

THE BORK CONFIRMATION SPECTACLE — ONE REJECTED

When you walk into the Arlen Specter Center, you encounter numerous photos and other memorabilia celebrating Senator Specter's career, but a small, somewhat innocuous political cartoon authored by the famous artist Tony Auth expresses the senator's career better than the hundreds of other items that accompany it. In this simple drawing, Specter spans a chasm between two cliffs, where on one side is an angry donkey, obviously representing the Democratic Party, and on the other is an angry elephant, representing the Republicans. Underneath is the caption "Senator Specter's Comfort Zone." At first glance, the drawing represents the constant pull that Specter had throughout his life between the policies offered by both parties. However, on a different level, it represents a man in the middle of events. Some public servants go through entire careers without causing major controversy or changing or even affecting national and international policy; Specter was not that person. He consistently appeared in the middle of events to be the individual whose presence profoundly influenced outcome. His *New York Times* obituary aptly captured this fact when it stated, "The irascible senator from Pennsylvania . . . was at the center of many of the Senate's most divisive legal battles."¹ His actions were reviewed positively or negatively,

depending on the political bent of his critic, but always passionately. Specter would have critical and significant influence, whether it was through his input in the political fallout of presidential scandals (President Clinton's impeachment and President Reagan's Iran–Contra scandal), the making of foreign policy (the Middle East and Cuba), the funding of medicine and health (stem cell research), facilitating the economic health of the nation (the stimulus bill), investigating corruption while also championing LGBT rights at a very early stage (the Magistrates' Affair), or legislating criminal justice initiatives or investigations (the insanity plea reformation and the Kennedy assassination). However, it was his central involvement as a member and later chair of the Senate Judiciary Committee where Specter would have his greatest influence. As stated by the author Jeffrey Toobin, "no Senator in fifty years had as profound an influence on the Supreme Court as he did."²

In 1981, as the newly elected Republican senator from Pennsylvania, Arlen Specter was appointed to the Senate Judiciary Committee. The twenty-member committee membership is determined by the ratio of majority to minority members in the Senate. In 1981, because the Republican Party held a majority of seats in the Senate, Specter sat as part of this majority on the Judiciary Committee. One of the primary responsibilities of the committee is to act as the first major step in the selection process vetting presidential nominations to the Supreme Court of the United States. After this process, which most often requires hearings in which the candidate is questioned by Judiciary Committee members, the committee has the option to send the presidential nomination to the full Senate floor, reporting it either favorably, unfavorably, or without recommendation. Once the nomination reaches the Senate floor, selection to the Supreme Court requires a simple majority vote of fifty-one senators.³ During Specter's tenure on the Judiciary Committee, he served a pivotal role in the two most controversial confirmation hearings in US history: the nominations of Judges Robert Bork and Clarence Thomas. To appreciate the nature of the controversies, which Specter was once again to find himself in the middle of and to be essential to the outcome, it is necessary to present the exact nature of the cultural and political landscape of that time.

Chief Justice Earl Warren, having departed from the Supreme Court in 1969, left a strong legacy of liberal decisions that still resonate in America. In addition to outlawing segregation policies in public



FIG. 1.1. Senate Judiciary Committee (original autographs) Back row, left to right, Senators Paul Simon, Howell T. Heflin, Patrick J. Leahy, Dennis W. DeConcini, Charles E. “Chuck” Grassley, Arlen Specter, and Gordon J. Humphrey; front row, left to right, Senators Howard M. Metzenbaum, Robert C. Byrd, Edward “Ted” Kennedy, Joseph R. “Joe” Biden, James S. Thurmond, Orrin G. Hatch, and Alan K Simpson

schools and antimiscegenation laws, his court also found a general right to privacy and contraception, and established the exclusionary rule in the states rendering inadmissible probative, but illegally seized evidence.⁴ Further, his court mandated that in criminal cases the states provide counsel for defendants who were unable to afford their own attorneys.⁵ Although Warren left the court in 1969, his legacy and influence were still present in 1973, when the court ruled in favor of legalizing a woman’s right to choose to terminate a pregnancy in *Roe v. Wade*.⁶ By 1987, the influence of the Warren-led Supreme Court was slowly ebbing. Many in America were not enamored with these liberal-leaning decisions, and a strong conservative backlash was gaining momentum. Seizing this opportunity for change, the 1980 Republican platform implicitly challenged the Warren Court’s liberal rulings.⁷

