g), namely: (1) the nature and circumstances of the offense charged; (2) the weight of the evidence against the person; (3) the history and characteristics of the person; and (4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release.

Ultimately, following careful consideration of Section 3142(g)'s four factors, as well as the rebuttable presumption that applies in this case, the Court concludes that the defense did successfully rebut the presumption. And from there, the Court finds that the government did not ultimately meet its burden to establish that no condition or combination of conditions will reasonably assure the safety of the community and Mr. Grabinski's further appearance in this case. Accordingly, the Court denies the Government's motion for pretrial detention and grants the Mr. Grabinski's request for pretrial release on specified conditions. The Court addresses each of the relevant considerations and factors in the sections that follow.

Rebuttable Presumption

As noted, everyone agrees that this case triggers a rebuttable presumption in favor of pretrial detention, *see* 18 U.S.C. § 3142(e)(3)(C), and the Court is aligned with that starting premise. But the Court finds that Mr. Grabinski successfully rebutted that presumption.

Although the legal threshold for rebutting a statutory presumption in favor of detention does not lend itself to bright lines, the D.C. Circuit has explained that it requires "some credible evidence contrary to the statutory presumption." *United States v. Alatishe*, 768 F.2d 364, 371 (D.C.

Cir. 1985); *United States v. Dabney*, 2020 WL 1867750, at *2 (D.D.C. Apr. 13, 2020) (K.B. Jackson, J.) (finding presumption rebutted where the defendant had no criminal history, among other factors). Here, the Court finds that Mr. Grabinski satisfied his burden of production to rebut the statutory presumption. One relevant consideration is the fact that he has no prior criminal history, certainly nothing that either side brought to the Court's attention. But more importantly, the Court considered the circumstances of Mr. Grabinski's conduct during the approximately one-week period that he was out of custody—when he was not subject to any restrictions or conditions of release following the dismissal of his original case.

Despite those circumstances, Mr. Grabinski did not flee or leave the District of Columbia. He did not commit any new offenses. He did not return to the Chinese Embassy location (where the offense conduct allegedly took place). And he did not engage in any other behavior that the Government invokes as a basis to argue for his criminal detention, whether on dangerousness grounds or otherwise. To the contrary, as his counsel reports—and as the Government does not dispute—he remained in D.C., he stayed in touch with counsel, he visited the Department of Veterans Affairs to seek assistance with housing and other benefits, and, upon learning about the new indictment and arrest warrant, he promptly and voluntarily surrendered to the custody of the U.S. Marshals Service that same day.

All these things, in the Court's view, operate to rebut any presumption of flight risk and/or danger to the community; after all, if Mr. Grabinski were going to reprise the conduct he is charged with (including toward the Chinese Embassy) or flee, one expects he would have seized the window of opportunity that he had while released from custody. He did none of those things. To the contrary, based on the information before the Court, Mr. Grabinski comported himself responsibly and in a manner inconsistent with an application of the default presumption here.

As noted, the presumption does not disappear entirely, of course. But Mr. Grabinski's rebuttal prompts the Court to turn to the Section 3142(g) factors to determine whether the Government met its burden of persuasion based on all the facts and circumstances before the Court.

Nature and Circumstances of the Offense

As the Court said on the record, this factor tends to support pretrial detention. These are serious charges. As Judge Leon put it in his recent dismissal ruling, "the alleged facts are serious; if proven, they reflect a premeditated plan to throw a Molotov cocktail at a foreign embassy." *United States v. Grabinski*, No. 22-cr-221, Dkt. 56, Mem. Opinion at 9 (Jan. 14, 2025). The undersigned agrees. As the Government correctly points out, the Mr. Grabinski's actions at the Chinese Embassy on June 9, 2022, do not appear to have been a spur-of-the-moment or spontaneous decision; rather, Mr. Grabinski reportedly traveled from Chicago to Washington, DC for these purposes, and he visited the Embassy on at least one occasion before throwing the alleged Molotov cocktail device[2] over the Embassy's wall. Moreover, as the Government notes, the offense is arguably more serious given that the intended target was a foreign embassy because if the roles were reversed—*i.e.*, if a criminal defendant abroad targeted a U.S. embassy with similar conduct—the United States would want that offense treated seriously for purposes of protecting its own citizens abroad.

