



Office of the Attorney General

Washington, D. C. 20530

January 5, 1981

The Honorable Walter P. Mondale
President of the Senate
United States Senate
Washington, D.C. 20510

Dear Mr. President:

I wish to inform the Senate that the United States will not defend the constitutionality of Section 202(f) of the Social Security Act, 42 U.S.C. 402(f), challenged in Steven J. Cramer v. Califano (E.D. N.Y., Civil No. 78-1523) and Robert M. Vitale v. Califano (S.D. Fla., Civil No. 78-6551).

Section 202(f) provides that the elderly surviving divorced husband of a wage earner cannot receive social security benefits based upon the earning account of his former spouse, although a similarly situated elderly surviving divorced wife of a wage earner would be eligible for benefits under Sections 202(e)(1) and 216 of the Social Security Act, 42 U.S.C. 402(e)(1) and 416. In my letter of October 23, 1980, I reported the decision of the Solicitor General not to appeal the judgment of the district court in Ambrose v. Califano, Civil No. 79-52 (D. Ore. July 17, 1980), holding that Section 202(f) violated the equal protection requirement of the Fifth Amendment to the United States Constitution. The issue in the Cramer and Vitale cases is identical to the issue in Ambrose, and consistent with the Solicitor General's decision in Ambrose, the Department of Justice cannot continue defending the statutory classification in the Cramer and Vitale cases.*/

*/ Albert Baker v. Califano (D.D.C., Civil No. 79-0532) also challenged the constitutionality of Section 202(f) of the Act. In September 1980, the District Court in Baker ruled that Section 202(f) is unconstitutional. Through an inadvertent mistake, which I have taken steps to see is not repeated in the future, the Justice Department attorneys handling the Baker case were not informed of the District Court's ruling until after the time period for appeal had run. In light of the decision not to appeal the Ambrose decision, we have not requested that the District Court re-enter its Order in Baker in order to permit us to file a timely notice of appeal.

In my letter of October 23, 1980, I set forth in detail the reasons for not defending this provision. (A copy of this letter is enclosed.) If you have questions, 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.

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.

Sincerely,

A handwritten signature in dark ink, appearing to read "Benjamin R. Civiletti". The signature is written in a cursive style with a horizontal line under the first name.

BENJAMIN R. CIVILETTI
Attorney General

Enclosure