Empowered by the conservative wing of the Republican Party, President Ronald Reagan wanted to shrink the Warren Court’s expansion of government power and undo perceived social damage caused by its decisions. At this point, the court, now led by Justice Warren Burger, maintained a delicate balance of liberal and conservative inter-

ests, but new judicial selections could change that balance decisively. Reagan's first opportunity arose when Justice Potter Stewart retired. Because Stewart was on the conservative wing of the court, his replacement would not change the balance. Although conservatives strongly urged the president to choose Judge Robert Bork, who was well-known for his opposition to the liberal Warren court decisions, Reagan appointed Sandra Day O'Connor, a choice that severely disappointed and infuriated conservatives who doubted O'Connor's commitment to opposing pro-choice laws. Essentially, his critics claimed Reagan replaced one moderate- to right-leaning Supreme Court justice with another and little was changed. Specter, who sat on the Judiciary Committee during O'Connor's confirmation hearings, voted in favor of her nomination, which facilitated her becoming the first female Supreme Court Justice to sit on the court.

In 1987 the retirement of Justice Lewis Powell Jr. offered Reagan another opportunity to appoint a Supreme Court justice. Considered a moderate by most liberals, Justice Powell had provided the swing vote in many of the most crucial Supreme Court decisions.⁸ This time Reagan, following the conservative-wing recommendation, nominated Judge Robert Bork. During his senatorial campaign, Senator Specter promised that he would not oppose any of Reagan's nominations based on philosophy; therefore, the Republican Party expected Specter to support this nomination as a loyal member of the GOP. However, Bork, no stranger to US politics or jurisprudence, proved a troubling choice for Specter because, according to the senator, Bork's "view of the Constitution . . . was different from anybody else who'd ever been nominated to the Court. He was, doubtless, a brilliant man, but he could have turned the Constitution upside down."⁹ Specter, a key player on the Judiciary Committee, explained, "Bork might be the decisive vote or, even more important, the most pervasive voice during deliberations on abortion, race relations, women's rights, privacy rights, free speech and other core issues."¹⁰

The stakes were undoubtedly high for both sides. Reagan, who had previously disappointed conservatives, wanted to make things "right" with them. The Democrats, who possessed a majority vote on the Senate Judiciary Committee due to a strong Democratic showing in the previous election, were ready and able to do battle.¹¹ Although previous judicial skirmishes had taken place behind closed doors, this one

would be broadcast nationwide on the new twenty-four-hour cable television services. Anxious for content, the media gleefully framed this Supreme Court nomination as a struggle for the soul of the nation, starring President Reagan, Senator Ted Kennedy, Judge Robert Bork, and Senator Specter, the powerful Republican moderate whose vote as a Judiciary Committee member would have great consequence.

It did not take long for the nomination process to become high drama. Less than an hour after Bork's nomination on July 1, 1987, Senator Kennedy proclaimed on the Senate floor: "Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists would be censored at the whim of government, and the doors of the federal courts would be shut on the fingers of millions of citizens for whom the judiciary is often the only protector of the individual rights that are the heart of our democracy."¹² In an unprecedented move, People for the American Way, a liberal advocacy organization founded by Norman Lear, the creator of the popular television show *All in the Family*, authored and sponsored an attack ad against Supreme Court nominee Bork that would take the nomination process out of the hearing room and into the living room. As an ominous picture of Bork filled the screen, Gregory Peck, a respected Hollywood actor announced: "Robert Bork wants to be a Supreme Court Justice. But the record shows he has a strange idea of what justice is. . . . He defended poll taxes and literacy tests, which kept many Americans from voting. He opposed the civil rights law that ended 'whites only' signs at lunch counters. He doesn't believe the Constitution protects your right to privacy. And he thinks that freedom of speech does not apply to literature and art and music."¹³ The television spot ended with a strong plea to viewers to ask their senators to fight the nomination.

