

Winter 1975

## In re Executive Assignment of State Attorney, 298 So. 2d 382 (Fla. 1974)

Bruce A. Alter

Follow this and additional works at: <http://ir.law.fsu.edu/lr>



Part of the [Constitutional Law Commons](#)

---

### Recommended Citation

Bruce A. Alter, *In re Executive Assignment of State Attorney*, 298 So. 2d 382 (Fla. 1974), 3 Fla. St. U. L. Rev. 127 (2014) .  
<http://ir.law.fsu.edu/lr/vol3/iss1/10>

This Comment is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized editor of Scholarship Repository. For more information, please contact [bkaplan@law.fsu.edu](mailto:bkaplan@law.fsu.edu).

## CASE COMMENTS

**Grand Juries—CHIEF JUSTICE MAY SUSPEND GRAND JURY INVESTIGATIONS THAT INTERFERE WITH CONSTITUTIONAL DUTIES OF LEGISLATIVE AND EXECUTIVE BRANCHES.—***In re Executive Assignment of State Attorney*, 298 So. 2d 382 (Fla. 1974).

On March 4, 1974, Governor Reubin O'D. Askew issued an order assigning T. Edward Austin, State Attorney of the Fourth Judicial Circuit, to the Second Judicial Circuit in order to investigate allegations concerning Commissioner of Education Floyd T. Christian.<sup>1</sup> On April 17, 1974 the Leon County Grand Jury indicted Christian.<sup>2</sup> Eight

---

1. Executive Order No. 74-19 (March 4, 1974). The governor may assign a state attorney from one district to another "for any . . . good and sufficient reason," to serve the ends of justice. FLA. STAT. § 27.14 (1973). This provision has been broadly interpreted by the Florida Supreme Court. *See* *Finch v. Fitzpatrick*, 254 So. 2d 203 (Fla. 1971).

2. Commissioner Christian was charged in five indictments with eleven counts of perjury and eight counts of bribery, perjury, and unauthorized compensation. He subsequently resigned from office. The First District Court of Appeal quashed the indictments, finding that the special prosecutor, T. Edwin Austin, had been invalidly assigned by Governor Askew, that Austin had improperly used two of his own assistants, and that it was illegal for all three prosecutors to be before the grand jury at once. The court held that FLA. STAT. § 27.14 (1973) does not provide for the assignment of a state attorney "to discharge the duties of (as distinguished from "assist") another state attorney in a single case or in regard to a single individual [unless that other state attorney is disqualified]." *State ex rel. Christian v. Austin*, 302 So. 2d 811, 819 (Fla. 1st Dist. Ct. App. 1974). In a companion case, the court found that FLA. STAT. § 27.14 (1973) does not authorize assignment of *assistant* state attorneys, and that FLA. STAT. §§ 905.17, .19 (1973) do not, in any case, allow the state attorney and his designated assistant to be with the grand jury at the same time. *State ex rel. Christian v. Rudd*, 302 So. 2d 821, 826 (Fla. 1st Dist. Ct. App. 1974).

The Florida Supreme Court quashed the decisions of the First District Court of Appeal insofar as they held that a state attorney may not be assigned by the governor to another judicial circuit for the purpose of discharging the duties of another state attorney in a single case or as regards a single individual. *Austin v. State ex rel. Christian*, No. 46,475, at 7 (Fla., Feb. 10, 1975). The court held that "if for any good and sufficient reason the Governor thinks that the ends of justice would best be served, he may assign any state attorney of the State to the discharge of the duties of State attorney in any investigations in any circuit of the State." *Id.* at 5. Nonetheless, the court agreed with the court of appeal that the assistant state attorneys were invalidly assigned. *Id.* at 7. The majority based this holding on the fact that the assistant state attorney is " 'not an officer of the State of Florida,' " and hence his authority is limited to the circuit of his appointment. *Id.* at 7-8. The majority noted that an "assigned State Attorney [who] desires to use his own assistants . . . could very easily present the assistant to the Judge of the Circuit Court to which he is assigned and have the assistant sworn in as an Assistant State Attorney in the circuit to which the State Attorney has been assigned." *Id.* at 9. However, as pointed out in Justice Overton's separate opinion, there seems little reason for the validity of an assignment to turn on whether an assistant has taken the same oath of office a second time in a different circuit. *Id.* at 10 (separate opinion of Overton, J.). Requiring a second oath seems especially unwarranted when, as here, the validity of the assignment of the assistant state attorneys determines the

days later, the Governor, with permission of the Florida Supreme Court, extended Austin's assignment for an additional 90 days to continue investigations of other officials.<sup>3</sup> Subsequently, the Governor filed an application for another extension "because of the magnitude and complexity of those matters which are before the Grand Jury."<sup>4</sup>

