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What Judges Do

By Benjamin Wittes  
The Washington Post  
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The unanimous decision last week by the D.C. Circuit Court of Appeals in the case of U.S. v. Microsoft should give a moment's pause to anyone certain that ideology ought to be a central consideration when the Senate examines President Bush's judicial nominees. Seven judges of extremely diverse politics took on a politically divisive case that involved a complex record and had significant implications for the national economy. Defying almost all predictions, they put ideology aside and managed to craft a ruling that every member of the court could sign in its entirety. The D.C. Circuit did not look much like a partisan battleground last week. Rather, its judges looked, well, like judges -- neutrally applying complicated precedents to even more complicated facts and striving successfully to get the right answer.

The debate over ideology and the courts is a frustrating one because the hypocrisy on both sides runs so thick. These days, Republicans like to pretend that ideology has no legitimate role in the judicial confirmation process. But this claim doesn't pass the laugh test after the past few years, during which some of those same Republicans waged war against President Clinton's nominees for their alleged tendency toward "judicial activism." It actually didn't pass the laugh test before that either: It simply defies logic to insist that a senator must support a nominee whose

approach to judging offends  
that senator's conscience.

On the other side, however, the new-found Democratic infatuation with  
subjecting nominees to ideological  
examination stinks of purity tests. Few are bothering to define what they  
mean by judicial ideology -- though  
it usually seems to have something to do with abortion -- or to specify in  
what universe of cases they think it matters.

The controversial nominees now before the Senate have been named to  
appeals courts, and the truth is  
that the average case before such courts -- even the average important,  
high-profile case -- is far more like  
Microsoft than like *Roe v. Wade*. Since the turn of the year, the D.C.  
Circuit has decided nearly 120 cases  
unanimously. In the same period, only 13 cases have produced dissents.  
Most of these dissents were on  
technical matters, with no ideological dimension at all. Only a few cases  
could plausibly be described as  
ideologically tinged, and in only one -- an affirmative action case last  
month -- did judicial philosophy play  
an obvious role.

Longer-term data compiled by the court's chief judge, Harry Edwards,  
likewise suggest only a minimal role  
for ideology on the D.C. Circuit. Edwards has reported that between 1995  
and 1999, no more than 3 percent  
of cases produced dissents in any given year. Of those cases in which  
dissents were filed, only about half  
involved disputes between judges appointed by presidents of opposing  
parties. The court's handling of  
Microsoft, however striking in the current environment, is actually  
typical.

The point is not that ideology should be a forbidden subject, only that  
the ideological stakes in the appointment  
of lower court judges should not be overstated. At the Supreme Court  
level, a nominee's views on abortion and  
other divisive social issues may matter enormously. At the courts of  
appeals, however, these are largely symbols  
that have come to serve as badges identifying the types of judges we  
expect individuals to be.

The trouble is that the badges can be extremely misleading. With a few  
exceptions -- affirmative action most  
notably -- the labels "liberal" and "conservative" say very little about  
how a judge is likely to resolve a given case.  
The craft of judging is far more important to the day-to-day work of the  
lower federal courts than are the political  
issues that drive the debate over the judiciary's future.

The legitimate place of ideology in the discussion of judicial nominees  
is, therefore, limited -- limited to those  
nominees whose ideology is so strong that it might interfere with judicial  
decision-making. The more ideological

the judge -- in any direction -- the less respectful of precedent and the less constrained by the facts of a given case he or she may be.

A senator who has reason to believe that a given nominee's pursuit of the right answer will be compromised by ideological precommitments should certainly vote against that nominee. But without some good reason to think a nominee's ideology will adversely impact his or her handling of a discernible body of cases, opposing that nominee on the basis of ideology is nothing more than punishment for his or her beliefs. That's a dangerous game.

The writer is a member of the editorial page staff.