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BERNARD SANDERS, VERMONT, INDEPENDENT

September 1, 2005

Senator Arlen Specter
Senator Patrick Leahy
Committee on the Judiciary
United States Senate

Dear Senators:

I am writing to request that you question Supreme Court nominee John G. Roberts about his role in a particularly shameful chapter in the history of the AIDS epidemic in the United States: the hysteria that led many communities to bar children with AIDS from attending school.

In 1985, unfounded fears over AIDS transmission were sweeping across the country. The Centers for Disease Control and Prevention (CDC) responded on August 30, 1985, by issuing a landmark scientific statement. The agency reviewed all available evidence and concluded that there was no evidence of spread through casual contact. CDC recommended that most children with AIDS "should be allowed to attend school and after-school day-care and to be placed in a foster home in an unrestricted setting."

Two weeks later, President Reagan had an opportunity to reassure the nation. Draft briefing materials for a major press conference advised the President to say that "as far as our best scientists have been able to determine, AIDS virus is not transmitted through casual or routine contact."

Yet in his role as Associate Counsel to President Reagan, Mr. Roberts recommended striking this statement from the President's briefing. Claiming that AIDS transmission through casual contact was a "disputed scientific issue," Mr. Roberts wrote that "we should assume that AIDS can be transmitted through casual or routine contact."

Five days later, when asked whether it was safe for children with AIDS to go to school, President Reagan did not cite the nation's leading public health officials. He instead stated, "I can understand both sides of it." The President's failure to speak clearly about scientific understanding of AIDS transmission is now widely understood to have stoked the hysteria about AIDS and the social stigma suffered by children with AIDS.

I urge you to question Judge Roberts about his actions in this case. How he answers will shed needed light not only on the past, but also on Judge Roberts's future approach to using scientific evidence in the formulation of law and policy.

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Background

In the summer and fall of 1985, the nation was swept up in a tide of hysteria about the presence of children with AIDS in public schools. Parents and school authorities worried that AIDS might be transmitted through casual contact among children and widespread panic had begun to set in. That summer, an Indiana school had barred 13-year-old Ryan White, a hemophiliac with AIDS, from returning to school.[1] Protesters organized mass boycotts of New York schools that had decided to allow children with AIDS to attend.[2] It was a time of great fear and confusion.

At the same time, however, scientific evidence had emerged to demonstrate that the risk of transmission from casual contact was certainly remote and very likely nonexistent. Based on this evidence, public health experts drew up comprehensive guidelines on the issue of AIDS children in schools. The goal of the effort was to counter the prevailing hysteria with the facts of actual risk.

On August 30, 1985, the Centers for Disease Control and Prevention (CDC) issued the first public health recommendations for children with AIDS.[3] The recommendations began by reviewing available evidence to date. According to CDC, not a single case of AIDS in the United States was known to have been transmitted in "school, day care, or foster-care setting or through other casual person-to-person contact." The agency also pointed out that not a single one of the family members of over 12,000 AIDS patients had been reported to have AIDS. The agency concluded that "casual person-to-person contact as would occur among schoolchildren appears to pose no risk." CDC recommended that most children with AIDS "should be allowed to attend school and after-school day-care and to be placed in a foster home in an unrestricted setting."

In drafting and publicizing the guidelines, leading public health experts attempted to calm parents' fears by raising public awareness of overwhelming scientific evidence that AIDS could not be transmitted through casual contact. Director of the National Institute for Allergy and Infectious Disease Dr. Anthony Fauci stated, "There's no evidence the virus is spread by casual contact, by saliva, by coughing, by any of the normal contact children might have in the

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[1] *AIDS Victim Kept From School in Indiana*, New York Times (Aug. 1, 1985).

[2] *The New Untouchables; Anxiety over AIDS is Verging on Hysteria in Some Parts of the Country*, Time (Sept. 23, 1985).