Bork's reaction was swift. He angrily complained, "The facts of my professional life have been misrepresented," and he denounced the use of "the tactics and techniques of national political campaigns in a confirmation fight."¹⁴ After a brief run, the ad had initially attracted little attention. However, when Reagan's press secretary, Marlin Fitzwater, attacked it, the twenty-four-hour news media, anxious for ratings, seized on it, and suddenly the ad garnered great attention. It is not

hyperbolic to claim that the Bork fight for the direction of US politics had gone viral, albeit in a non-internet age.

An additional flash point during Bork's nomination involved his previous role in the US attorney general's office under President Richard Nixon during the Watergate scandal. Archibald Cox had been appointed by the attorney general's office as special prosecutor to investigate Nixon's role in paying hush money to criminals to cover up the illegal, covert, White House-directed operations against the Democratic Party. On October 20, 1973, Cox demanded that Nixon, who had wired the White House with listening devices, turn over tape recordings that might shed light on his administration's role in the Watergate affair. Nixon, unwilling to turn over the tapes, ordered Attorney General Elliot Richardson to fire Archibald Cox. Instead, Richardson went to the White House and resigned rather than comply with what he perceived to be an improper presidential order. Nixon immediately ordered William Ruckelshaus, Richardson's former deputy and now the new attorney general, to fire Cox. According to Ruckelshaus, one owes "a duty of loyalty to the president that transcends most other duties. . . . But there are lines. . . . In this case the line was bright and the decision was simple."¹⁵ Ruckelshaus refused to fire Cox and also resigned.

Richardson and Ruckelshaus understood that despite the loyalty they owed to the president, the ultimate duty of the attorney general, as chief law officer, demanded fidelity to the Constitution and not the president.¹⁶

Third in line that night was Robert Bork, who was then the US solicitor general. Unlike Richardson and Ruckelshaus, Bork fulfilled Nixon's order and fired Cox. This scenario has been popularly labeled as the "Saturday Night Massacre."¹⁷ According to Bork, Nixon promised him the next Supreme Court vacancy if he complied with Nixon's order. He recalled that after Richardson and Ruckelshaus's refusals to obey Nixon's directives, the White House sent a car to the Justice Department to fetch him that night to secure his decision. When he met Nixon's lawyers Leonard Garment and Fred Buzhardt, Bork felt "like he was being taken for ride, as in the scene from a gangster movie, but that no one else laughed." Shortly after that, Bork fired Cox; however, Nixon never got a chance to nominate him due to his resignation in disgrace over the Watergate affair.¹⁸



FIG. 1.2. Arlen Specter and Judge Robert Bork pose together after an interview in Specter's office

Bork's role in the Saturday Night Massacre was not forgotten or forgiven by his Democratic opponents. The George Mason University law professor Robert P. Davidow testified at the confirmation hearing that Bork "was not merely violating a department regulation, but also assisting the president in refusing to acknowledge the authority of the US Court of Appeals." He further claimed that Bork's actions "raise serious questions about the extent to which he, as a judge, would require the federal government to adhere to constitutional and other legal limitations."¹⁹ Senator Edward Kennedy, in a published position paper against Bork's nomination, cited Judge Bork's role in the Saturday Night Massacre as a leading example of his profoundly troubling belief in virtually unrestrained presidential power. According to Kennedy, "Robert Bork broke the law when he obeyed the president and fired

Archibald Cox. Rather than doing his duty, he was a dutiful apparatchik of President Richard Nixon.”²⁰

The intensity of interest and personal stake in this public battle for the political balance of the Supreme Court was well represented by the pressure brought on Specter, the perceived moderate Republican swing vote on the Judiciary Committee.

