



Office of the Attorney General

Washington, D. C. 20530

October 23, 1980

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 Solicitor General has determined that the United States will not appeal the judgment of the district court in Ambrose v. Califano, Civil Action No. 79-52 (D. Ore. July 17, 1980). A notice of appeal was filed on August 11, 1980, and a Jurisdictional Statement would currently be due, following an extension, on or before October 28, 1980.

This case is a nationwide class action challenging the constitutionality of Section 202(f) of the Social Security Act, 42 U.S.C. 402(f), which provides that the elderly surviving divorced husband of a wage earner cannot receive social security benefits on his former spouse's account in certain circumstances in which the elderly surviving divorced wife of a wage earner would be eligible under Sections 202(e)(1) and 216 of the Social Security Act, 42 U.S.C. 402(e)(1) and 416. In particular, the elderly surviving divorced wife of a wage earner would be entitled to benefits on her former husband's account if they were married for at least 10 years and she has not remarried, is more than 60 years of age, and has a lower "primary insurance amount" (calculated on her own employment history) than does her ex-husband; an elderly surviving divorced husband of a wage earner in the same

situation is absolutely ineligible for such benefits even though, for instance, he was actually dependent on his former wife's earnings. The district court, adopting the recommendation of the magistrate, granted plaintiff's motion for summary judgment on the ground that Section 202(f) is a gender-based provision that violates the equal-protection component of the Fifth Amendment. The court ordered that benefits be paid without regard to the fact that the applicant is a surviving divorced husband rather than a surviving divorced wife.

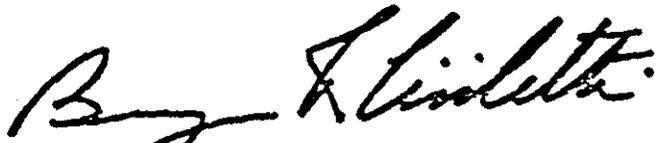
The Supreme Court has recently held that, to be valid, "gender-based discriminations must serve important governmental objectives and * * * the discriminatory means employed must be substantially related to the achievement of those objectives." Wengler v. Druggists Mutual Insurance Co., No. 79-381 (Apr. 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, the Solicitor General has concluded, after consultation with the Civil Division and the Department of Health and Human Services, that Section 202(f) does not meet this standard. Rather, as the magistrate observed, "the legislative history shows that the failure to provide benefits for surviving divorced men was based on the casual assumption that women are more likely to be child rearers or dependents" (Findings and Recommendation, at 4-5). Under the Court's precedents, this is plainly insufficient. Moreover, Section 202(f) may be said to discriminate against both men, by denying benefits to elderly surviving divorced husbands, and women, by effectively devaluing their employment and providing less protection to their former husbands. See Wengler, *supra*, slip op. 5-8. Finally, the impact of Section 202(f) is particularly harsh because its proscription of benefits to the elderly surviving divorced husband is absolute in nature and cannot be overcome by a showing of actual dependency or need. See Weinberger v. Wiesenfeld, 420 U.S. 636, 645 (1975). In these circumstances, we believe that further review of the district court's decision would serve no useful purpose.

We also believe, for reasons apart from the merits of the issue, that this case should not be pursued. First, the Department of Health and Human Services has estimated that the district court's decision will affect only 500 men at an annual cost of \$1 million and therefore is of relatively minor significance to the operation of the Social Security program. Furthermore, we have declined to pursue appellate review in similar cases. In particular, no appeal was taken by the government in Oliver v. Califano, CCH Unempl. Ins. Rep. ¶15,244 (N.D. Cal. 1977), which was heavily relied on by the magistrate in the instant case and involved, in the context of retirement benefits, the same gender-based discrimination as is presented here concerning death benefits. The legal issues are virtually indistinguishable, and it would simply not be sensible to pay social security benefits to a divorced husband while his former wife is alive but to terminate his benefits when she dies.

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, Deputy Solicitor General Kenneth S. Geller will be pleased to discuss the matter further. He can be reached at 633-4037.

Sincerely,



Benjamin R. Civiletti
Attorney General