Legislative Affairs
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**2019 – 2020 Legislative Memorandum**

**Subject:** **Double Jeopardy**
**A.6653 (Lentol) / S.4572 (Kaminsky)**

**Position:** **OPPOSE**

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Since this country's founding, people in the United States have relied on double jeopardy protections to shield individual liberty and guard against government harassment and overreach.[1] After the Supreme Court undermined constitutional double jeopardy protections by introducing the concept of dual sovereignty,[2] permitting successive state and federal prosecutions based on the same crime,[3] New York wisely adopted strong statutory double jeopardy protections superseding dual sovereignty[4] and prohibiting "a second prosecution if the defendant has been once tried by another government for a similar offense."[5]

This legislation would undermine New York's model double jeopardy statute to give effect to short-term political gratification. The NYCLU opposes A.6653/S.4572 and urges lawmakers to reject it.

Double jeopardy protections reflect the principle "that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him [sic] to embarrassment, expense, and ordeal and compelling him [sic] to live in a continuing state of anxiety and insecurity . . ."[6]

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[1] *See* 3 Joseph Storey, *Commentaries on the Constitution of the United States*, § 1774, at 653 – 54 (Boston, Hillard, Gray, and Co. 1833).

[2] *See generally* Amicus Brief of Const. Accountability Ctr, Cato Inst., & Am. Civ. Liberties Union, *Gamble v. United States*, No. 17-646 (2018), https://www.aclu.org/legal-document/gamble-merits-brief.

[3] *See United States v. Lanza*, 260 U.S. 377 (1922).

[4] *See* N.Y. CRIM. PROC. LAW § 40.20 et seq.

[5] *Bartkus v. People of State of Ill.*, 359 U.S. 121, 138 (1959).

[6] *Green v. United States*, 355 U.S. 184, 187 – 88 (1957).

A.6653/S.4572 would eliminate New York's strong statutory double jeopardy protections for a specified class of individuals who have received a presidential pardon, reprieve, or clemency. This includes people who have worked for or are related to the president who grants the pardon, reprieve, or clemency; people who have acted in concert with those who worked for or are related to the pardoning president; anyone pardoned, reprieved, or granted clemency for an action that benefits the pardoning president; and anyone whose pardon, reprieve, or clemency benefits the president who grants it.[7]

Mr. Trump's campaign and tenure in the White House have produced a remarkable number of indictments, plea deals, and convictions for unsavory behavior.[8] Given the prospect that Mr. Trump may pardon individuals who have been convicted of or pled guilty to conspiracy and other crimes that undermine democracy,[9] the impulse to empower New York to prosecute for these crimes is perhaps understandable. However, the short-term satisfaction derived from these individual cases is not worth the long-term damage this measure will do to New York's critical protections for all people accused of crimes.

A.6653/S.4572 is not – and, indeed, could not be[10] – restricted to individuals who serve in the current administration. Long after Mr. Trump is out of office, individuals related to a president or serving in a presidential administration will be specially excluded from double jeopardy protections in New York. Had fortunes turned out differently, A.6654/S.4572 could just as easily have been proposed and used during a Hillary Clinton administration by those calling to "lock her up."

This misguided legislation could also lead to further erosion of New York's statutory double jeopardy protections, laying the path for those who wish to carve out

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[7] A.6653 § 1, 2019-2020 Reg. Sess. (N.Y. 2019).

[8] *See generally* Andrew Prokop, *All of Robert Mueller's indictments and plea deals in the Russia investigation so far. That we know of*, VOX, Jan. 25, 2019, https://www.vox.com/policy-and-politics/2018/2/20/17031772/mueller-indictments-grand-jury; Spencer S. Hsu, Rachel Weiner, & Ann E. Marimow, *Paul Manafort sentenced to a total of 7.5 years in prison for conspiracy and fraud, and charged with mortgage fraud in N.Y.*, WASH. POST, Mar. 13, 2019, https://www.washingtonpost.com/local/legal-issues/paul-manafort-faces-sentencing-in-washington-in-mueller-special-counsel-case/2019/03/12/d4d55dd4-44d0-11e9-aaf8-4512a6fe3439_story.html.

[9] *See generally See* Christopher Dunn, *Trump Pardon Power: Any Constitutional Limits?*, N.Y. L. J., June 6, 2018, https://www.law.com/newyorklawjournal/2018/06/06/trump-pardon-power-any-constitutional-limits/; Amanda Shanor, *No, President Trump, You Are Not Above the Law*, ACLU SPEAK FREELY, June 18, 2018, https://www.aclu.org/blog/executive-branch/no-president-trump-you-are-not-above-law.

