

April 10, 2019

To: Members of the New York State Assembly and  
the New York State Senate

RE: Support for A.6653/S.4572

Our organizations, which collectively represent many thousands of New Yorkers, write in support of this narrowly-crafted bill that would restore the ability of New York State to hold a small number of individuals legally accountable.

The legislature has previously enacted various exceptions to its double jeopardy statute—twelve in all.<sup>1</sup> This bill adds a thirteenth.<sup>2</sup> The bill applies only to situations involving pardons that raise the prospect of presidential self-dealing.<sup>3</sup>

In a small number of cases, state prosecutors could demonstrate to the court by clear and convincing evidence that one of five categories applies: (1) the defendant worked as a White House or top political appointee, or for the president's campaign, transition, or business; (2) the defendant is the president's relative; (3) the defendant was a co-conspirator with someone in the first two categories; (4) the president derived a legal benefit, such as avoiding his own prosecution, from the pardon; or (5) the defendant has material information about the liability of the president, his top aides, or his relatives. In those cases, state prosecution would be allowed notwithstanding the federal clemency. (Of course, the defendant would retain all other protections of New York law, and prosecutors would need to prove that the defendant committed the crime beyond a reasonable doubt.)

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<sup>1</sup> See *id.* §§ 40.20(2)(a)-(i), 40.30(2)-(4).

<sup>2</sup> See N.Y. Crim. Proc. Law. § 40.30(2)(b).

<sup>3</sup> While an earlier version of the proposed legislation would have allowed state prosecution of any defendant who received presidential clemency within five years of conviction, the bill's sponsors have worked with the Speaker of the Assembly to narrow its applicability.

The vast majority of the (few) New Yorkers who might receive a presidential pardon for a federal crime would not be affected by this bill. Rather, this narrowly-targeted legislation would apply only in the case of self-dealing presidential pardons to family, political aides, business associates, and potential adverse witnesses.

It is true that the need for this legislation has arisen because of specific concerns about President Donald Trump. But this legislation is not just about the present moment. Future presidents, whether Democrats, Republicans, or neither, may yield to the same temptations. Under current New York state law, the president can not only pardon *federal* crimes, but may also (contrary to principles of federalism) hold the de facto power to pardon *state* crimes committed by his or her own relatives, associates, and cronies. It strains credibility to suggest that this was the intention of the legislature that enacted the double jeopardy statute.

Finally, this bill would not violate the U.S. Constitution's Ex Post Facto Clause.<sup>4</sup> Section 2 of the bill specifies that it only applies in two situations.

First, it applies to "offenses committed on or after" the effective date. Obviously, there is no ex post facto issue with respect to crimes that have not yet occurred.

Second, it applies to offenses that were committed before the effective date, but which have not yet been prosecuted in any court in the United States. This application also does not pose an ex post facto problem. The bill does not change the definition of the underlying state crimes, does not aggravate the underlying state crimes, does not increase the underlying state crimes' punishment relative to when they were committed, and does not reduce the quantum of evidence necessary to convict the offender.<sup>5</sup> Furthermore, it is absurd to claim that an individual, at the time of committing a crime, has a reliance interest in

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<sup>4</sup> See U.S. Const. art. I, § 10, cl. 1.

<sup>5</sup> Cf. *Stogner v. California*, 539 U.S. 607, 612 (2003).

the prospect of receiving a presidential pardon that would also act as a de facto state pardon.

Not for the first time, matters of national importance fall on the Empire State. The proposed bill is a narrowly crafted solution to a problem that the legislature can fix without endangering broader statutory double jeopardy protections. The bill makes sense regardless of the political leanings of any particular president. We urge the legislature to enact A.6653/S.4572 and close this gap in the law, and would be happy to arrange to meet with you to discuss this further.

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