[3] Centers for Disease Control and Prevention, *Current Trends Education and Foster Care of Children Infected with Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus*, Morbidity and Mortality Weekly Reports, 517-21 (Aug. 30, 1985).

classroom setting."[4] CDC director Dr. James Mason described the risk of getting AIDS from another child in schools as akin to the risk of "being struck by lightning when you walk out the front door in the morning" and "much less than the chance of the boiler that heats the building blowing up."[5] He stated that AIDS was causing an "epidemic of fear" that was "entirely unnecessary."[6]

Inside the White House

In the midst of a battle to counter ignorance and panic with science and reason, President Reagan held a press conference on September 17, 1985. It was a critical moment. Even though more than four years had passed since the first cases had been reported, it would be the first time that the President had discussed AIDS in public. In preparing for this appearance, the White House staff debated what the President should say about the transmission of AIDS.

Draft briefing materials provided to the White House counsel's office advised that the President clearly explain the views of leading scientific experts. He was to say, "as far as our best scientists have been able to determine, AIDS virus is not transmitted through casual or routine contact."[7]

Yet in a memo dated September 13, 1985, John G. Roberts, who was then Associate Counsel to the President, advised a completely different approach. In an internal memo, Mr. Roberts recommended deleting any reference to the best scientific evidence. He gave several reasons.

First, Mr. Roberts argued that the President should not provide information to the public on a technical point. He wrote that the President "has no way of knowing the underlying validity of the scientific 'conclusion,' which has been attacked by numerous commentators."[8] No citations were provided.

Second, he expressed concern that relating the views of the country's top scientists could embarrass the president if the state of scientific evidence changed.

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[4] *As schools opened across the nation this month, the spectre of young AIDS' victims attending classes with healthy children has created an epidemic of fear...*, United Press International (Sept. 15, 1985).

[5] *U.S. Counters Public Fears of AIDS*, New York Times (Sept. 15, 1985).

[6] *Id.*

[7] John G. Roberts, Deborah K. Owen, *Memorandum for Fred F. Fielding, Domestic Briefing Materials for Press Conference* (Sept. 13, 1985).

[8] *Id.*

Third, he endorsed the scientific idea that "we should assume AIDS can be transmitted through casual or routine contact, as is true with many viruses." He stated that the assumption that AIDS can be transmitted through casual contact could be overcome only when "it is demonstrated that it cannot be."[9]

At the same press conference, the President provided technical information to the public on the impact of tax reform and trade policy. But Mr. Roberts apparently did not object to the use of these data on the ground that the President was not an expert.

Mr. Roberts provided no scientific support for his assumption that AIDS can be transmitted through casual contact. Moreover, his standard for dislodging that assumption would require scientists to conclude otherwise with absolute certainty, a standard that is not applied elsewhere in medicine or public health.

Sadly, President Reagan followed Mr. Roberts's advice. At the news conference on September 17, 1985, the President was asked about the issue of AIDS in schools. Instead of affirming the conclusions reached by the nation's top scientists, the President undermined them. The President stated that he was glad not to be faced with the decision of whether or not to send a child to school with a child who had AIDS. He added:

> I can understand the problem of the parents. It is true that some medical sources have said that this cannot be communicated in any way other than the ones we already know and which would not involve a child being in the school. And yet, medicine has not come forth unequivocally and said, "This we know for a fact, that it is safe." And until they do, I think we just have to do the best we can with this problem. I can understand both sides of it.[10]

The President's failure to support the science on AIDS transmission exacerbated fear, prejudice, and discrimination against children with AIDS. After the press conference, one pediatrician told the *Los Angeles Times* that he expected parents to "quote the President and say, 'Gee, even the President doesn't come out and support the medical experts — how can he expect us to send our children to school?'" The expert added, "Given the current information and the circumstances, he could have been much more definite."[11]

Questions for Mr. Roberts

It is important for the Senate and the public to understand Judge Roberts's role in this deplorable chapter in the history of public health in the United States. Judge Roberts should be

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[9] *Id.*

[10] *Close to Home*, Washington Post (Sept. 22, 1985).