What was historically a political process became a national event, with emotions running high, so high that fistfights were nearly breaking out in town meetings.²¹ By the end of one week, Specter’s office had received more than 50,000 pieces of mail (over 750,000 overall) and almost 50,000 telephone calls. He even received two phone calls threatening his life.²² Other reactions, while not as violent, were not exactly pleasant. One such contact included a note from Representative Robert Walker, an outspoken conservative Pennsylvania Republican. Walker reminded Specter of his previous promise to the religious conservatives not to oppose any of Reagan’s nominations based on philosophy. Walker warned him, “The religious right will see a vote against Bork as a betrayal.”²³

Unlike his Democratic counterparts, Specter was not troubled by Bork’s role in the Saturday Night Massacre and did not consider Bork’s firing of Cox significant in terms of his confirmation decision. He explained, if Bork “didn’t carry out the president’s order and fire the special prosecutor, somebody else along the Department of Justice hierarchy was going to fire Cox.”²⁴ However, Specter was deeply troubled that Bork held an originalist interpretation of the Constitution, a philosophy that bases judicial opinions on the framers’ original intentions. Describing his approach to Specter in a meeting before the hearings, Bork stated that he “looked to the intent of the founding fathers on the Constitution and of the authors of its amendments.”²⁵ Specter mused, “Apparently Bork knew what the drafters and ratifiers of the Constitution had been thinking or could find out. If so, that gave him unique insight.” Bork’s theory essentially held that judges should not make law, but should follow what was originally intended.” Specter disagreed and instead believed that the Constitution should be “much more dynamic. . . . A living growing document responsive to the needs of people.”²⁶

Fearing that Bork’s approach would favor segregationist policies and overrule *Roe v. Wade*, the senator signaled that he might vote

against Bork.²⁷ In response, James Clymer, chair of the Pennsylvania Conservative Caucus, sent Specter a handwritten note, which was more of a rant, labeling Specter as a traitor who lied to the Republican Party and the president, “just to get elected.” Clymer railed, “You have turned the tide against Judge Bork, if Bork is defeated you are to blame!!!! . . . Do you really want to be known as a liar and betrayer of Ronald Reagan? . . . You must change you[r] mind on Bork or face the reality that you are done, finished, washed up, politically a dead duck.”²⁸

Likewise, Specter received a heated letter from Pennsylvania House Representative Carmen Sirianni, stating, “Dear Benedict: [referring to the infamous traitor Benedict Arnold] go to hell!”²⁹

Specter replied, “I will cherish your letter as it epitomizes the level of intellectual discourse that so many of the supporters of the Bork nomination managed to attain.”³⁰

The personal attack strategy practiced by Bork’s allies as well as opponents even reached the White House. The *New York Times* charged President Reagan with “trying to win an argument of such profound constitutional and political significance,” by employing, “character assassination” and “smear tactics.”³¹

Specter, described as a key swing vote on the committee, led the charge against Bork, by engaging the judge in the most extended debates during Senate questioning. Specter was well prepared to question Bork after immersing himself for weeks in Bork’s writings and judicial opinions. During the hearings he was particularly critical of Bork when the judge attempted to soften his previous ultraconservative image, and accused him of undergoing a “confirmation conversion.” Specter, exasperated by Bork’s changing testimony during the hearings concerning his judicial philosophy, confronted the judge, exclaiming, “What troubles me is the very significant pronounced shifts. . . . The concern I have is: where’s the predictability in Judge Bork? . . . What are the assurances that this committee and the Senate has?”³²

After the hearings, in an announcement that the media described as unexpected, Specter stated that because of his “deep-seated philosophical objections” to Bork’s legal philosophies concerning equal protection of the law and freedom of speech, and because of his “substantial doubt” about Judge Robert H. Bork’s commitment to preserving constitutional guarantees of freedom, Specter declared his oppo-

Good Morning,

My name is James Clymer, I am the Pennsylvania chairman for the Conservative caucus.

