

## **Response to NYCLU Legislative Memorandum Re: A.6653/S.4572**

The New York State Legislature is now considering Bill A.6653/S.4572 to prevent possible and perhaps previously unimagined presidential self-interested pardons of crimes that may arise under both federal and state law.<sup>1</sup> A.6653 would close a loophole in New York’s statutory double jeopardy provision that could allow presidents to pardon their family members and close associates and thereby prevent state prosecution. The New York Civil Liberties Union has circulated a legislative memorandum stating four arguments in opposition to the bill.<sup>2</sup> This memorandum responds to the NYCLU’s objections.

### I. The bill applies to future presidents.

The NYCLU argues that “A.6653/S.4572 is not . . . restricted to individuals who serve in the current administration.” We agree. The bill applies to pardons issued by *all* presidents, whether Democrats, Republicans, or otherwise. This is not a point against the bill, but rather in its favor.

### II. The legislature should not reject the bill because a future legislature might hypothetically pass unrelated bills in the future.

The NYCLU argues that the bill “could also lead to further erosion of New York’s statutory double jeopardy protections, laying the path for those who wish to carve out other categories of individuals from our state law’s important safeguards.” This is a slippery slope fallacy. The bill proposes to create an extremely narrow exception that can and should be evaluated on its merits. Hypothetical future bills proposing to create entirely different exceptions, if any such bills are ever proposed, can be evaluated on *their* merits.

### III. The bill is not a bill of attainder.

The NYCLU argues that the bill constitutes an unconstitutional bill of attainder. This argument is entirely meritless. The U.S. Supreme Court has defined a bill of attainder as “a law that legislatively determines guilt and inflicts punishment upon

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<sup>1</sup> A.6653, 2019–2020 Reg. Sess. (N.Y. 2019), [https://assembly.state.ny.us/leg/?default\\_fld=&leg\\_video=&bn=A06653&term=2019&Text=Y](https://assembly.state.ny.us/leg/?default_fld=&leg_video=&bn=A06653&term=2019&Text=Y).

<sup>2</sup> See NYCLU, *2019 – 2020 Legislative Memorandum: Double Jeopardy*, [https://www.nyclu.org/sites/default/files/field\\_documents/s4572kaminsky-a6653lentol\\_double\\_jeopardy\\_oppo\\_memo\\_-\\_crim\\_justice\\_2019.pdf](https://www.nyclu.org/sites/default/files/field_documents/s4572kaminsky-a6653lentol_double_jeopardy_oppo_memo_-_crim_justice_2019.pdf) (“NYCLU Memorandum”).

an identifiable individual without provision of the protections of a judicial trial.”<sup>3</sup> The Court applies this definition as a three-part test requiring all three requirements: “[1] specification of the affected persons, [2] punishment, and [3] lack of a judicial trial.”<sup>4</sup>

The NYCLU does not mention this three-part test, perhaps because it would end the argument before it even begins. It is dispositive that the bill manifestly does *not* revoke the right to trial. Any defendant who is charged in state court with a state offense would retain the full panoply of protections afforded by New York law and the state and federal constitutions. The NYCLU does not argue, because it cannot, that the bill would in any way deprive a single defendant anywhere in the state of a judicial trial.

The fact that the bill does not meet a critical part of a bill of attainder analysis—lack of judicial trial—ends any serious discussion of A.6653/S.4572 as a bill of attainder. However, in the interest of completeness, the bill *also* fails to meet the other two elements.

First, the bill does not designate a specifically identified group. This element requires that the bill applies to “named individuals or to easily ascertainable members of a group.”<sup>5</sup> But, as the Supreme Court has explained, legislatures do not violate the bill of attainder clause merely “whenever a law imposes undesired consequences on an individual or on a class that is not defined at a proper level of generality.”<sup>6</sup> Indeed, the Court has even upheld legislation that “refer[red] to [one individual] by name” because Congress sought to remedy a problem that required regulating only that one individual (President Nixon) who therefore constituted a “legitimate class of one.”<sup>7</sup> For the legitimate purpose of preventing presidential corruption, the bill applies to various persons connected to presidents. The law does not meet the specificity element merely because it applies to a defined class of people, like all laws that apply to some class of people. Indeed, NYCLU’s analysis

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<sup>3</sup> *Selective Serv. Sys. v. Minnesota Pub. Interest Research Grp.*, 468 U.S. 841, 846–47 (1984) (quoting *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 468 (1977)); *see also* *United States v. Lovett*, 328 U.S. 303, 321–22 (1946) (“The distinguishing characteristic of a bill of attainder is the substitution of legislative determination of guilt and legislative imposition of punishment for judicial finding and sentence.”).

