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Judicial setbacks for Bush, delicately delivered

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The US Supreme Court has just ended its nine-month work year with a flurry of rulings quite different in tone from previous years' decisions. In 2000 a narrow majority of the nine justices assertively resolved the contested US presidential election by handing victory to George W. Bush.

Assertiveness has been a hallmark of this high court's behaviour for more than a decade, but this year, with the November presidential election looming, the justices have done all they can to avoid political controversy rather than stoke it.

Their most notable decisions concerned the Bush administration's executive detention of alleged al-Qaeda supporters. In a case involving Yaser Esam Hamdi, a US citizen captured in Afghanistan, a piecemeal majority rebuffed the president's claim that Mr Hamdi could be incarcerated without right of appeal. In a second and potentially more consequential ruling, six justices held that the 600 foreign citizens jailed at the US military base in Guantanamo Bay without recourse to US courts must be allowed to file judicial challenges to their detention.

Both rulings were decisive defeats for Mr Bush, but the court rendered them in the most politically inoffensive manner possible. In the Hamdi case the justices required only that detained citizens be given a "meaningful opportunity" to contest the grounds for their incarceration before a "neutral decisionmaker". That requirement can be met with someone less than a real judge, such as a military officer and, the justices volunteered, that officer can also be required to apply a "presumption in favour of the government's evidence". The incarcerated citizen thus will bear a heavy if not insuperable burden of proof in such faux-judicial proceedings.

Likewise in the Guantanamo case, the court held only that the foreign detainees can now challenge their detentions in a US court. The majority voiced no quotable criticisms of Mr

Bush, and plans are now in train to shift the prisoners from Guantanamo to a mainland facility in one of the most conservative US judicial districts. Just as in the Hamdi case, the court's ostensible provision of a right of appeal may well amount to little or nothing for the foreign detainees.

In both cases the court maintained an aura of judicial supremacy while giving Mr Bush's opponents scant political ammunition. The same style of decision-making was also evident in the court's two other most politically loaded cases this term. In a highly contentious challenge seeking secret records from an energy policy committee headed by Dick Cheney, US vice-

president, a majority of seven justices voted to send the case back to a lower court. That ruling delays any possible embarrassment to Mr Cheney until well after the election.

Domestically the most visible case the court confronted was a challenge to the inclusion of the words "under God" in the widely mandated pledge of allegiance to the US flag. The constitution prohibits any "establishment" of religion and an atheist parent had objected to his daughter being confronted daily with the "under God" pledge in her public-school classroom. The court, however, ducked controversy by saying that a child custody dispute between the girl's parents rendered the case unfit for decision.

No justices have left the Supreme Court for 10 years now, but their increasing age alone assures that whoever is elected US president this November will select at least two and perhaps as many as four new nominees over the next four years. Presidential selection policies in recent years have peopled the court largely with little-known career jurists, a big change from earlier decades when prominent politicians were often placed on the high court despite a lack of judicial experience.

Until this year's outbreak of judicial meekness, the eagerness of these career jurists to exercise judicial authority manifested itself both in conservative rulings limiting the power of Congress and in liberal decisions protecting abortion and gay rights. But after their decisive role in the 2000 presidential election, the justices this year have clearly tried to stay out of the 2004 contest. This strategy makes it likely that a year from now either John Kerry or Mr Bush will continue to restock the court with career jurists comfortable with judicial authority, rather than appoint politicians who would defer to the elective branches. If so, one year of judicial self-abnegation will allow the Supreme Court to continue exercising a degree of judicial power rare indeed in a democratic country.

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