



The Attorney General

Washington, D.C. 20530

May 6, 1981

The Honorable George Bush
President of the Senate
United States Senate
Washington, D. C. 20510

Dear Mr. President:

I wish to inform the Senate pursuant to P.L. 96-397 that the Department of Justice will not defend the constitutionality of Section 402(a)(19)(A)(vi) of the Social Security Act, 42 U.S.C. §602(a)(19)(A)(vi), challenged in Conley v. Schweiker (D. Mass., Civil No. 80-2735-MC).

This case is a state-wide class action challenging the constitutionality of Section 402(a)(19)(A)(vi), 42 U.S.C. §602(a)(19)(A)(vi), which provides that every individual, as a condition of eligibility for the receipt of benefits, shall register for manpower services, training and employment unless the individual is the mother or other female caretaker of a child if the father or other male caretaker is in the home and otherwise not excluded. Thus, under the statute, a mother or other female caretaker of a child need not register for employment related activities as a condition for qualifying for AFDC benefits under certain circumstances, whereas a father or male caretaker must register for such activities in order to qualify for AFDC benefits. In particular, a mother in two-parent families is exempted from the requirement that she register with the Work Incentive (WIN) Program if the father is registered, but the father in such families is not exempt from WIN registration if the mother is registered.

The Supreme Court has recently held that, to be valid, "gender-based discriminations must serve important governmental objectives and * * * the discriminatory means employed must be substantially related to the achievement of those objectives." Wengler v. Druggists Mutual Insurance Co., No. 79-381 (April 22, 1980), slip op. 8. The same test has previously been applied to provisions of the Social Security Act. See, e.g., Califano v. Westcott, 443 U.S. 76, 89 (1979); Califano v. Webster, 430 U.S. 313, 316-317 (1977). Upon careful consideration, I have concluded, after consultation with the Civil Division and the Department of Health and Human Services, that Section 402(a)(19)(A)(vi) does not meet this standard.

In Westcott, the Supreme Court held unconstitutional Section 407 of the Social Security Act, 42 U.S.C. §607, which governs the Aid To Families With Dependent Children, Unemployed Father (AFDC-UF) program. The Supreme Court held that Section 407, which provides for AFDC benefits to families whose dependent children have been deprived of parental support because of the unemployment of the father, but does not provide such benefits when the mother becomes unemployed, was unconstitutional because it unlawfully discriminated on the basis of gender. The Court stated that the "gender classification of §407 . . . is not substantially related to the attainment of any important and valid statutory goals, [but] is rather, part of the 'baggage of sexual stereotypes,' (citations omitted) that presumes the father has the 'primary responsibility to provide a home and its essentials,' (citations omitted) while the mother is the 'center of home and family life.'" Califano v. Westcott, supra, 443 U.S. at 89.

In light of the unanimous decision in Westcott to invalidate the gender distinction contained in Section 407 of the Social Security Act, we believe that it could not be persuasively argued that the challenged classification of Section 402(a)(19)(A)(vi) does not similarly discriminate on the basis of gender. Under the challenged statute, if the parent who registers with the WIN program is male, the needs of the female caretaker of the child are considered in determining benefits. However, if the registered parent is female, the needs of the male caretaker of a child are not considered in determining benefits. Thus, as in Westcott, where the sex of the unemployed parent determined the amount of AFDC benefits a family unit receives, the sex of the parent registered with the WIN program will determine the amount of benefits the family unit receives. This statutory distinction appears to be premised on the same "baggage of sexual stereotypes" referred to by the Supreme Court in invalidating the gender-based distinction in Westcott: that the father provides a home and essentials for the family while the mother is the center of home and family life.

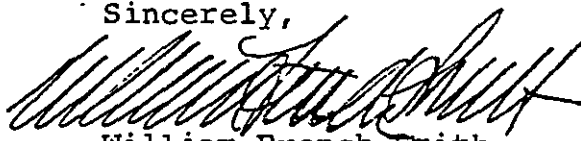
The government's case here may actually be weaker than in Westcott for the rationale offered in support of the gender-based distinction invalidated there -- to deter desertion by the father -- cannot even be offered in support of the gender-based distinction of Section 402(a)(19)(A)(vi). This statute, which exempts mothers from registering for the WIN program if the father "is in the home," but does not exempt fathers from registering if the mother "is in the home," does not even arguably serve to deter paternal desertion, nor does the legislative history indicate that the statute's purpose is to deter desertion by the father.

Moreover, the gender-based distinction of Section 402(a)(19)(A)(vi) is not substantially related to the goals of the WIN program -- to encourage families with children to become self-supporting. ^{1/} The legislative history of the statute provides no other purpose for the gender-based distinction of Section 402(a)(19)(A)(vi). In these circumstances, we believe that no colorable argument can be offered in support of Section 402(a)(19)(A)(vi) and that the statute is legally indefensible.

The Department of Justice is, of course, fully mindful of its duty to support the laws enacted by Congress. Here, however, the Department has determined, after careful study and deliberation, that reasonable arguments cannot be advanced to defend the gender-based discrimination at issue.

If the Department can be of further assistance to you in explicating the reasons for our decision or if you or your staff believe it would be helpful to discuss the options that the Senate may wish to pursue, Barbara B. O'Malley, Branch Director, Civil Division, will be pleased to discuss the matter further. She can be reached at 633-3501. Should the Senate wish to take any action in this matter, prompt action would be essential.

Sincerely,



William French Smith
Attorney General

^{1/} The stated purpose of the WIN program is "to assist needy families with children to become self-supporting and to provide them with a basic level of financial assistance necessary to encourage self-support, improve family life, and enhance personal dignity." H.R. Rep. No. 92-231, 92nd Cong., 2nd Sess., reprinted in [1972] U.S. Code Cong. & Ad. News 4989, 5330.