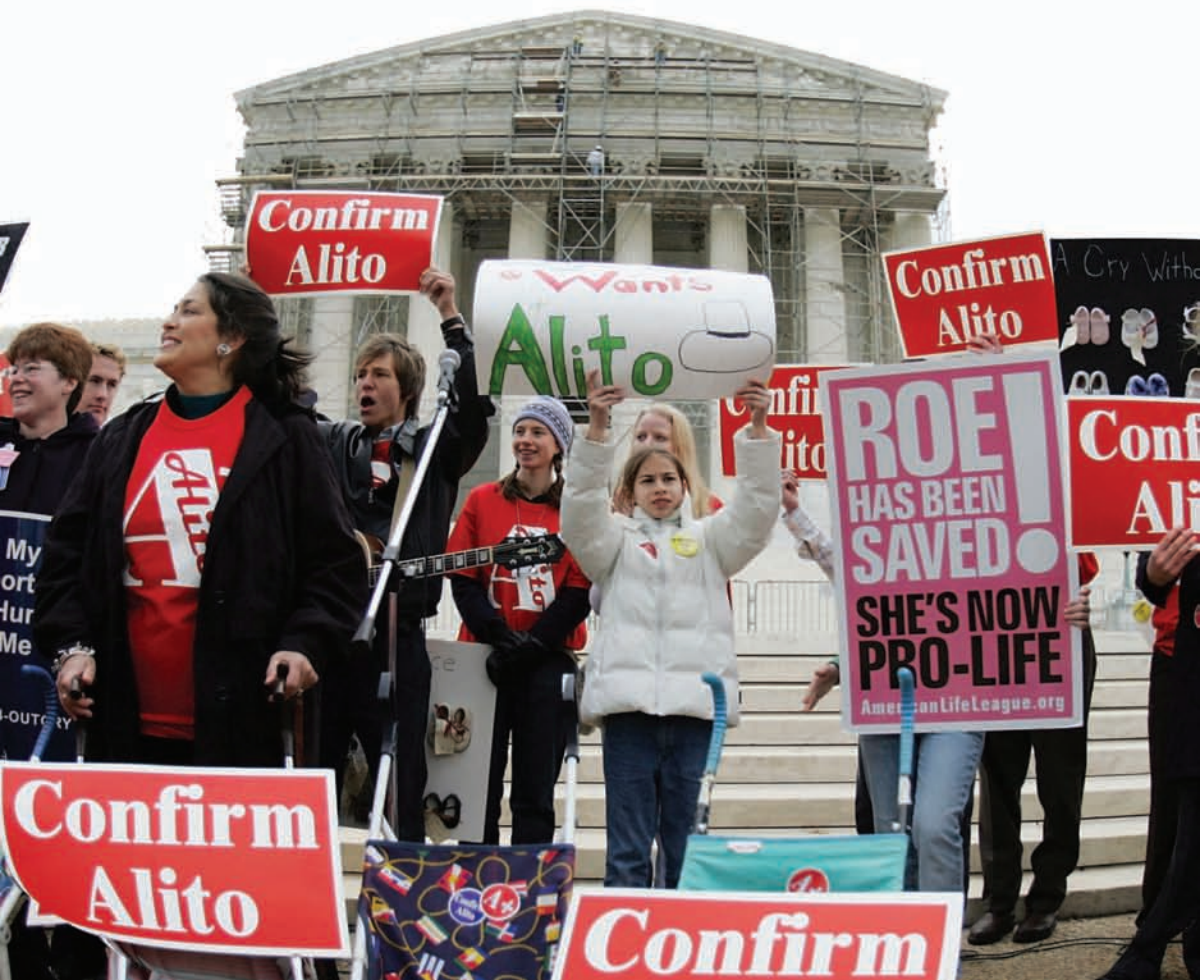
Positivity Theory And The Judgments Of The American People

JAMES L. GIBSON
and GREGORY A. CALDEIRA

CITIZENS, COURTS, *and* CONFIRMATIONS



Citizens, Courts, and Confirmations

Citizens, Courts, and Confirmations

POSITIVITY THEORY AND THE JUDGMENTS OF THE AMERICAN PEOPLE

James L. Gibson
and Gregory A. Caldeira

PRINCETON UNIVERSITY PRESS
PRINCETON AND OXFORD

Published by Princeton University Press, 41 William Street,
Princeton, New Jersey 08540
In the United Kingdom: Princeton University Press, 6 Oxford Street,
Woodstock, Oxfordshire OX20 1TW

