Written Statement of

Michael J. Gerhardt,

Samuel Ashe Distinguished Professor of Constitutional Law,

University of North Carolina at Chapel Hill Law School

Hearing before the

United States Senate Judiciary Committee

On the Nomination of Judge Samuel A. Alito, Jr., to be an Associate Justice of the Supreme Court of the United States

January 12-13, 2006

We meet at a special moment in American history. The stakes in this week's hearings are no secret. First, and foremost, what is primarily at stake in these hearings is the nomination of Judge Samuel Alito, Jr., to be an Associate Justice of the Supreme Court. Second, it is impossible to ignore the enormous transformative potential of Judge Alito's nomination to replace Justice O'Connor. For the past 25 years, the Court might have gone by different names – the Burger, Rehnquist, and Roberts Courts, but the justice throughout that time that has embodied the Court's center is Justice O'Connor. Indeed, between 1995 and the present, Justice O'Connor was in the majority in 148 out of 193 cases that the Court decided by a 5-4 majority in whole or in part. She was, in other words, in the majority in almost 77% of the Court's 5-4 decisions during the past 10 years. In nominating Justice O'Connor's replacement, President George W. Bush made no secret of his intentions to appoint someone with a very different approach to judging than Justice O'Connor has had. In particular, President Bush pledged to nominate appoint justices who were "strict constructionists" and who were in the mold of Justices Antonin Scalia and Clarence Thomas. If Judge Alito were to fit that mold, then his appointment would decisively shift the Court's ideological balance. Third, the Senate's stature and power are at stake. Senators fully appreciate that how they handle Judge Alito's confirmation hearings will establish an important precedent. Every senator appreciates that whatever considerations they take into account will help to guide and to inform subsequent Supreme Court confirmation hearings. With so much at stake, these hearings have been filled, as the Chairman has suggested, with a good deal of "drama." These are anxious moments, and I do not take this occasion -- or the extraordinary privilege and honor of addressing you – at all lightly. I hope that I may be able to do my

small part in extending to the present hearings the high standards of decorum, civility, and candor set by the Senate in its confirmation hearings for Justices Ruth Bader Ginsburg and Stephen Breyer and Chief Justice John Roberts.

I..

The Appointments Clause of the Constitution, which empowers the Senate with the authority to give its "Advice and Consent" on Supreme Court nominations, needs no introduction. Neither the plain language of the Appointments Clause nor the structure of the Constitution requires senators to simply defer to a president's Supreme Court nomination(s). Nor does the text or the structure of the Constitution require hostility to a president's Supreme Court nomination(s). Nor, for that matter, does the text of the Appointments Clause require either the President or the Senate to employ certain criteria in discharging their respective authorities in the federal appointments process. Indeed, the text, the structure, and the history of the Appointments Clause (including the Senate's historical practices) allow senators to take anything into consideration that you deem appropriate or necessary to discharge your unique constitutional authority. There is, in short, ample support for your entitlement to make your own separate evaluation of a nominee's fitness to serve as an Associate Justice. How you make that evaluation is your choice. You may choose, as senators have always chosen, to take into account the nominee's experience, integrity, collegiality, temperament, legal acumen, and craftsmanship. But, you may do more than that, if you choose. Our history is replete with senators' taking Supreme Court nominees' likely judicial philosophies or ideologies into account. Senators, particularly the members of the Judiciary Committee, may do this

as an exercise of their functions as gatekeepers, for they are ultimately responsible for filtering out the personnel and the particular constitutional views they do not wish to see reflected on the Supreme Court. Their function as gatekeepers extends to determining which views are in the mainstream of constitutional law and which views are acceptable on the Court. The question is not whether you may take judicial philosophies and ideologies into account; the question is how you may do this, if you are so inclined.

We are fortunate to have some exemplary models of Supreme Court confirmation hearings to follow. The present hearings mark the fourth straight set of Supreme Court confirmation hearings that have, at least to date, been exemplary in their tone, civility, decorum, and focus. And there is every indication to expect that the Alito hearings will be conducted with the same kind of respect that the Ginsburg, Breyer, and Roberts confirmation hearings demonstrated for the important constitutional values of judicial independence, the President's prerogative to set the terms for Supreme Court confirmation hearings through the kinds of nominees he chooses, and the Senate's ability to evaluate these terms.

