



MIKE HUNTER  
ATTORNEY GENERAL

April 15, 2019

Attorney General William Barr  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

Dear Attorney General Barr:

For the past year, I have publicly supported the effort to secure a presidential pardon for former Army First Lieutenant Michael Behenna, an Oklahoma native. Behenna was released from prison in 2014 after serving five years in prison for shooting a suspected terrorist in Iraq while attempting to track down those responsible for an IED that killed two of his men. In a letter to President Trump sent last year, I explained why Behenna's case deserved, at minimum, careful consideration for a pardon. That letter is attached, along with a follow-up letter I am sending to President Trump today.

I am writing you because I am concerned that the Department of Justice (DOJ) procedures for handling pardon requests unduly inhibit the President's constitutional pardon power. As you know, Article II, Section 2 of the Constitution gives the President nearly absolute authority to "grant Reprieves and Pardons for Offences against the United States." Despite this extremely broad bestowal of power, DOJ regulations severely restrict those who can officially apply for pardons. Perhaps most significantly, the regulations state that "[n]o petition for pardon should be filed until the expiration of a waiting period of at least five years after the date of release of the petitioner from confinement" and that "no petition should be submitted by a person who is on probation, parole, or supervised release." 28 C.F.R. § 1.2. This prevents a large segment of eligible persons from officially applying for a pardon. All of the nearly 200,000 inmates currently incarcerated are excluded, for example, as are numerous released individuals. And persons serving life sentences, though unlikely candidates for pardon, appear to be completely barred from applying, ever. The more fortunate still must wait years to apply, even if they are out of prison and behaving in an exemplary fashion. Mr. Behenna, for example, was informed by the DOJ that he cannot apply until 2024—even though he was released in 2014—because he is still on parole.

These limitations have no basis in the text or history of the Constitution. The Framers did not restrict the pardon power this drastically; indeed, they barely restricted it at all. The President has wide discretion on how to exercise his pardon power, of course. But enshrining these significant limitations

into the Code of Federal Regulations goes beyond that, in that it officially closes the avenue by which the vast majority of those who would otherwise be pardon-eligible can even apply, and it facially binds all future administrations. Presidential practice has not acquiesced to these restrictions, either. Rather, presidents have repeatedly pardoned those outside the current regulations' eligibility requirements.

To be sure, the DOJ website emphasizes that the regulations “are advisory only.” But in reality, it is virtually beyond dispute that: (1) the regulations *do* bind the DOJ, internally; and (2) the DOJ is the only place where official applications for pardon can be submitted.<sup>1</sup> Moreover, the DOJ website states that “[c]orrespondence sent directly to the White House ... concerning the President’s executive clemency power is forwarded to [the DOJ] for an official response.” So even if applicants want to petition the President directly to exercise his authority, it’s not clear how they are supposed to do so given that their mail will (apparently) be immediately shuffled back to the DOJ. Thus, again, these regulations and DOJ practice effectively bar hundreds of thousands of eligible persons from seeking a pardon. That the President may of his own personal effort—without the assistance of his administration—identify candidates does not change the rather obvious fact that these regulations unduly interfere with the President’s pardon power. The regulations act as a practical impediment to his constitutional prerogative by unreasonably and arbitrarily refusing to even consider legitimate applicants like Mr. Behenna, shutting them out before they ever reach the White House gates.<sup>2</sup>

Put differently, the current regulations encourage disorder, rather than order, by requiring most aspiring applicants—at least, those who don’t just give up—to ignore the DOJ and attempt to find a creative way to get to the President directly. This can lead to the undeniable impression that only those with elite political contacts and influence are able to obtain a pardon.<sup>3</sup> Nor is this barrier to access based on the merits of the applicant, but rather based on arbitrary time restrictions that in large part

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<sup>1</sup> Federal courts have indicated that the DOJ regulations do indeed cover (and restrict) all potential applicants for a pardon. See *United States v. Vogel*, No. 4:08-CR-224(1), 2010 WL 11636634, at \*2 (E.D. Tex. Jan. 8, 2010) (“[A]ccording to federal regulations governing petitions for executive clemency, Vogel does not appear eligible to seek a presidential pardon [pre-trial.]”); *In re Grand Jury Subpoenas*, 179 F. Supp. 2d 270, 289 (S.D.N.Y. 2001) (“If [Marc] Rich’s interpretation were correct, every pardon applicant could circumvent the Department of Justice by submitting the pardon petition ‘directly’ to the White House. ... [T]he language of § 1.1 suggests it applies to all pardon petitions. It contains no limitations. ... It makes no sense [to argue] that individuals who seek a pardon before they are convicted are free to follow whatever procedures they wish.”).