<sup>4</sup> *Minnesota Pub. Interest Research Grp.*, 468 U.S. at 847.

<sup>5</sup> *Lovett*, 328 U.S. at 315.

<sup>6</sup> *Nixon*, 433 U.S. at 469–70.

<sup>7</sup> *Id.* at 472.

relies on a 1982 trial court decision from Rhode Island in which the court considered a bill that applied to a single named corporation—and rejected a bill of attainder claim for the exact same reason.<sup>8</sup>

Second, the bill does not impose any punishment. In establishing what constitutes a “punishment,” the Court has “recognized three necessary inquiries: (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes; and (3) whether the legislative record evinces a [legislative] intent to punish.”<sup>9</sup> None of these three inquiries render the bill an imposition of punishment.

1. The bill does not fall within the historical meaning of legislative punishment because it does not, in fact, impose any punishment. It simply removes a statutory barrier to prosecution in state court.
2. The bill has an obvious nonpunitive legislative purpose. As the NYCLU concedes, the bill “advance[s] a laudable public interest in redressing corruption, deterring future corruption, and ameliorating instances where a presidential pardon represents a conflict of interest.”<sup>10</sup> This conceded nonpunitive purpose is dispositive: “[t]he line of Supreme Court law on the Bill of Attainder Clause indicates that legislation will survive Bill of Attainder attack if the statute furthers nonpunitive legislative purposes.”<sup>11</sup>
3. Finally, the legislative record does not evince an intent to punish. The NYCLU claims that A6653 is “unambiguously aimed at punishing Mr. Trump’s entourage.”<sup>12</sup> Yet the only evidence it provides for this claim consists of two news articles citing stray remarks by a handful of

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<sup>8</sup> *United Nuclear Corp. v. Cannon*, 553 F. Supp. 1220, 1227 (D.R.I. 1982).

That case involved a bill that required a specifically named corporation to post a bond to cover the costs of nuclear decontamination. The court held that the specific designation was reasonable, noting that “singling out may be rational in certain circumstances, among these being situations in which an appropriate class of one exists,” and that the identified corporation ran “the only nuclear fuel processing plant in the state.” *Id.*

<sup>9</sup> *Minnesota Pub. Interest Research Grp.*, 468 U.S. at 852 (internal quotations removed).

<sup>10</sup> NYCLU Memorandum at 3 (internal quotation and punctuation removed).

<sup>11</sup> *Siegel v. Lyng*, 851 F.2d 412, 418 (D.C. Cir. 1988).

<sup>12</sup> NYCLU Memorandum at 3.

legislators and the governor. The Supreme Court has held that these types of remarks “do not constitute ‘the unmistakable evidence of punitive intent which ... is required before a [legislative] enactment of this kind may be struck down.’”<sup>13</sup>

Because the bill legitimately identifies a class, does not impose punishment, and does not limit the right to judicial trial, it does not meet *any* of the three required elements of a bill of attainder.

IV. The bill should not be delayed pending a decision on *Gamble v. United States*.

The NYCLU urges that the legislature defer consideration of this bill pending the Supreme Court’s consideration of *Gamble v. United States*.<sup>14</sup> That case asks the Court to reconsider its long-held separate sovereigns doctrine, under which separate federal and state prosecutions do not violate the U.S. Constitution’s Double Jeopardy Clause.

But this is simply stalling. In the unlikely event that the Supreme Court decides to change course and modify its precedent, state prosecutors can evaluate the contours of the decision and its legal implications for any particular prosecution. In the meantime, delay is irresponsible: as time moves on, statutes of limitations may approach, new federal prosecutions may begin, and new pardons may issue.

V. Conclusion

None of the NYCLU’s objections provide a basis to oppose the bill. We urge the legislature to pass A.6653/S.4572.

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<sup>13</sup> *Minnesota Pub. Interest Research Grp.*, 468 U.S. at 856 n.15 (quoting *Flemming v. Nestor*, 363 U.S. 603, 619 (1960)).

<sup>14</sup> No. 17-646 (U.S. Supreme Court argued Dec. 6, 2018).