By all accounts (and all the evidence we have seen so far), Justice O'Connor and Judge Alito appear to be very different kinds of judges. They appear to have very different approaches to judging. Consequently, a critical question for this Committee, then, is whether the differences between Justice O'Connor and Judge Alito ought to be significant in these hearings? Should these differences make any difference? Different senators may answer the question differently. The important thing for each senator is to answer the question.

In my judgment, Sandra Day O'Connor has been distinctive as a Supreme Court justice in at least four respects. As best I can tell, Judge Alito differs from her with respect to each of these. First, Justice O'Connor's resignation will leave the Court without a member with first-hand experience as a legislator. (Justice O'Connor's resignation leaves Justice Breyer as the only justice with extensive legislative experience but not as an elected representative.) To her credit, Justice O'Connor's experience as a state legislator never led her to defer reflexively to Congress or state legislatures or to be disdainful of the legislative process. Nor did she ever apparently feel the need to over-compensate for her experience by deferring excessively to the other branches, including the presidency.

An obvious question, for the Senate, is whether Judge Alito can be as successful as Justice O'Connor in not allowing his extensive experience in one branch to color his judgment in separation-of-powers conflicts. The question is whether he can avoid allowing the primary professional experience he has had other than judging – working for the Justice Department – to lead him into giving undue and maybe even absolute deference to the executive branch or the presidency in separation-of-powers disputes.

If he were confirmed to the Court, Judge Alito would become one of four justices on the Roberts Court with significant experience working in the executive branch of the federal government. (The others are Chief Justice Roberts and Justices Scalia and Thomas. Judge Souter, who was once Attorney General of the State of New Hampshire, would make a fifth justice with significant executive experience.) The Court has rarely had as many (or, for that matter, more) justices with significant executive experience. Consequently, it makes sense for senators so disposed to consider the impact of the net

loss of Justice O'Connor's first-hand experience as a legislator, coupled with her failure to defer unduly to the executive branch or the presidency.

A number of senators (and Americans) have expressed the concern that, because of his extensive experience in the Justice Department , Judge Alito may be disposed to be more disdainful of the Congress (or of state legislatures) than Justice O'Connor ever was or to be more deferential to the President than Justice O'Connor ever was in cases involving questions about the scope of executive authority. As we all know, the Court is likely to face serious questions of executive power, particularly during a time of war, in the foreseeable future. Given Judge Alito's background, many senators (and Americans) expect him to have the burden in these hearings to persuade the Senate and the public of his impartiality in adjudicating disputes between the President and either of the other branches.

Judge Alito's apparent endorsement of the theory of the unitary executive (in a speech before the Federalist Society) intensifies his need to demonstrate to the Senate's satisfaction that he will be an impartial arbiter of disputes between the President, or the executive branch, and the other branches. Moreover, his endorsement of the unitary theory of the executive raises a question about what he considers to be the scope of congressional authority to constrain executive power, even in a time of war. In a nation that chose to rebel against a king and tyrannical authority, it is not surprising that the Constitution does not establish a limitlessly powerful chief executive. Consequently, it is appropriate to consider to what extent, if any, Judge Alito would be disposed to give special deference to the President in conflicts with Congress, the courts, or the individual rights of American citizens. There is no indication that Justice O'Connor ever played

favorites in separation-of-powers disputes, and senators are entitled to explore, if they choose, the constitutional limitations on executive power that Judge Alito is disposed to recognize if he were to be confirmed to the Court.

A second distinctive feature of Justice O'Connor's legacy is her commitment to pragmatic, bottom-up judging. In his confirmation hearings last September, Chief Justice Roberts characterized himself as a "bottom-up" judge. A "bottom-up judge" decides cases incrementally, one-at-a-time, and infers the principles to be deployed in constitutional adjudication from the records and decisions of the lower courts. "Bottom-up" judges are distinct from "top-down" judges, such as Justices Scalia and Thomas, who tend to infer principles directly from the Constitution (and what they each regard as synonymous with the Constitution) that they then impose onto the lower courts (and, if need be, the other branches).

