

AUG 6 1979

Mr. Michael Davidson  
Senate Legal Counsel  
U.S. Capitol  
Washington, D.C. 20510

Dear Mr. Davidson:

Pursuant to Section 712(b) of the Public Law 95-521, I wish to inform you that the United States will not defend the constitutionality of the provision of Section 202 of the Social Security Act, 42 U.S.C. 402 challenged in James M. O'Connor, individually, and on behalf of his minor child, Shannon O'Connor v. Califano USDC WD Washington, Civil No. C78-608V.

Section 202 provides certain death and disability benefits for female but not male spouses of wage earners. In my letter to Senator Byrd of May 8, 1979, I reported the decision of the Solicitor General not to appeal the separate judgments of the respective district courts in Rose and Richard Cooper v. Joseph A. Califano, Jr., (E.D. Pa., No. 78594), and in Harlan Yates v. Joseph A. Califano, Jr., (W.D. Ky., No. C 770323LB), holding that this provision violated the equal protection requirement of the Fifth Amendment to the United States Constitution. The issue in this case is identical to the one present in Yates and consistent with the Solicitor General's decision in Yates, the Department of Justice cannot continue defending the statutory classification involved in this case.

In my letter to Senator Byrd of May 8, 1979, I enclosed memoranda from the Civil Division and the Office of Solicitor General setting forth in detail the reasons for not defending this provision. If you continue to have questions about this matter, or if you believe that it may be helpful to discuss the options that you may wish to pursue, Barbara E. O'Malley, Branch Director, Civil Division, will be pleased to discuss the matter further. She can be reached at 633-3301. Should you wish to take any action in this matter prompt action would be essential.

Sincerely,

Griffin B. Bell  
Attorney General