There are a few mitigating circumstances as to this factor, some of which defense counsel highlighted in briefing and at argument. For one, the device thankfully did not detonate, explode, or even catch fire. Mr. Grabinski seemingly gave up after a few tries and tossed it over the wall anyway, unlit. This fact somewhat distinguishes this case from some other recent, and somewhat

[2] The Court understands there is a factual dispute about the nature, characteristics, functionality, and/or efficacy of the object(s) Mr. Grabinski is charged with throwing. The undersigned expresses no view about those competing arguments but simply follows the parties' lead in using the term "Molotov cocktail."

analogous, matters (including *Nesmith* and *Hinton*, discussed more below). The Court certainly does not mean to minimize the charged conduct here, but the undersigned believes that Mr. Grabinski's lack of success renders this case somewhat less serious than if he had persisted in trying to light the device—and succeeded in lighting the device—before throwing it.

Further, as the Court addressed on the record, although Mr. Grabinski is accused of engaging in these actions during daytime hours (around 7:00 AM), at a time when bystanders and others were more likely to be present (versus the 1:00 AM timeframe of his prior visit), the Court was not presented with any information to suggest that Mr. Grabinski was targeting people or trying to harm anyone personally in connection with the charged conduct. Rather, as the defense argues, the specific circumstances of his charged actions are in some ways a bit more consistent with protest activity than conduct aimed at harming anyone—albeit quite serious either way.

In sum, the Court concludes that, although there are points that tilt in Mr. Grabinski's favor on this element, this factor on balance favors pretrial detention.

Weight of the Evidence

This factor likewise favors pretrial detention, as the Government argues.

For one thing, the Government has video footage of Mr. Grabinski outside the Chinese Embassy on multiple occasions, including on the date and the approximate time of the charged conduct. The Government also points to strong physical evidence linking Mr. Grabinski to the offense, including a sock recovered from the scene that matches the type of other socks recovered from Mr. Grabinski, a lighter recovered on Mr. Grabinski, broken bottle fragments recovered from the scene, and more. There are also Mr. Grabinski's statements to law enforcement. The morning of the charged offense, Mr. Grabinski stated—in law enforcement's presence—that "[he] tried to light it, but it didn't work, so [he] just threw it." Further, a week or so earlier, he reportedly threw

a rock over the Embassy wall and shouted to a special police officer, "Next time, it's going to be a firebomb." Mr. Grabinski previously moved to suppress these statements, but Judge Leon denied that motion, meaning that the evidence ought to be fair game for the Government moving forward. *United States v. Grabinski*, No. 22-cr-221, Dkt. 54, Mem. Opinion (Dec. 30, 2024).

In response, the defense largely focuses on its arguments surrounding whether the device that Mr. Grabinski is accused of throwing was in fact an "explosive" device. As noted during the hearing, the Court need not resolve that issue. If the defense argument finds meaningful support in the law, this could undercut the strength of the Government's case in part. But even that defense would only seem to apply to the Arson charge, as the Destruction of Property Used by Foreign Governments would not require the use of an explosive device to trigger a violation of the statute.

History and Characteristics of the Defendant

Mr. Grabinski's history and characteristic, on the other hand, favor release.

The Court starts with the types of information that is typically relevant and considered in connection with this element. Mr. Grabinski has no criminal history, at least none that has been brought to the Court's attention. He is a military veteran who served our Nation, including in combat zones. And although he was previously without significant family contact, counsel reports that he recently reestablished contact with his family, who live outside the area.

For its part, the Government argues that Mr. Grabinski's history reflects "an escalation in criminal behavior." In support, the Government points to a two prior instances in 2016 and 2017 when Mr. Grabinski posted comments, including through Facebook messenger, directed at the White House and others. Further, the Government points to comments he supposedly made to law enforcement in August 2018—nearly four years before the date of the offense conduct here—about wanting to "blow up the Chinese Embassy." Years later, Mr. Grabinski traveled to Washington,

DC, and is alleged to have visited the Embassy on two occasions and culminating with him allegedly throwing the device at issue in June 2022. The Court agrees that, based on the history to this point, Mr. Grabinski's conduct can fairly be described as "escalating," at least to some degree.

But the Court balances all that against a much more recent—and in the Court's eyes, far more relevant—datapoint: Mr. Grabinski's behavior during the period of his release last month. On that front, the Court finds relevant both Mr. Grabinski's inactions and his actions. Start with the inactions. During the approximately one week that he was released from custody—with no restrictions or conditions placed upon him—Mr. Grabinski is not accused of engaging in any new criminal or even arguably dangerous conduct. He is not accused of going anywhere near the Chinese Embassy. He did not attempt to flee or abscond from the D.C. area. To the contrary, as his counsel reports, he acted to: (1) reconnect with his family; (2) stay in regular touch with counsel about the status of any re-indicted charges; and (3) seek help from the VA based on his veteran's status for housing assistance and other potential benefits. Moreover, upon learning about the new indictment and arrest warrant, Mr. Grabinski promptly surrendered to U.S. Marshals the same day.