Based on my reading of Judge Alito's opinions, I am not sure whether he is a "bottom-up" or "top-down" judge. These hearings provide an important opportunity to learn which kind of judge he may be. To be sure, Judge Alito has mentioned that the justices he most admires are Chief Justice John Marshall and Justices Byron White, William Rehnquist, and William Brennan. I assume Judge Alito mentioned Justice Brennan not because Judge Alito actually approves of Justice Brennan's judicial methodology but rather because he admires Justice Brennan personally as a Catholic from New Jersey appointed to the Supreme Court. As for the other three justices Judge Alito most admires, only one – Byron White – was a consistently bottom-up judge, who tended to decide cases incrementally and as narrowly as possible and tended to defer to precedent. Though Chief Justice Marshall was trained in the common law methodology

of the times, he was not consistently either a top-down or bottom-up judge. Sometimes Chief Justice Marshall inferred principles directly from the Constitution and its original understanding (in a top-down fashion), and sometimes he did not. Chief Justice Rehnquist, for at least much of his tenure, appears disposed to have been more top-down than bottom-up, particularly in cases in which state sovereignty was at issue. In discussing the justices he most admires in these hearings, senators may wish to clarify the extent to which Judge Alito admires, or intends to emulate, their respective judicial methodologies.

The third distinctive feature of Justice O'Connor's legacy is her solid commitment to the traditional approach to constitutional stare decisis. Justice O'Connor never seemed eager to go out of her way to overrule precedent. Throughout her tenure, she adhered to the Court's traditional approach for deciding whether to overrule wrongly decided cases. Under this approach, justices do not overrule prior decisions that they deem wrongly decided, unless they can demonstrate their reversals as being required because of lessons of experience, changed circumstances, the absence of societal reliance, or inconsistency with intervening line(s) of decisions. In his confirmation hearings, Chief Justice Roberts expressed a similar attitude toward stare decisis. Moreover, he acknowledged that overruling a precedent caused "a shock to the legal system," and he implied that too many shocks – too many overrulings – would be bad for the legal system. Justice O'Connor put a premium on maintaining stability, predictability, and consistency in constitutional law as much as possible. This approach oftentimes put her at odds with most of her colleagues. In Lawrence v. Texas, for instance, she refused to concur in the overruling of the Court's 1986 opinion in Bowers v. Hardwick. In other

cases, she refused to join the entreaties of Justice Scalia and particularly Justice Thomas to overrule cases which one or the other and sometimes both deemed wrongly decided. Indeed, my survey of the Rehnquist Court indicates that over the course of its 18-year lifespan the two justices urging the largest numbers of precedents were Justices Scalia and Thomas. Obviously, an important question to pursue with Judge Alito is whether he agrees with the approach of Chief Justice Roberts and Justice O'Connor or with the approach of Justices Scalia and Thomas on the level of deference he expects to give to the precedents with which he disagrees. The institutional values promoted by fidelity to precedent are difficult to achieve without a healthy degree of such respect.

A related question is whether Judge Alito recognizes the phenomenon of super-precedent, discussed in Chief Justice Roberts' confirmation hearings. As I understand it, super-precedent refers to prior Supreme Court decisions that are so deeply entrenched in constitutional law (and consistently supported by the other branches) that they have become effectively immune to reconsideration and overruling. The possible existence of super-precedent raises the question whether there are some constitutional issues that are simply off the table and are so firmly settled as to be effectively sacred in American constitutional law.

Super-precedent is not necessarily a new notion. Abraham Lincoln was one of the first public figures to acknowledge the possibility of super-precedent. In the famous debates he had in his Senate race with Stephen Douglas in 1857, Lincoln spoke at some length about why the Court's tragic decision in Dred Scott v. Sanford deserved little or no respect from the other branches. While it is popular to quote the speech for what it says about the obligation of either of the political branches to adhere to, or respect, a precedent

like Dred Scott, many people rush past the part of the speech quote in which Lincoln acknowledges the conditions for universally respecting Supreme Court precedent. At that point in the speech, Lincoln declared, that "if this important decision had been made by the unanimous concurrence of the judges, and without any apparent partisan bias, and in accordance with legal public expectation, and with the steady practice of the departments throughout history, and had been, in no part, based on assumed historical facts which are not really true; or, if wanting in some of these, it had been before the court more than once, and had been affirmed and re-affirmed through a course of years, it then might be, perhaps would be, factious, nay, even revolutionary, to not acquiesce in it as a precedent . . ." Lincoln never used the words "super-precedent," and it is likely few decisions ever would meet his criteria for universal acquiescence or respect. Nevertheless, the kind of precedent he suggested would be "revolutionary" to ignore or not to follow is consistent with the phenomenon of super-precedent.