<sup>2</sup> It is also of no avail that the DOJ apparently grants “waivers” to these restrictions, given that the waivers are “infrequently granted” (to quote the DOJ’s response to Mr. Behenna), the waivers are not expressly contemplated by the regulations, and the waivers are not explained in any detail, even in the FAQ section of the DOJ website. Arbitrariness is not a sign of a healthy system.

<sup>3</sup> See, e.g., *In re Grand Jury Subpoenas*, 179 F. Supp. 2d at 273 (“The pardons [of Marc Rich and Pincus Green] were highly controversial and generated much public outcry ... the pardon petition was submitted directly to the White House, with no notice to the prosecutors who had brought the charges or to the Pardon Attorney at the Department of Justice.”).

frustrate the purpose of the pardon power: to extend mercy and correct the rare but unfortunately injustices in our system. I would strongly encourage you to withdraw or amend the current regulations to better reflect the President's broad pardon power under the Constitution. Some regulations, obviously, are going to be necessary. But regulations that effectively eliminate the ability of many of those eligible to even apply for a pardon through official channels are contrary to the Constitution's design and wrongly restrict the President's ability to be merciful.

Sincerely,

A handwritten signature in black ink that reads "Mike Hunter". The signature is written in a cursive, slightly stylized font.

Mike Hunter  
Attorney General



MIKE HUNTER  
ATTORNEY GENERAL

April 15, 2019

President Donald J. Trump  
The White House  
1600 Pennsylvania Avenue NW  
Washington, D.C. 20500

Dear President Trump,

Early last year, I wrote you to express my support for the pardon of former Army First Lieutenant Michael Behenna.

I want to re-emphasize my full support for Behenna's pardon. Thus, I have attached my earlier letter on his behalf. I also want to alert you to significant concerns I have about the current federal regulations—and federal practice—governing the official pardon application process. As I have detailed in a letter to Attorney General Barr, I believe the federal regulations unduly restrict your broad constitutional power to show mercy and issue pardons. I have attached that letter as well.

Thank you for your consideration, and please reach out to me if you have any questions.

Sincerely,

A handwritten signature in black ink that reads "Mike Hunter".

Mike Hunter  
Oklahoma Attorney General



MIKE HUNTER  
ATTORNEY GENERAL

February 7, 2018

President Donald J. Trump  
The White House  
1600 Pennsylvania Avenue NW  
Washington, D.C. 20500

Dear President Trump,

I write you today to voice my support for a pardon of former Army First Lieutenant Michael Behenna. Nearly a decade ago, Behenna was convicted and sent to prison for shooting a suspected terrorist in Iraq while attempting to track down those responsible for an IED that killed two of the men in his unit. Some of Behenna's actions leading up to the shooting were undoubtedly wrong and condemnable. But that does not mean he deserves the label "murderer," or the lifelong punishment and stigma that come with being a federal criminal. Indeed, there are several critical factors that point toward him deserving a pardon for his conviction.

First and foremost, Behenna's original court-martial was unfortunately handled. All five judges on the U.S. Court of Appeals for the Armed Forces agreed that the trial judge gave an erroneous and confusing jury instruction on Behenna's right to act in self-defense, a key issue at trial. What's more, the government prosecutors failed in their duty to turn over exculpatory evidence to Behenna's defense team in a timely manner—evidence showing that the government's own renowned expert changed his mind and agreed with Behenna (and his two forensic experts) regarding self-defense and how the events on that tragic day unfolded.

Second, it is undisputed that the events in question took place during wartime, when Behenna was serving in Iraq, risking his life to serve our great country, and attempting to track down terrorists responsible for killing two American soldiers under his command. These facts are meaningful, especially when stacked on top of the critical errors made in Behenna's court martial. Simply put, American troops risking their lives in war to protect us deserve a better legal process than the hand that was dealt to Behenna.

Third, Behenna has already paid dearly for his actions leading up to the shooting. Before he was released on parole in 2014, he spent five years behind bars, in the prime of his life. He was an exemplary inmate for that entire time, leading to a parole grant at the earliest date possible. Moreover, he is remorseful for his conduct. This should be taken into account when deciding whether his punishment outside of prison should continue indefinitely.

For these reasons, I believe a pardon for Behenna is deserved. At minimum, I encourage you to take close look at this case, and ask yourself: Does this situation—with incorrect jury instructions on a key issue and unlawfully withheld evidence—really display the type of justice we believe is appropriate for an otherwise outstanding soldier who was attempting to protect his country and his fellow soldiers from terror attacks?

Sincerely,

A handwritten signature in black ink that reads "Mike Hunter". The signature is written in a cursive, slightly stylized font.

Mike Hunter

Attorney General