Senator Arlen Specter has announced he will vote against President Regan's nominee to the supreme court Judge Robert Bork.

Sen. Specter's decision is a landmark in his political career. That landmark ladies and gentleman is the beginning of the end.

Ronald Regan has been called by many a lame duck because he can't run again. The reality for Arlen Specter is that he is about to become politically a Dead duck for joining the liberal lynch mob that has wrongly slandered Judge Bork since his nomination by President Regan to the court.

Its not just the nay vote on Bork that will trigger Sen. Specter Political 'Dead Duck' status, its the fact that he told conservative republicans a boldface lie in order to get reelected.

During the his 1986 fall re-election campaign Sen. Specter in an effort to mend fences with the third of midstate republicans who voted for a total unknown in the republican primary.

In a series of meetings both private and public Arlen Specter assured GOP conservatives that he would support all Future Regan judicial appointments unconditionally.

There is no way around the cold hard fact: Arlen Specter lied to us just to get elected.

Its not just conservatives that are upset with Sen. Specter's announcement Republican moderates now understand why many conservatives have called Arlen Specter 'Benidict Arlen' since his 1980 election. The facts are plain and simple Sen. Specter is a traitor to the Republican party and its President who assisted in his re-election in 1986.

Unlike Sen. Specter past acts of treason to the Republican platform, Arlen Specter has betrayed the Republican state committee's clear mandate last weeks Republican state meeting in Philadelphia. Sen. Specter : Do you recall the vocal chants of 'We Want Bork' from the normally moderate state party leaders?

FIG. 1.3. Letter from James Clymer, the chair of the Pennsylvania Conservative Caucus, to Specter. Clymer ran unsuccessfully for several state offices and as of this writing serves as Judge of Elections for Manor Township, Pennsylvania

sition to the Supreme Court nominee. Specter proclaimed, "This is a difficult vote since I will be opposing my President, my party, and a man of powerful intellect whom I respect and like." Because Specter had been one of the key undecided votes on the committee, commentators believed that Specter's decision dealt a serious blow to Bork's chances for approval by the Judiciary Committee and the full



FIG. 1.4. Letter from Carmel Sirianni to Specter, Sirianni served as a Republican member of the Pennsylvania House of Representatives from 1975 to 1990, representing its 11th District.

Senate.³³ Specter was the only Republican on the committee to cast a negative vote.

On October 6, 1987, in a vote of 9–5, Specter voted with the majority of the Judiciary Committee to report Bork’s nomination with a negative recommendation, which led to his ultimate rejection by the Senate on October 23, 1987, by a vote of 58–42.³⁴ Bork blamed Specter for his failure to be confirmed, claiming that Specter played a key role and “did a great deal” to prevent his confirmation.³⁵ Specter instead blamed Bork’s inconsistencies and repeated shifts in position during his testimony as the reasons for his failure to be confirmed. “He tried to ride two horses and fell from both.”³⁶