As the Court explained on the record, the brief period encompassing Mr. Grabinski's release between his prior case and the current case is a relatively rare occurrence—one that offers a particularly relevant window into a defendant's nature and characteristics. Courts do not often get this sort of real-world "test case" to observe how a defendant might behave if released, but the Court has that information here. And it is meaningful in the Court's eyes.

The Government argues that the absence of any new troubling conduct during that period should hardly be a surprise because it coincided with the Inauguration activities in Washington, DC, with all of the additional security and police presence that such an event brings with it. As the Government put it, these relatively unusual dynamics would have been a deterrent to Mr.

Grabinski, such that the Court should not put much stock into his behavior over that period. In the Court's view, the opposite takeaway is arguably just as true—especially considering the nature of the charges here, which focus on governmental actors and foreign officials. In fact, Chinese Vice President Han Zheng personally attended the Inauguration, marking the first time a senior Chinese leader attended a new U.S. President's swearing-in ceremony, at least according to reporting.[3] Simply put, the applicable climate in Washington, DC in mid-January 2025 would arguably have been more likely to trigger dangerous conduct by Mr. Grabinski, not less likely, and so the Court finds that argument largely unpersuasive.

All told, the Court concludes that Mr. Grabinski's history and characteristics support his release pending trial, particularly with conditions the Court can fashion (as described below).

Nature and Seriousness of Danger Posed by Release.

Finally, the Court finds that consideration of the nature and seriousness of the danger that would arguably be posed by Mr. Grabinski's release does not support pretrial detention.

As a starting point, the Court is mindful that this case implicates a statutory presumption, which remains relevant to the analysis even after Mr. Grabinski has rebutted it. But for many of the reasons discussed already, the Court believes that any risk of danger here can be mitigated by conditions of release the Court—in conjunction with counsel and Pretrial Services—can shape.

On this issue, the Court's analysis necessarily focuses on whether "the defendant's history, characteristics, and alleged criminal conduct make clear that he or she poses a concrete, *prospective* threat to public safety." *Munchel*, 991 F.3d at 1279–80. In other words, this is a forward-looking assessment based on information before the Court at the time of its decision.

[3] See NBC News, *China says it will send it vice president to Trump's inauguration*, https://www.nbcnews.com/news/world/china-vice-president-han-zheng-trump-inauguration-rcna188083.

Viewed through that lens, the Court puts great weight on Mr. Grabinski's behavior—both the things he did do and the things he did not do—while he was released for a period in January 2025. Again, he did not flee. He is not alleged to have engaged in any new criminal conduct or dangerous conduct or even inappropriate conduct—there was no argument made to that effect. Instead, he took positive steps that reflect an effort to move forward productively, including contacting family, staying in touch with counsel, pursuing housing assistance and other benefits from the VA, and—arguably most importantly—turning himself in voluntarily when he learned of the new indictment and arrest warrant.

That backdrop does not paint a picture of dangerousness or flight; it paints the opposite picture. And that was during a time when Mr. Grabinski was not subject to any court-ordered conditions that could subject him to additional penalties, criminal charges, and other consequences if he were to violate them—conditions the Court can impose now. The Court turns to those next.

The Court believes the following conditions of release can reasonably assure the safety of the community and Mr. Grabinski's appearance at future proceedings (these are spelled out in detail in the Court's Order Setting Conditions of Release, but the Court gives the high points here):

- Mr. Grabinski must report to Pretrial Services within 24 hours of his release.
- Mr. Grabinski should stay in the DC area until the conclusion of this case.
- Mr. Grabinski will be subject to GPS monitoring by Pretrial Services; as a condition of release, he must keep his GPS monitor appropriately charged and active at all times.
- Mr. Grabinski must stay at least a half-mile away from the Chinese Embassy at all times, as well as stay away from any future events in Washington, DC related to the People's Republic of China and/or their dignitaries.
- Mr. Grabinski will be required to personally check in with the Federal Public Defenders office on a daily basis during weekdays (Monday through Friday).
- If Mr. Grabinski secures a cell phone, as he suggested he would likely be able to do, he must immediately report that to his counsel and Pretrial Services, to allow Pretrial to consider whether any of the monitoring conditions should be revisited as a result.

The Court imposed other standard conditions, as well.

During the hearing, the Court asked the Government whether it would seek any additional conditions of release (or modification to any of these conditions) during the hearing, recognizing of course that the Government opposed release as a general matter. The Government offered none.