[11] *Health Experts Glad Reagan Cited AIDS; Pleased by Attention, Disappointed He Did Not Quell School Fear*, Los Angeles Times (Sept. 19, 2005).

asked to explain why he blocked President Reagan from referring to the views of our nation's leading scientific experts, why he substituted his own uninformed scientific judgment for theirs, and whether he regrets contributing to a climate of unsubstantiated fear.

Judge Roberts also should be asked to explain his actions in the context of how he views the appropriate role of scientific evidence in the formation of law and policy. One important question is whether he would now defer to the medical judgment of public health officials, as he failed to do in 1985. This issue came before the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), which involved a school teacher with tuberculosis who had been fired from her job. In that case, the Court held:

> In the context of the employment of a person handicapped with a contagious disease, we agree with the *amicus* American Medical Association that this inquiry should include "findings of facts, based on reasonable medical judgments given the state of medical knowledge about the nature of the risk (how the disease is transmitted) ... and the probabilities the disease will be transmitted ...." In making these findings, courts normally should defer to the reasonable medical judgment of public health officials.[12]

Similarly, the case of *Bragdon v. Abbott*, 524 U.S. 624 (1998), involved a patient with HIV whose dentist had refused to treat her. In that case, the court stated:

> In assessing the reasonableness of [the dentist's] actions, the views of public health authorities, such as the U.S. Public Health Service, CDC, and the National Institutes of Health, are of special weight and authority.[13]

Another important question relates to the role of scientific certainty in regulatory and judicial decision-making. In 1985, Mr. Roberts appeared unwilling to take any position on HIV transmission in the absence of complete scientific certainty. He applied a standard that required scientists to prove a negative, a requirement that can be impossible to satisfy.

But the Supreme Court must make decisions in the absence of total scientific certainty. For example, in the recent case of *Roper v. Simmons*, (125 S.Ct. 1183), the Court held the death penalty to be unconstitutional when applied to those who commit crimes under the age of 18. In reaching this conclusion, the Court relied on an array of studies and expert opinions that "tend[ed] to confirm" the limited maturity and sense of responsibility of juveniles under 18.[14] It

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[12] *Arline*, 480 U.S. 273, 288 (1987). Emphasis added.

[13] *Abbott*, 524 U.S. 624, 650 (1998). The Court continued: "The views of these organizations are not conclusive, however. A health care professional who disagrees with the prevailing medical consensus may refute it by citing a credible scientific basis for deviating from the accepted norm." *Id.* The Court then found that there should be a remand to allow this kind of debate since the CDC guidelines on dental care were not definitive.

[14] *Roper v. Simmons*, 125 S.Ct. 1183, 1195 (2005) (emphasis added).

also relied on the apparent lack of deterrent effect of the death penalty on juveniles, despite the absence of absolute proof for that conclusion. While noting that "it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles," the Court held that "'the likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent.'"[15]

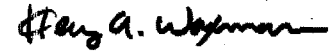
In our increasingly complex world, law and science frequently intersect. Understanding Judge Roberts's views on these important issues will shed considerable light on his approach to the responsibilities of a Supreme Court justice. It would be a significant departure from the Court's current jurisprudence were he to seek to impose a standard of proof that requires absolute scientific certainty, as he appeared to do in the fall of 1985.

Conclusion

On April 8, 1990, Ryan White died. In an editorial eulogizing Ryan, President Reagan stated: "We owe it to Ryan to make sure that the fear and ignorance that chased him from his home and his school will be eliminated."[16] The President implicitly acknowledged that he had been wrong not to support the findings of his own experts sooner, and that his refusal to trust the evidence had only contributed to the isolation and shame that surrounded AIDS.

It is important for the Senate and the American public to hear whether Judge Roberts learned the right lessons as well.

Sincerely,



Henry A. Waxman
Ranking Minority Member

[15] *Id.* at 1196 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 837 (1988)).

[16] President Reagan, *We Owe It to Ryan*, Washington Post (Apr. 11, 1990).