Library of Congress Cataloging-in-Publication Data

Gibson, James L.
Citizens, courts, and confirmations : positivity theory and the judgments of the American people / James L. Gibson and Gregory A. Caldeira.
p. cm.
Includes bibliographical references and index.
ISBN 978-0-691-13987-6 — ISBN 978-0-691-13988-3
1. Judges—Selection and appointment—United States. 2. United States. Supreme Court—Officials and employees—Selection and appointment. 3. Alito, Samuel A., 1950– 4. Public opinion—United States. 5. Alito, Samuel A., 1950—-United States Supreme Court confirmation hearings, 2006. I. Caldeira, Gregory A. II. Title.
KF8776.G53 2009
347.73′14092—dc22 2008055155

British Library Cataloging-in-Publication Data is available

This book has been composed in Sabon

Printed on acid-free paper. ∞

press.princeton.edu

Printed in the United States of America

10 9 8 7 6 5 4 3 2 1

This book is dedicated to the memory of Mark Andrew Kinsella.

Contents

Figures and Tables

Figures

Tables

Preface

Upon returning from the annual meeting of the American Political Science Association, waiting for a flight at D.C. National, we first learned of the death of Chief Justice William Rehnquist. With Rehnquist's death came another vacancy on the Supreme Court, and the very real possibility that a highly disputatious fight over the nominee would materialize. Rehnquist's demise immediately stimulated us to think about the role of the mass public in confirmation processes, and how the upcoming events might provide an opportunity to test some interesting theories about how Americans view the Supreme Court and how those views change in response to contentious nominations to the high bench.

But a study of change must, perforce, have measures before and after the event hypothesized to drive opinion evolution. When the timings of important political events are not predictable, it is typically impossible to find relevant data preceding the event (t_1), just as it is logistically demanding to secure funding for survey work during the event itself (t_2) and after the dispute has subsided (t_3). Thus, the optimal research design has never before been used to study public opinion during the course of a nomination to the United States Supreme Court.

In this case, we were fortunate that a t_1 survey existed, fielded several months before the nomination, and that the survey included a number of highly relevant measures of attitudes toward the Supreme Court. That survey was not designed to have anything to do with the nomination and confirmation of judges to the Supreme Court, but the questionnaire did include crucial measures of institutional support. In addition, the general measures of political knowledge included in that survey were directed toward the Supreme Court. Thus, the t_1 survey provided sufficient baseline indicators to make a study of opinion change interesting and feasible.

But where could funding be found quickly enough to be able to mount a second interview of the t_1 respondents during the course of the nomination battle itself? Few funding agencies exist that can decide within the course of just a few months to allocate significant research support to time sensitive projects. Fortunately, the National Science Foundation (NSF) is one such agency.

NSF has a program designed to fund worthy projects of this sort. Proposals for small-scale, exploratory, and high-risk research in the fields of science, engineering, and education normally supported by NSF may be submitted to individual programs, including social behavioral and eco-

nomic sciences. Such research is characterized as preliminary work on untested and novel ideas; ventures into emerging research ideas; the application of new expertise or new approaches to "established" research topics; having extreme urgency with regard to availability of or access to data, facilities, or specialized equipment, including quick-response research on natural disasters and similar unanticipated events; and efforts of similar character likely to catalyze rapid and innovative advances. Fortunately for us, NSF was willing to consider a proposal for research on the Alito nomination under this SGER program, and even more fortunately, the Law and Social Sciences Program, directed by Isaac Unuh, found our proposal worthy of funding. "Firehouse studies" of this type are not common in political science, not because of their lack of value, but because funding is so difficult to secure in a timely manner. We are fortunate that NSF has the foresight to appreciate that important research proposals require expeditious consideration if valuable opportunities are not to be lost, and we appreciate even more the support of the Law and Social Sciences Program for this research.

Thus, this project employs a three-wave panel study and is an effort to assess how public opinion affects and is affected by controversial nominations to the Supreme Court. Our research discovers a number of unexpected findings about all aspects of the process, ranging from the extent of knowledge that Americans possess about the Supreme Court to their perceptions and assessments of Judge Alito to the consequences of the confirmation battle for longer-term attitudes toward the Court. Just as our research design is unprecedented, so too are our principal findings.

Given the unusual nature of the design of this project, we are uncommonly indebted to a number of people and institutions. Support for the 2005 survey (t_1) was provided by the Atlantic Philanthropies in a grant to the Center for Democracy and the Third Sector (CDATS) at Georgetown University. The 2005 survey was also funded in part by the Weidenbaum Center on the Economy, Government, and Public Policy at Washington University, St. Louis. Marc Morjé Howard, with the assistance of James L. Gibson, was primarily responsible for executing that survey. We greatly appreciate Howard's untiring efforts on the 2005 project, as well as the support for this research provided by Steven S. Smith and the Weidenbaum Center.