Super-precedent arises as a concern in these hearings for the simple reason that some of Judge Alito's stated personal beliefs are at odds with a number of landmark opinions that could be fairly described as super-precedent. Among the decisions I regard as super-precedent are the Court's reapportionment decisions (now apparently supported by the leadership of the political branches and by all the Court's justices) as well as the Court's decisions upholding the constitutionality of the 1964 Civil Rights Act and 1965 Voting Rights Act, and Miranda v. Arizona (reaffirmed not long ago in an opinion by Chief Justice Rehnquist). There are a number of other decisions – both liberal and conservative – that could qualify as super-precedent, including, for instance, the Court's 1883 decision in The Civil Rights Cases. The question is the extent to which Judge Alito

acknowledges the possibility that any cases have achieved something akin to the status of super-precedent.

Another distinctive aspect of Justice O'Connor's tenure on the Court is her pivotal voting in a number of areas of constitutional law in flux. Her resignation arguably leaves in flux some of the many 5-4 decisions in which she joined the majority. As I have already suggested, one obvious question for Judge Alito is whether he would defer to most or all of these decisions based on the institutional values promoted by fidelity to precedent, including stability, predictability, consistency, and continuity. A related question is whether Judge Alito agrees, or will work to weaken or undo, many of the decisions in which Justice O'Connor cast decisive votes. Neither time nor space allow an exhaustive account of all these decisions, but I will mention just three for illustrative purposes. In particular, we know that in 2000 the Court struck down Nebraska's partial-birth abortion law 5-4, and more recently it struck down 5-4 a public display of the Ten Commandments at a courthouse in Kentucky. In both opinions, Justice O'Connor was in the slim majority, and an obvious question for Judge Alito is the extent to which his deference to precedent may depend on the kinds of factors Chief Justice Rehnquist once recognized as pertinent for reconsidering precedent in Payne v. Tennessee – namely, the voting margins in particular cases, the interests at stake in cases, and the longevity of the cases at issue.

In yet another opinion, decided 6-3 not 5-4, the Court in an opinion by the late Chief Justice upheld the Family Leave Act, a law whose constitutionality Judge Alito had questioned in the lower court. The case in question, Nevada v. Hibbs is important, because it demonstrates that the Court took seriously its oft-repeated recognition that

section five of the Fourteenth Amendment was the Congress' only power to abrogate state sovereignty. It should come as little or no surprise that the Court's stance on this point makes eminent sense. The Reconstruction Amendments clearly were designed in part to restrict state sovereignty more than it had been limited by the original Constitution, and section five of the Fourteenth Amendment provides the Congress with the "power to enforce, by appropriate legislation, the provisions of" the Fourteenth Amendment. One matter to explore with Judge Alito is whether he agrees with the Court's repeated recognition of section five of the Fourteenth Amendment as the exclusive power through which it may abrogate state sovereignty.

II.

I cannot improve upon the account of the evolution of judicial conservatism given by University of Chicago law professor David Strauss in Chief Justice Roberts' confirmation proceedings. When President Bush pledged to nominate "strict constructionists" to the Court and to model his Supreme Court appointments on Justices Scalia and Thomas, he plainly signaled that his Supreme Court nominees would have a distinct judicial philosophy. Professor Strauss pointed out, quite rightly I believe, that in promising to appoint a "strict constructionist" to the Court President Bush had different criteria and models in mind than did President Richard M. Nixon who similarly pledged to appoint "strict constructionists." President Nixon's apparent model was Justice John Marshall Harlan (the Younger), whose hallmarks Professor Strauss describes as "deference to Congress and respect for precedent." President Bush's model Supreme Court appointee is a conservative of a very different kind than Justice Harlan; "[t]he

hallmarks of the new conservatism," Professor Strauss noted, is "a skeptical attitude toward the work of Congress, and a willingness to overturn precedent."

An important question for Judge Alito is which kind of conservative (or strict constructionist) he may be. Is his judicial philosophy more akin to Justice Harlan's practice to defer to the kinds of laws Congress has been enacting for most of the past century to protect consumers, the environment, workplace safety, and the rights of the disabled? Or, is Judge Alito deeply skeptical of the constitutionality of many of these laws and share the beliefs of Justices Scalia and Thomas that the Supreme Court's privacy decisions have been almost all wrongly decided?