By the time of the second request it had become apparent that the investigation was of State Treasurer-Insurance Commissioner Thomas D. O'Malley. O'Malley, who had qualified for re-election, filed a petition for leave to intervene in the supreme court's review of the application. He alleged that the investigation was "politically motivated" and prayed that the court order the grand jury immediately either to indict or report no true bill "in order that no cloud of suspicion continue during the campaign and election process currently underway."<sup>5</sup>

On July 25, 1974, Chief Justice Adkins issued an administrative order deferring consideration of the extension and staying until after the election all grand jury proceedings that involved investigation of

validity of otherwise sufficient indictments. *See id.* Justice Overton also took exception to the characterization of an assistant state attorney as a "circuit official" since "[a] circuit is not a political subdivision under our constitution, and both the state attorney and his assistants are paid by the State from the same appropriation." *Id.* at 11.

In the companion case of *Rudd v. State ex rel. Christian*, No. 46,476 (Fla., Feb. 10, 1975), the supreme court approved the appeal court's determination that Christian could be indicted prior to impeachment or conviction. *Id.* at 2. The court disagreed with the First District's construction of FLA. STAT. § 905.19 (1973) regarding the presence of more than one prosecutor in the grand jury room at one time. Approving *Dotty v. State*, 197 So. 2d 315 (Fla. 4th Dist. Ct. App. 1967), the court held that a "State Attorney and one or more lawful and qualified Assistants [may] be present at the sessions of the Grand Jury to examine witnesses and give legal advice about any matter cognizable by the Grand Jury." *Rudd v. State ex rel. Christian*, *supra*, at 5 (emphasis added). The court found, however, that the presence of assistants who were not "lawful and qualified" voided the indictments. *Id.* Justice Overton again dissented from part of the opinion. Not only did he feel that the "second oath" requirement imposed by the majority was unfounded, but also found "no prejudice to the defendant shown in this record." *Id.* at 6.

3. Executive Order 74-25 (April 25, 1974), *approved*, Order Approving Extended Assignment, *In re* Executive Assignment of State Attorney (Fla., April 26, 1974).

The Governor acted pursuant to FLA. STAT. § 27.14 (1973), which provides in pertinent part:

Any exchange or assignment of any state attorney hereunder to a particular circuit for a period in excess of sixty days in any one calendar year must be approved by order of the supreme court upon application of the governor showing good and sufficient cause to extend such exchange or assignment.

4. Executive Order No. 74-36, at 1 (July 23, 1974).

5. Petition for Leave to Intervene, at 1, 4, *In re* Executive Assignment of State Attorney, 298 So. 2d 382 (Fla. 1974).

persons who had qualified for election.<sup>6</sup> Adkins based his authority<sup>7</sup> on article VI, section 5 of the Florida Constitution, which provides for general elections,<sup>8</sup> and article V, section 2(b), which states in pertinent part: "The chief justice of the supreme court shall be . . . the chief administrative officer of the judicial system." Also, he took judicial notice that grand juries were investigating persons who had qualified for the upcoming election, and that the press was "feed[ing] the rumor mills . . . ."<sup>9</sup> From this he reasoned that the news leaks would infringe upon the constitutional mandate for free elections, and that as chief administrator it was his duty to prevent such infringements.<sup>10</sup>

The Governor, by and through the Attorney General, petitioned the supreme court to review and dissolve Adkins' order.<sup>11</sup> The result

6. Order Defining Action on Request for Second Extension of Assignment of a State Attorney and Continuing Grand Jury Investigation of Certain Matters, *In re* Executive Assignment of State Attorney, 298 So. 2d 382 (Fla. 1974). This order was subsequently modified and is reproduced as modified at 298 So. 2d 384.

On at least one occasion, the proceedings of a federal grand jury have been suspended. *In re* National Window Glass Workers, 287 F. 219 (N.D. Ohio 1922). In that case, the person being investigated alleged that the proceedings were instituted in order to obtain evidence to be used in a separate trial. The government claimed that such was not the purpose of the proceeding, but did admit that the evidence probably would be used in the other trial. Other facts tended to support the contentions of the accused. The court restrained the grand jury from proceeding until after the trial.

It should be noted that the court placed upon those being investigated the burden of showing that the grand jury abused its power. Such a burden has been very difficult to carry. See *United States v. United States District Court*, 238 F.2d 713 (4th Cir. 1956), *cert. denied*, 352 U.S. 981 (1957).