As we have noted, the nomination surveys were supported by the Law and Social Sciences Program of the National Science Foundation (SES-0553156). Any opinions, findings, and conclusions or recommendations expressed in this material are those of the authors and do not necessarily reflect the views of the National Science Foundation. Additional funding for the 2006 survey was provided by the Mershon Center for

International Security Studies at the Ohio State University ("The Legitimacy of the Supreme Court and Critical Nominations"), to whom we are much indebted. Finally, questions in the 2006 surveys relating to the U.S. Congress were added with the support of a Congressional Research Award from The Dirksen Congressional Center.

Various portions of this book have profited from presentations at professional conferences. Chapter 2 is a revised version of a paper delivered at the 65th Annual National Conference of the Midwest Political Science Association, April 12–15, 2007, Palmer House Hilton, Chicago, Illinois. In addition to the 2005–2006 panel data, that research relies upon multiple data sets, gathered with the support of various agencies. Collection of the 2001 data would not have been possible without the support of the Weidenbaum Center on the Economy, Government, and Public Policy, Washington University, St. Louis, and The Ford Foundation (Grant Number 1015–0840). We are especially indebted to Steve Smith, Director of the Weidenbaum Center, for his encouragement of this work. We also appreciate the research assistance of Marc Hendershot, Jessica Flanigan, and Christina Boyd on that project. We are thankful for the most useful comments on an earlier version of that paper from our colleagues, including Bert Kritzer, Markus Prior, Kent Tedin, Marc Hendershot, Jan Leighley, C. Neal Tate, Michael X. Delli Carpini, Jon Krosnick, Skip Lupia, Gary Segura, Elliot Slotnick, Jeff Mondak, Chris Claassen, Tali Mendelberg, and the Workshop on Empirical Research in Law at Washington University Law School.

For comments on chapter 3, we are indebted to Damon Cann, Jeffrey Yates, Gerhard Loewenberg, and Robert Y. Shapiro. We also appreciate the research assistance of Marc Hendershot, Jessica Flanigan, and Christina Boyd.

Chapter 4 is a revised version of a paper delivered at the 64th Annual National Conference of the Midwest Political Science Association, April 20–23, 2006, Palmer House Hilton, Chicago, Illinois. We also appreciate the research assistance of Marc Hendershot and Christina L. Boyd, both of Washington University, and the comments of Jonathan To, Carissa van den Berk Clark, Amy Overington, Thomas G. Hansford, Barry Friedman, Lee Walker, and Jeff Yates on an earlier version of that paper.

Chapter 5 is a revised version of a paper presented at the 2007 Annual Meeting of the American Political Science Association. In that chapter, we make use of information about the advertisements run during the Alito confirmation process that was made available by the Brennan Center at New York University. We appreciate the counsel of Deborah Goldberg on various aspects of those data.

Chris Claassen and Rachel Berland provided most useful research assistance on various aspects of this project.

Finally, we appreciate President Bush for his decision to name a controversial candidate for a seat on the Supreme Court. Had Bush nominated a centrist judge, our project might have been jeopardized. By naming one of the most conservative candidates available, Bush ensured that the confirmation process would be controversial and politicized, thereby giving us an opportunity to learn more about how citizens update their views toward the nation's highest judicial institution.

James L. Gibson
Cape Town, South Africa
August 2007

Gregory A. Caldeira
Columbus, Ohio
August 2007

Citizens, Courts, and Confirmations

CHAPTER ONE

Introduction

THE PUBLIC AND SUPREME COURT NOMINATIONS

The processes by which nominees are confirmed to a seat on the United States Supreme Court have changed rather dramatically over the past fifty years. It is not just that confirmation struggles are more disputatious today; perhaps more important is the expansion of the numbers of actors involved in such disputes. In the past, it was relatively rare for the mass public to play much of a role. Today, one of the crucial elements in confirmation strategies concerns how public opinion will be managed and manipulated. We do not gainsay that elite groups have great influence over whether a nominee is to be confirmed (and that is another important part of how the process has changed). But at least since the days of the Bork defeat and Thomas victory, the preferences of the mass public have been influential in determining who goes on the Supreme Court.

The role of ordinary people has increased in part owing to the far greater availability of information about nominees and the confirmation process. In recent times, cable television has provided extensive coverage of the Senate hearings, and the public's pulse is often taken by media polls during the confirmation period. Evidence from many sources indicates that Americans are remarkably attentive to and even informed about the actors and issues involved when a president puts forth a nominee to the nation's highest court.

And there is little doubt that the stakes of confirmation politics have increased as well. The Supreme Court is divided on many salient sociolegal issues, as are the American people and their elected representatives. Indeed, the whole question of who gets on the Supreme Court has become one of the most important political issues of our time. And even beyond any given issue, debates over the proper role of the judiciary within the American democratic framework are becoming increasingly vocal, even strident. Confirmation politics have entered a new era in which the process is more open than ever before; the public is more engaged than it has been in the past; and nearly everyone believes that confirmation fights are entirely worth fighting.