Moreover, President Bush's model Supreme Court appointees Justices Scalia and Thomas (and Justice O'Connor, too, for that matter) suggested in their dissent in The Term Limits Case that they employed a default rule in federalism cases requiring them to construe any constitutional ambiguities, silences, or gaps in favor of state sovereignty. Hence, another important question before the Judiciary Committee is whether Judge Alito is committed to employing a default rule like the one deployed by the dissenting justices in The Term Limits Case? Alternatively, he may be asked whether he agrees with the default rule employed by the majority in that case, requiring in federalism cases that the gaps and ambiguities in the text of the Constitution to be resolved in favor of the exercise (and protection) of federal power.

Even if Judge Alito were to reject the label of strict constructionist, the question remains whether, if he were confirmed, his confirmation could be construed as endorsing a particular kind of judicial philosophy. Some senators have characterized the Senate's confirmation hearings for Justices Ginsburg and Breyer and Chief Justice Roberts as

precedents to follow, and I am confident that, regardless of the outcome of the present hearings, they will inevitably become an important precedent, too. The question is what kind of precedent.

The Senate has the power to decide this question. At the very least, there is little or no doubt that Judge Alito's confirmation hearings will establish a precedent on the kinds of questions senators may ask a Supreme Court nominee and the kinds of questions he chooses to answer or to avoid. As such, there is nothing unique about these hearings. In his confirmation hearings, Chief Justice Roberts once refused to answer a question based on "the precedent" of prior nominees' testimony in their confirmation hearings. We all expect Judge Alito to hew closely to the precedent set by Chief Justice Roberts and other recent nominees in answering questions during their confirmation hearings.

Nevertheless, these hearings have the potential to establish a precedent of even greater significance than just what questions the nominee chooses to answer or to avoid. These hearings will follow a string of prior ones in which senators on the Judiciary Committee asked pointed questions to the nominee about his or her judicial philosophy. Thus, the present hearings will help to extend a tradition within the Senate to take Supreme Court nominees' likely judicial philosophies into account in the confirmation process.

You clearly have the power to shape the kind of precedent these hearings will become. I respectfully urge each of you to consider which one, if any, of the following possibilities best encapsulates what you believe the hearings to signify. Candor will be critical in this endeavor. It is important not only to clarify what you believe these hearings to be about. What happens here will also go a long way toward erasing the

concerns that many Americans have that the confirmation process is broken. They are concerned, frankly, that senators say they believe a nominee's judicial philosophy is irrelevant unless they think otherwise.

The first possibility is that these hearings could be a precedent for confirming, or not confirming, a Supreme Court nominee primarily based on his judicial ideology. I have heard expressed some interest in using these hearings as the opportunity to establish a precedent for endorsing a nominee who has been outspoken critic of Roe v. Wade. A variation on this is that the hearings may provide the opportunity for the Senate to demonstrate that the kind of judicial philosophy that Judge Alito has got fits within the mainstream of constitutional law. These hearings may, in other words, provide an important opportunity to define the mainstream of constitutional law.

If this is what you believe these hearings are about or if you disagree that these hearings are about endorsing a particular ideology, I respectfully urge you to say so. Your candor will help to increase the transparency of this process. The problem with making Judge Alito's judicial philosophy the central issue in his confirmation hearings is that he must not only state his philosophy clearly and unambiguously but also most senators will need to expressly address it. There is no guarantee that this will happen, particularly because Judge Alito may be reticent about specifying in much detail his approach to deciding cases and many senators may not agree with every aspect of his judicial philosophy. Moreover, taking the position that these hearings are primarily about endorsing (or rejecting) a particular judicial philosophy may conflict with positions some senators may have already staked out. Some senators may already be on record against doing this, and thus may feel constrained from appearing to be indecisive or inconsistent

in the hearings. Others may distinguish between Judge Alito's personal beliefs and judicial ideology or philosophy (and other qualifications as a justice) and thus make it harder for what are the most controversial opinions of the judge to be fairly (or unambiguously) included as linked to his judicial philosophy. (Indeed, his opening statement strongly emphasized the distinction between his personal opinions about constitutional law and his judicial philosophy. Still other senators may believe that focusing primarily on the judge's philosophy may be likely to increase, rather than diminish, the friction in judicial confirmation hearings. The divergent opinions of senators about the relevance (or the propriety) of the nominee's judicial philosophy makes it hard for these hearings to be construed as a complete endorsement, or rejection, of it.