[10] The federal constitution prohibits bills of attainder, U.S. Const. art. I, § 10, cl. 1, which are "act[s that] impermissibly designate[] an individual or an easily identifiable group and then proceed[] to punish that person or group," *United Nuclear Corp. v. Cannon*, 553 F. Supp. 1220, 1227 (D.R.I. 1982).

other categories of individuals from our state law's important safeguards. Even the way New York's robust double jeopardy protections are now being described by the bill's proponents – as "loopholes" – threatens to undermine the law's critical protections for all defendants.[11]

Not only is the bill troubling as a matter of policy, but it gives rise to constitutional concerns. If a court were to find that the enacted legislation "impermissibly designates . . . an easily identifiable group,"[12] it would almost certainly fall as a violation of the U.S. Constitution's bill of attainder clause. In that analysis, three factors determine whether an act that designates an identifiable group "proceeds to punish that . . . group."[13] An evaluating court is to consider "(i) whether the legislation safeguards the public interest; (ii) the motivations of the legislature in enacting the statute; and (iii) if there is an apparent unambiguous infliction of punishment, whether a less burdensome alternative exists."[14]

The bill certainly purports to advance a laudable public interest in redressing public corruption, deterring future corruption, and ameliorating "instances where a [p]residential pardon represents a . . . conflict of interest."[15] However, the motivations of the legislature, as illustrated in numerous press articles and public statements,[16] are unambiguously aimed at punishing Mr. Trump's entourage,[17] and less burdensome alternatives to the legislation clearly exist.[18]

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[11] *See* Sam Bieler, *We Must Hurt Trump; Ergo We Must Hurt. . .*, SIMPLE JUSTICE, Mar. 14, 2019, https://blog.simplejustice.us/2019/03/14/bieler-we-must-hurt-trump-ergo-we-must-hurt/ . ("[T]he entire proposal taints how defendants' rights are fought for and discussed. Look at how CPL § 40.20 is being described. It's . . . a 'loophole.' You know, just like those damn drug dealers getting off on 'technicalities.' (It's the Fourth Amendment. . . .)").

[12] *United Nuclear Corp. v. Cannon*, 553 F. Supp. 1220, 1227 (D.R.I. 1982).

[13] *Id*.

[14] *Id*. (summarizing the holding of *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425 (1977)).

[15] MEMORANDUM IN SUPPORT OF LEGISLATION, A.6553, 2019-2020 Reg. Sess. (N.Y. 2019); MEMORANDUM IN SUPPORT OF LEGISLATION, S.4572, 2019-2020 Reg. Sess. (N.Y. 2019).

[16] *E.g.* Dan M. Clark, *Effort to Close Double Jeopardy 'Loophole' in NY Revived in New Session*, N.Y. L. J., Jan. 3, 2019, https://www.law.com/newyorklawjournal/2019/01/03/effort-to-close-double-jeopardy-loophole-in-ny-revived-in-new-session/; Nick Reisman, *Cuomo Calls Double-Jeopardy Loophole Closure 'A Safeguard'*, STATE OF POLITICS, Mar. 18, 2019, https://www.nystateofpolitics.com/2019/03/cuomo-calls-double-jeopardy-loophole-closure-a-safeguard/.

[17] *Cf. Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 483 (1977) ("[A] full-fledged judicial inquiry . . . would be . . . punitive and intrusive . . .").

[18] For example, Sen. Kaminsky has also introduced S.85, which amends the definition of what it means to be "prosecuted" for the purposes of New York's statutory double jeopardy protections, S.85 § 1, 2019-2020 Reg. Sess. (N.Y. 2019), and bill sponsors professed a willingness to amend that bill to limit the crimes to which it applies in response to lawmaker concerns. *See* Dan M. Clark, *Effort to*

Additionally, the Supreme Court heard a case this term asking it to reconsider the dual sovereignty exception to the federal constitution's double jeopardy clause.[19] It would be premature to legislatively undermine New York's statutory double jeopardy protections while this case is pending.

New York's strong statutory double jeopardy protections embody the commitment made in the federal and state constitutions: that individuals should not live in fear of vindictive government action that can wear them down and subject them to expense, embarrassment, anxiety, and insecurity by repeatedly trying them in different venues until they secure a conviction. New York should not undermine its important statutory safeguards for short-term political gain. The NYCLU urges the rapid defeat of A.6653/S.4572.

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*Close Double Jeopardy 'Loophole' in NY Revived in New Session*, note 17 *supra*. This memo takes no position on S.85.

[19] *Gamble v. United States*, No. 17-646 (argued Dec. 6, 2018).