7. Revised and Clarified Order Defining Action on Request for Second Extension of Assignment of a State Attorney and Continuing Grand Jury Investigation of Certain Matters, *In re* Executive Assignment of State Attorney, 298 So. 2d 382, 384 (Fla. 1974).

8. FLA. CONST. art. VI, § 5 provides:

General and special elections.—A general election shall be held in each county on the first Tuesday after the first Monday in November of each even-numbered year to choose a successor to each elective state and county officer whose term will expire before the next general election and, except as provided herein, to fill each vacancy in elective office for the unexpired portion of the term. Special elections and referenda shall be held as provided by law.

9. Revised and Clarified Order Defining Action on Request for Second Extension of Assignment of a State Attorney and Continuing Grand Jury Investigation of Certain Matters, *In re* Executive Assignment of State Attorney, 298 So. 2d 382, 385 (Fla. 1974).

10. *Id.* at 384-85.

11. Motion Before the Full Court for Review of Order Defining Action on Request for Second Extension of Assignment of a State Attorney and Continuing Grand Jury Investigation of Certain Matters as Issued by the Chief Justice of This Court On or About July 25, 1974. The Governor made several arguments. First, he argued that the application for the extension had shown "good cause" supporting the extension. *Id.* at 3. Second, he pointed out that Judge Rudd, who was supervising the grand jury, had filed an affidavit,

set[ting] out in meticulous detail exactly why the extension was not only needed but vital to a resolution of the matters being considered by the grand jury, to-wit:

was a 4-3 affirmation of a slightly modified order.<sup>12</sup> The modification allowed a grand jury investigation of a candidate to continue if a showing could be made that "the public welfare requires such investigation or that law enforcement would be hampered."<sup>13</sup> The majority did not question Adkins' power to stay the proceedings.

The grand jury in America has traditionally served two functions. First, as an investigatory body it undertakes independent inquiries into possible violations of the law.<sup>14</sup> Second, as an accusatory body it acts as a buffer between the citizenry and the government, protecting individuals from overzealous prosecutors.<sup>15</sup> Both of these functions

---

that the state attorney specifically requested that he be allowed to continue in the investigation; that the grand jurors, in open court, requested that the investigation continue to an expeditious conclusion; and that the failure to do so would constitute irreparable harm in that they could not complete their investigation prior to expiration of their legal existence.

*Id.* Third, he questioned Adkins' power:

A more serious question arises with regard to the authority of the chief justice to suspend all grand jury proceedings . . . [T]here is no [statutory] authority conferring upon the chief justice, or indeed this very Court, the authority to suspend the operation of the grand jury in their respective jurisdiction.

*Id.* at 6. Finally, he challenged the court's use of its inherent constitutional authority to justify such extraordinary action. *Id.*

12. *In re Executive Assignment of State Attorney*, 298 So. 2d 382 (Fla. 1974).

13. Revised and Clarified Order Defining Action on Request for Second Extension of Assignment of a State Attorney and Continuing Grand Jury Investigation of Certain Matters, *In re Executive Assignment of State Attorney*, 298 So. 2d 382, 386-87 (Fla. 1974). On August 6, 1974, Adkins rescinded this order and granted the extension of Austin's assignment to the Second Judicial Circuit. Order on Request for Second Extension of Assignment of State Attorney and for Continuing Grand Jury Investigation, *In re Executive Assignment of State Attorney*, 298 So. 2d 382, 389 (Fla. 1974). Adkins made it clear that he rescinded the order only because the Leon County grand jury had made a presentment constituting the necessary showing which was required in the full Court's review of his order. *Id.* The rescision did not affect the chief justice's power to issue such an order in the future.

14. Massachusetts Bay Colony provides an early example of the investigatory role of the colonial grand jury. In 1634, Governor James Winthrop ordered the grand jury to report all crimes and misdemeanors which came into its knowledge. The jury apparently complied, returning over one hundred presentments, including some against the colony's magistrates. R. YOUNGER, *THE PEOPLE'S PANEL 6* (1963). In Florida, the grand jury's investigatory role extends beyond criminal offenses. See notes 21-24 and accompanying text *infra*.

15. A clear example of the protective role which the grand jury plays is the famous libel action against New York publisher Peter Zenger. Zenger savagely attacked the English governor of the colony, William Cosby. In 1734, Cosby sought to have Zenger indicted. The grand jury twice refused to indict, thus establishing the grand jury as a buffer between oppressive government and individual liberties. Kuh, *The Grand Jury "Presentment": Foul Blow or Fair Play?* 55 COLUM. L. REV. 1103, 1108-09 (1955).