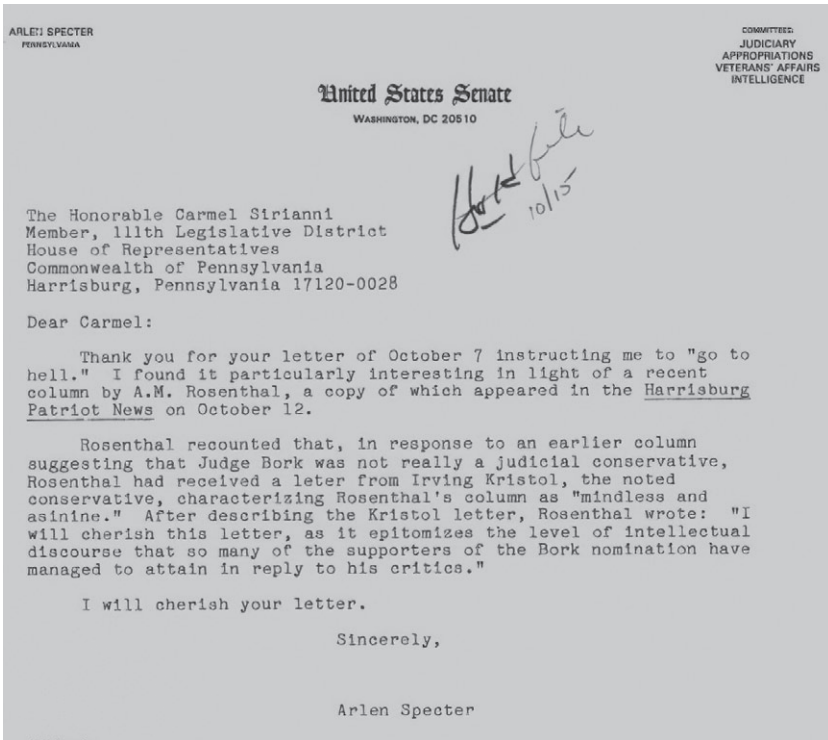


FIG. 1.5. Response letter from Specter to State Representative Carmel Sirianni

Vehement in their reaction, Republicans accused Democrats of systematically defaming and vilifying Bork in the mass media instead of making the confirmation process about qualifications, arguing that Bork was clearly qualified. The Harvard law professor Lawrence Tribe accused the Democrats of personalizing policy in "attempts to stir up fear about him as a person."³⁷ Subsequently, the term "Borked" was coined to describe the treatment Bork received. As defined by the *Chicago Tribune* writer Stephen L. Carter, the target of a "Borking" is "not merely wrong but dangerous; not merely mistaken, but evil."³⁸ Moreover, the Republican Right especially did not appreciate the large role the media played in this Borking. Bork accused the Judiciary Committee members Arlen Specter and Joseph Biden of manipulating "the hearings for maximum media coverage of Bork's detractors."³⁹ The author Joseph Green opined that the media "was less of an investigator and more of a messenger for interest groups. However, they still played a significant role in swaying the opinions of the public."⁴⁰

Indeed, the media reveled in covering the Bork controversy. Between July, when the nomination was made, and the October 7, 1987, negative Senate vote, the *New York Times* ran over 200 articles about Bork and the confirmation process. In that same period, The *Philadelphia Daily News* ran 120 articles and the *Philadelphia Inquirer* over 100.⁴¹ The Center for Media and Public Affairs coded 232 TV news and *Washington Post* stories.⁴² The Republican senator and Bork supporter Alan Simpson commented that although Bork's testimony before the judiciary committee was seen by about 4 million people, perhaps "60, 70 million, 150 million saw Gregory Peck in full flower."⁴³ Senator Orrin Hatch bemoaned the decline of thoughtful political debate, claiming the process had been reduced to "look[ing] at things in terms of 30-second soundbites."⁴⁴ Before the final senatorial vote, the *New York Times* lamented, "The outcome still in balance may hinge largely on the nominee's appeal to the electorate as measured by poll results, which in turn may depend more on simplistic images in advertisements and television news programs."⁴⁵ The numerous articles, news stories, and televised hearings themselves "held the country spellbound."⁴⁶ National polls revealed a two-to-one margin opposing confirmation.⁴⁷ Whether it was Bork's conservative policies, overall perceived arrogance, indifference to civil rights, or his unusual beard, the American public did not like Bork. Reagan administration officials claimed that the anti-Bork fervor reflected "the harsh anti-Bork advertising and public relations campaigns being waged by groups concerned with civil rights, civil liberties," and the environment of "hysteria whipped up by special interest groups."⁴⁸ In response to his public rejection, Bork argued, "Federal judges are not appointed to decide cases according to the latest opinion polls." However, despite Bork's protestations, he had lost his case in the court of public opinion and the senatorial vote followed likewise.⁴⁹