Secondly, these hearings could become a precedent for confirming, or not confirming, a Supreme Court nominee, in spite of his judicial philosophy. I believe much of the rhetoric of these proceedings, at least as of the time I write this statement, are consistent with this understanding of the proceedings. But, if I am right that this is the kind of precedent many senators would like to see created here (or not created here), they need to say so. Once again, candor will increase respect for the process by increasing its transparency. If there is a problem with trying to ensure these proceedings become a precedent for endorsing a nominee in spite of his judicial philosophy, it is that, first, many senators may be careful in how they disown, or criticize, Judge Alito's judicial philosophy. Those disposed to support the judge are not likely to be critical of him. Thus, the burden falls mainly to critics of the nominee's judicial philosophy to express

their disapproval. In doing so, they make it harder to construe the hearings as an unequivocal endorsement of the nominee's judicial philosophy.

Third, Judge Alito's confirmation hearings could become a precedent for confirming, or not confirming, a Supreme Court nominee, regardless of his likely judicial philosophy or ideology. A number of senators have expressed concerns not so much about Judge Alito's judicial philosophy but rather his credibility. These senators appear skeptical about his attempts to distinguish statements about strongly held personal views from his performance, or qualifications, as a Supreme Court justice. It is not by any means unprecedented for Supreme Court nominations to falter on grounds other than ideology, particularly on the basis of possible ethical improprieties. If senators believe that these hearings ought to become, or ought not to become, a precedent for this kind of focus, they ought to say so.

This past Saturday, January 7th, a law school classmate of Judge Alito's wrote an elegant column in The New York Times in which she suggested, among other things, that, "Since announcing the nomination of Judge Alito, the Bush administration has conducted a high-powered marketing campaign to sell him to the public. Such efforts anticipate and seek to thwart hostile confirmation hearings like those that sank Robert Bork. But neither a witch hunt nor a hard sell from the White House will afford Samuel Alito the confirmation process he, or the country, deserves: one as thoughtful and measured as the legal mind it considers." This is, to be sure, an admirable sentiment. I would just respectfully add that the President's nomination of Judge Alito is not the end of the appointment process; it merely marks the end of one important phase within it. I do not believe that it diminishes this great institution, or poses any separation-of-powers

problem, for senators to be as open and as thorough as possible in their examination of Judge Alito's nomination. Anyone who seeks to exercise the Court's awesome power, vested with life tenure, asks a great deal of the nation. It is not asking too much in response that the Senate be as careful as possible in ensuring the fitness (and even the propriety of the judicial philosophy) of a particular nominee to serve for decades on the Court. The fact that the stakes in Supreme Court appointments has increased with the years requires senators to take as much care as possible in giving their Advice and Consent to a particular nomination. How you do your job will be ultimately as important as how you ultimately vote on the nomination of Judge Alito as an Associate Justice.

****

It is possible that these hearings may not unfold in any clear direction. That will leave subsequent generations to make sense of them. Even so, they will be important for the lessons they teach us about the Supreme Court confirmation process. As I have prepared for these hearings, I have wondered what my students may learn from them. Ironically, the first televised confirmation hearings were for Justice Sandra Day O'Connor. Since then, the nation has watched subsequent hearings closely, and much of what we all have learned – and will learn-- about a particular nominee, the Court, and the Senate is based on these hearings. Supreme Court confirmation hearings provide a rare opportunity for the American people to get a glimpse inside the Supreme Court and particularly to get to know, at least to some extent, the people entrusted to discharge the awesome responsibilities of the nation's highest tribunal. The critical question, apart from whether the Senate will vote to confirm Judge Alito to replace Justice O'Connor, is

what do you want the American people to learn from these proceedings? They will undoubtedly get to know Judge Alito, and that is good. But they will also get to judge for themselves whether the confirmation process is broken. I believe these hearings allow the Senate to showcase a dignified dialogue on Judge Alito's qualifications, including his judicial philosophy, and the future of the Supreme Court. If you are able to ensure that the Senate does at least that much, you will have created a precedent worthy of enduring respect.