The Government's main argument as to why Mr. Grabinski's proposed conditions for release were insufficient is that he did not have a third-party custodian and a stable residence. Those points are true as far as they go. And the Court recognizes that the appointment of a qualified third-party custodian can be an important factor in crafting effective conditions of release in certain cases. But in the Court's view, that presence or absence of a third-party custodian cannot operate as the be-all-end-all of release decisions because the reality is that not all criminal defendants have the familial, financial, and other resources to offer such a concrete plan for release.

Mr. Grabinski is among them. He is unhoused and he has no concrete family ties in Washington, DC; his family is reportedly located in the Chicago area. But the mere fact that he is unhoused should not be a basis to deny him release. If that were so, then it would mean that a Court could never release an unhoused person, and that sort of categorical, inflexible rule would run contrary to the balancing factors that are prescribed by the Bail Reform Act.

In this case, given the other conditions imposed by the Court—including daily weekday check-ins at the Federal Public Defender's office, GPS monitoring, and stay-away orders from the Chinese Embassy and related events and gatherings—the Court believes Mr. Grabinski can be released on terms that will reasonably assure his appearance and the safety of the community.

As a final point, the Court pauses to address a few other cases involving similar charges—some quite recent—in which the defendants were released pending trial. These cases were cited in the defense memorandum arguing for release. In *United States v. Nesmith*, Case No. 20-cr-156,

Judge Boasberg reversed a detention order in a case where the defendant was charged with one count of Arson under the same statute, based on a claim that he threw a lit Molotov cocktail at a police cruiser; according to the motion for detention, the defendant then fled on foot before police apprehended him, and he had several prior convictions. The defendant was released on conditions. In *United States v. Hinton*, No. 25-cr-26, the defendant was charged for driving his vehicle into the area of the U.S. Capitol and then lighting the roof of the car on fire using what he believed was an accelerant. He quickly acquiesced to law enforcement and did not flee or resist arrest, and he had no meaningful criminal history. The defendant was released on conditions. And in *United States v. Olson*, No. 24-cr-550, the defendant attempted to enter the U.S. Capital Visitor Center with a torch, a flare gun, and two bottles filled with gasoline. The defendant was released on conditions (the Government in fact did not seek detention). Obviously, there are at least some differentiating factors between those cases and the case at hand—that will always be true to some extent. But the substantial overlap of many factors, and the fact that all those defendants were released, bears on the Court's analysis.

The Court recognizes that in two of those cases, the Court ordered some variation of home detention with monitoring, which sets the conditions here apart somewhat. But for the reasons explained, this is not an option for Mr. Grabinski. Instead, the Court has ordered GPS monitoring and regular (daily during the week) check-ins with counsel, which the Court believes will reasonably help to police his compliance. Further, the Court notes that several facts that arguably pointed against release in those other cases that are not present here. For instance, in both *Nesmith* and *Hinton*, the defendants actually lit the objects used in the offense—which increased the risk of injury (or worse) to bystanders and the public—whereas Mr. Grabinski never lit the items he threw into the Embassy. Further, in *Nesmith*, the defendant initially fled from police and had a criminal

history, neither of which is true for Mr. Grabinski. And in *Olson*, although the defendant never attempted to trigger or detonate the items he tried to bring into the Capitol, his possession of a flare gun and gasoline is arguably more serious than the items that Mr. Grabinski is charged with using.

Finally—and to return to one of the most important points underlying the Court's decision—none of those cases offered a glimpse into how those other defendants would actually behave if released. Would they attempt to flee? Would they pose a danger? The Court was provided with that relatively unusual sightline here during the period that Mr. Grabinski was released with no restrictions. Based on the information before the Court, Mr. Grabinski comported himself as the Court would expect he should upon release. And upon release at this juncture, he will be subject to a Court order and serious consequences if he fails to comply with his myriad conditions.

* * *

The Court concludes that Mr. Grabinski rebutted the presumption of detention, and that the Government failed to establish by clear and convincing evidence that no combination of conditions can reasonably assure the safety of the community or by a preponderance of the evidence that Mr. Grabinski will appear as required. So the Court **DENIES** the Government's motion for detention and orders that Mr. Grabinski be released on conditions.

At the conclusion of the hearing, the Government asked the Court to stay Mr. Grabinski's release while the Government appeals. The Court agreed to stay its order until February 6, 2025, to allow the Government to file its appeal. Any further stay falls to the discretion of Judge Leon.

Dated: February 5, 2025

MATTHEW J. SHARBAUGH
United States Magistrate Judge