The Bork confirmation hearings represented a watershed change in the landscape of political battles. Having lost a critical skirmish on a national stage, the Conservative Right learned that, instead of transpiring behind closed doors, political conflict should now unfold in the public spotlight, a place where debates on policy and qualifications are rescripted as narrative battles of good versus evil. The significance of this strategic change did not go unnoticed by public officials, who were deeply alarmed by the "quasi-electoral environment in which the nom-

ination took place,” and the “openness of lobbying and the intrusion of advertising” into the political process of Justice Confirmation.”⁵⁰ Bork summed it up well when he proclaimed the campaign against him during the confirmation process a “part of a larger war for control of our national culture.”⁵¹ Pat Buchanan echoed Bork’s observation in his 1992 Republican National Convention speech when he declared, “There is a religious war going on in our country for the soul of America. It is a cultural war, as critical to the kind of nation we will one day be as was the cold war itself.”⁵²

Likewise, the former presidential candidate and right-wing Republican Pat Robertson could not have made it clearer when he explained the nature of his war on secularism in 1991, at a Christian coalition rally. “It’s going to be a spiritual battle,” Robertson told the crowd. “There will be satanic forces. . . . We are not going to be coming up just against human beings, to beat them in elections. We’re going to be coming up against spiritual warfare.”⁵³ Leaving no room for misinterpretation, he further claimed, “The strategy against the American Radical Left should be the same as General Douglas MacArthur employed against the Japanese in the Pacific. . . . Bypass their strongholds, then surround them, isolate them, bombard them, then blast the individuals out of their power bunkers with hand-to-hand combat. The battle for Iwo Jima was not pleasant, but our troops won it. The battle to regain the soul of America won’t be pleasant either, but we will win it.”⁵⁴

An October 7, 1987, letter from Congressman Bill Goodling to Senator Specter left little doubt that this war had been declared and Specter might be its literal first casualty. According to Goodling, “I spoke in Bradford County on Saturday night and would recommend you [Specter] stay out of that area at least through hunting season. In fact, I think it would be in your best interest to stay out of the central portion of the state for the next couple of months until people cool off, because I am afraid some might not be responsible for what they say or do.”⁵⁵

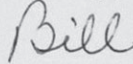
The massive public relations campaign, financed by liberal anti-Bork organizations that resulted in a deluge of letters and calls expressing distain for Bork, left the Republican Right with no doubt that the next major battle in the cultural war would be personal and public. However, this time Republicans would be prepared to do what was

Honorable Arlen Specter
Page 2
October 7, 1987

The ideal judge, I would think, would be one who puts strong personal feelings aside and considers only the law and the Constitution in making his or her decision. Your hearings would indicate that is what Mr. Bork did as a judge.

I spoke in Bradford County on Saturday night and would recommend you stay out of that area at least through the hunting season. In fact, I think it would be in your best interest to stay out of the central portion of the state for the next couple of months until people cool off, because I am afraid some might not be responsible for what they say or do.

Sincerely,



BILL GOODLING
Member of Congress

Honorable Arlen Specter
SH-331 Senate Office Building
Washington, D. C. 20510

FIG. 1.6. Letter from Congressman Bill Goodling, from Pennsylvania's Nineteenth District, to Arlen Specter

necessary to defeat the Democrats, whom they perceived to possess evil intent set on destroying America.⁵⁶

To fill the still empty court seat, President Reagan, stung by the failure of the Bork proceedings, nominated Judge Anthony M. Kennedy and hoped he could be confirmed quickly in a spirit of bipartisan cooperation. Reagan emphasized that Judge Kennedy seemed to be “popular with many senators of varying political persuasions.”⁵⁷ Essentially a moderate, Justice Kennedy was confirmed without major incident, and the balance of the court remained intact.⁵⁸ For a brief moment, there was a truce.