For another example of a grand jury's refusal to indict despite instructions, see Nahum & Schatz, *The Grand Jury in Connecticut*, 5 CONN. B.J. 111, 113 (1931). *But see* note 19 *infra*. For discussion of the origins and development of the American grand jury, see *Nixon v. Sirica*, 487 F.2d 700, 789-792 (D.D.C. 1974); *In re Russo* 53 F.R.D. 564 (C.D. Cal. 1971); R. YOUNGER, *THE PEOPLE'S PANEL* (1963).

were preserved by Florida common law.<sup>16</sup> When the State's constitution was redrafted in 1885, the federal grand jury provision was taken as a model for Florida.<sup>17</sup> Section 10 of the Declaration of Rights provided that "No person shall be tried for a capital or other felony unless on presentment or indictment by the grand jury."<sup>18</sup>

Subsequent revisions of Florida's constitution have limited the role of the grand jury. Although a grand jury still is empowered to issue an indictment for any felony, an indictment is mandatory only in capital cases.<sup>19</sup> For other felonies the state attorney can charge a person by simply swearing out an information.<sup>20</sup>

The provisions governing grand juries are found in chapter 905 of the Florida statutes. Under that chapter, the grand jury is empowered to "inquire into every offense triable within the county . . . if an

16. *Portee v. State*, 253 So. 2d 866, 867 (Fla. 1971); *Cotton v. State*, 95 So. 668, 669 (Fla. 1923); *English v. State*, 12 So. 689, 691 (Fla. 1893). For early examples of the grand jury's role in Florida, see 2 C. BREVARD, *A HISTORY OF FLORIDA* 158 (1925).

17. U.S. CONST. amend. V, provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury." The framers of the Constitution apparently feared that a despotic government might oppress individuals with unwarranted accusations. This fear is indicated by the debates surrounding passage of the fifth amendment. Abraham Holmes of Massachusetts, reminding delegates of the British experience, warned that new federal officials would be able to file informations and "bring any man to jeopardy of his life" without the protection of a grand jury. Massachusetts thus recommended that the Constitution be amended to include a provision for a grand jury in all capital cases. New York and New Hampshire proposed similar amendments. Finally, in 1789, the amendment passed. R. YOUNGER, *supra* note 14, at 45 & nn.

18. FLA. CONST. art. I, § 10 (1885).

19. FLA. CONST. art. I, § 15(a) provides:

No person shall be tried for capital crime without presentment or indictment by a grand jury, or for other felony without such presentment or indictment or an information under oath filed by the prosecuting officer of the court . . . .

Although this change reduced the accusatory role of the grand jury, the change probably had little effect on individual civil liberties. A comprehensive study by Dean Wayne Morse indicated that the indictment function of the grand jury often is reduced to a "rubber stamp" operation. The study included 6,453 cases in which the prosecutor expressed a preference; the grand jury disagreed with the prosecutor in only about five percent of them. Morse, *A Survey of the Grand Jury System*, 10 ORE. L. REV. 101, 153-54 (1931). See also, Duff & Harrison, *The Grand Jury in Illinois: To Slaughter a Sacred Cow*, 1973 U. ILL. L. FORUM 635.

20. FLA. CONST. art. I, § 15(a). There are two obvious situations in which the state attorney would want to convene a grand jury rather than swear out an information. First, if the state attorney does not have what he considers to be sufficient information, he can use the grand jury's subpoena powers to obtain it. Second, use of the grand jury allows the state attorney to evade responsibility when charging public figures. It is also possible, of course, for a prosecutor to use the grand jury to harass an individual even though prosecution is unlikely.

The Florida Supreme Court in *In re: Florida Rules of Criminal Procedure*, No. 44,958-A (Fla., Mar. 26, 1975), amended FLA. R. CRIM. P. 3.140(g) to require that a state attorney or designated assistant state attorney filing a felony information certify "he

indictment has not been found or an information filed"<sup>21</sup> and to "make presentments [informal accusations] for offenses against the criminal laws."<sup>22</sup> Narrowly construed, these provisions would limit investigations to criminal matters. But a broader interpretation has been given to them, especially when the subject of the investigation is a public official. For instance, in *In re Report of the Grand Jury*,<sup>23</sup> the Florida Supreme Court, in sustaining a grand jury recommendation that a constable be removed from office, recognized that:

[T]rial courts have directed the grand jury to investigate every offense that affected the morals, health, sanitation, and general welfare of the county. . . . The grand jury is in other words the guardian of all that is comprehended in the police power of the State.<sup>24</sup>

This interpretation gives the grand jury enormous power. Consequently controls are needed to prevent abuse of this power.