More generally, the process of nominating and confirming judges to the federal bench has become more intensely politicized than in the

recent past.[1] Perhaps this era can be demarcated by the failed Bork nomination (e.g., Epstein et al. 2006), but the period of the Clinton presidency (and indeed any instance of divided control of the Congress and the presidency) also represents a high-water mark in the politics of contested confirmations. Recent nominations to the Supreme Court have been divisive and controversial. These politicized circumstances constitute a potentially volatile brew.

Many questions arise from this mix of ingredients, questions that scholars heretofore have been unable to address. Perhaps most important is that of ascertaining the effect of politicized confirmation battles on the legitimacy of the Supreme Court and the broader court system in the United States. Many fear that politicization undermines judicial legitimacy: that once the judiciary is seen as just one more political plum, the special reverence Americans hold for their courts will be eroded. The assumption is that whenever Americans are exposed to the politics that has always provided a backdrop for the judiciary, the respect accorded to courts diminishes. The process is fairly simple:

- Americans dislike many of the inherent processes of democratic politics—logrolling, bargaining, compromise, deal making, et cetera.
- The legitimacy of institutions profits when policy makers dissociate themselves from ordinary political processes.
- The great strength of courts is that their decision-making processes are grounded in principle and logic, not politics, and that they are to some considerable degree opaque.
- Any process that associates courts with ordinary politics does so at the risk of considerable damage to the legitimacy of the judiciary.

This set of arguments is widely heard when it comes to campaigning by judges holding elected positions in the state judiciaries (e.g., Geyh 2003). Many fear exactly the same dynamics will undermine the legitimacy the Supreme Court and other federal courts if the politicization of the selection process continues along its current trajectory.

Indeed, the process envisaged by critics is well represented in a somewhat different but related context by the extremely controversial decision the United States Supreme Court made in the 2000 presidential dispute. In *Bush v. Gore*, a perfectly divided Supreme Court—and one divided by political party affiliation as well—awarded the election to George W. Bush. The justice casting what many consider to be the deciding vote (Sandra Day O'Connor) was reported to have proclaimed at a cocktail party "this is terrible" when told that a Gore victory in the election was

[1] On the worldwide tendency toward the politicization of law and the legalization of politics, see Tate and Vallinder 1996.

likely (Gillman 2001, 18, citing Thomas and Isikoff 2000). Various law professors proclaimed in an advertisement in the *New York Times* that the Supreme Court had sacrificed a significant portion of its institutional legitimacy through its ruling in *Bush v. Gore*.[2] It is difficult to imagine how a set of circumstances could arise that would constitute a greater threat to the legitimacy of the Supreme Court than its (so-called self-inflicted) involvement in settling the presidential election in Florida and therefore for the nation.

Yet things are not always as they seem. It turns out that the available evidence is that the Court's involvement in the election did *not* damage its legitimacy. In a comparison of data from a survey conducted at the height of the controversy with survey data from 1995 and 1987, Gibson, Caldeira, and Spence (2003a) found no evidence whatsoever that the Court's legitimacy took a dip owing to its decision. Other scholars report similar findings; for instance, Price and Romantan (2004, 953, emphasis added) draw the following conclusion from their research: "On the whole our findings are consistent with the hypothesis that the election—even with the vituperative disputes in its wake—served to *boost* public attachment to American political institutions."[3] Many academic understandings of the impact of *Bush v. Gore* seem to be considerably off the mark.

How is it that the United States Supreme Court avoided any harmful consequences of the election imbroglio? Again, Gibson, Caldeira, and Spence (2003a) have proffered an answer: the theory of positivity bias. According to this theory, discussed more completely below, anything that causes people to pay attention to courts—even controversies—winds up reinforcing institutional legitimacy through exposure to the legitimizing symbols associated with law and courts. The theory suggests a bias in favor of developing positive feelings for the institution, even during conflicts, and even among losers in such conflicts. While there are many elements to this theory, its central prediction is that legal controversies tend to reinforce judicial legitimacy by teaching the lesson that courts are different from the other institutions of the American democracy, and are therefore worthy of respect.

Does the theory of positivity bias apply to confirmation hearings? No one knows, and it is therefore the purpose of this research to test the theory in that context. Specifically, our objectives in this book are to assess the hypothesis that confirmation hearings are not injurious to institu-

[2] On 13 January 2001, 585 law professors placed an advertisement in the *New York Times* condemning the Court's decision in *Bush v. Gore* as illegitimate. The advertisement, as well as much additional material and criticism, can be found at *http://www.the-rule-of-law.com* (accessed 12/7/2001).

[3] See also Yates and Whitford 2002; Kritzer 2001, 2005; Gillman 2001; Nicholson and Howard 2003.