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Judicial Restraint

### JOURNAL EDITORIAL STAFF

Critics of our appellate courts often skewer judges for being "judicial activists." But a case before the N.C. Supreme Court demonstrates that overly zealous judges are not always at fault for this over-stepping of authority. Sometimes, the governor and legislature are to blame because they fail to act.

North Carolina is in the middle of a de facto moratorium on executions caused by a dispute between two state agencies. State law requires that a doctor be present during the administration of the death penalty.

The N.C. Department of Correction says the doctor is there to assure that the execution is properly administered. The N.C. Medical Board says that the doctor's only role would be the certification that the inmate has actually been executed.

No executions will take place until this dispute is settled, and it went to the N.C. Supreme Court this month. But North Carolinians should be asking whether this is an issue for the justices to decide or, as Associate Justice Patricia Timmons-Goodson said, one for the legislature.

The standoff ties back to the U.S. Constitution's prohibition against "cruel and unusual punishment." The Department of Correction wants the doctor to assure the proper administration of the lethal drugs that kill the inmate. If administered properly, the department says, the drugs will kill the inmate in a constitutional manner.

The medical board does not want to have anything to do with assuring proper administration of this lethal cocktail. Doctors are on a mission to heal and cure, not to kill, the board says. If doctors assure that the lethal cocktail is properly administered, they will be killing their patients, the board argues.

The gap between the two viewpoints is significant and represents a major dispute over public policy. Courts are not supposed to be the formulators of major public policy. When they are, the public often criticizes the judges involved for being judicial activists. The role of courts is to interpret and apply laws that were written by the legislative branch and signed by the executive.

Public policy formulation, therefore, should rest outside the judicial branch. But the failure of the N.C. General Assembly to address this issue has meant that it has inappropriately landed in court.

Timmons-Goodson suggested that the legislature further define the doctor's role at executions. During the last biennial assembly, legislators could have acted on either of two bills designed to set that policy. It acted on neither.

Gov.-elect Bev Perdue should address this issue early in the 2009 session, and legislators should, also. Then they can debate the proper course.

The execution of a Death Row inmate is the most serious thing the state does. All three branches should be properly performing their roles in the process.