Certain sections of chapter 905 provide a system for controlling the grand jury. Each of the co-equal branches has specified powers. The judiciary has broad procedural control,<sup>25</sup> while the executive branch, through the state attorney, has virtually complete substantive control.<sup>26</sup> The legislature has the power to formulate the rules and regu-

has received testimony under oath from the material witness or witnesses for the offense." *Id.* The amended rule requires no such certification in misdemeanor cases.

21. FLA. STAT. § 905.16 (1973).

22. FLA. STAT. § 905.165 (1973).

23. 11 So. 2d 316 (Fla. 1943).

24. *Id.* at 318. Justice Chapman's concurrence added: "The practice has come into existence for grand juries to investigate, make inquiry, hear testimony, and make reports, without apparent statutory authority, on matters affecting public interest and general welfare." *Id.* at 320; *accord*, *Owens v. State*, 59 So. 2d 254 (Fla. 1952); *Clein v. State*, 52 So. 2d 117 (Fla. 1951). In *Owens* the court held that the Palm Beach County grand jury did not exceed its power in making a report containing findings of fact that the town council showed gross incompetence in handling taxpayers' money. *See also* *Ryon v. Shaw*, 77 So. 2d 455 (Fla. 1955); *Clemmons v. State*, 141 So. 2d 749 (Fla. 1st Dist. Ct. App. 1962), *modified*, 150 So. 2d 231 (Fla. 1963); *In re Polk County Grand Jury*, 9 Fla. Supp. 113 (Polk County Cir. Ct. 1956).

25. The circuit court of each county has the power to dispense with convening the grand jury, FLA. STAT. § 905.01(2) (1973); recall it after it has been discharged, FLA. STAT. § 905.09 (1973); or extend the time period of its proceedings, FLA. STAT. § 905.095 (1973). The court also charges the jurors with their duties, FLA. STAT. § 905.11 (1973); and advises them upon request, FLA. STAT. § 905.18 (1973). Further, the court determines whether the secrecy which surrounds the proceedings is to be compromised. FLA. STAT. §§ 905.26-27 (1973).

26. The state attorney presents matters for investigation, FLA. STAT. § 905.16 (1973); and examines witnesses and gives legal advice, FLA. STAT. § 905.19 (1973). The state attorney thus controls what is to be presented and how effectively the presentation is made.

lations that govern the grand jury. This balance of control among the three branches allows each branch to check the power of the others, and should ensure the independence of the grand jury. Political independence when investigating criminal matters is one of the primary reasons given for maintaining the grand jury system.<sup>27</sup> In its absence, the task of investigating political figures would fall to executive, legislative, or judicial committees. As one commentator has explained it:

Investigatory committees, whether of the legislative or of the executive arm of government, suffer common defects. Their members, being either elected or appointed by elected officials, ordinarily are not completely free of political motivation. . . . As the outcome of all these investigations is probably influenced by political considerations, partiality and a deliberate lack of thoroughness are apt to be present.<sup>28</sup>

The same criticism can be extended to judicial committees, particularly in jurisdictions where judges are elected.

The importance, then, of ensuring the independence of the grand jury is clear. Balanced control must persist to prevent any one branch from usurping so much power that it might abuse the system. The Adkins order, however, threatens chapter 905's system of balances by vesting virtually complete control of the grand jury in the judiciary.

Adkins reasoned that the grand jury is a part of the judicial system and that it was his duty as chief administrative officer of the judiciary to see that the grand jury does not interfere with the performance of statutory or constitutional duties of the other branches.<sup>29</sup> In rendering the order, Adkins relied solely on judicial notice to find that interference existed. The order did not require a member of the executive or legislative branch to make any showing that the grand jury actually was interfering with that branch's performance of its duties.

---

27. See *Wood v. Georgia*, 370 U.S. 375, 390 (1962); Sharp, *An Investigative Force*, TRIAL, Jan.-Feb. 1973, at 10.

The political independence of Florida grand juries has been recently demonstrated. Florida grand juries have indicted three members of the Florida cabinet. Ex-Education Commissioner Floyd Christian was charged with 11 counts of perjury and eight counts of bribery, perjury and unauthorized compensation. State Treasurer-Insurance Commissioner Thomas O'Malley was charged on Oct. 18, 1974 with two counts of unauthorized compensation and one charge of perjury before a notary public. Ex-Comptroller Fred O. Dickinson, Jr. was indicted by a federal grand jury on six charges of federal income tax violations.

28. Kuh, *supra* note 15, at 1118.

29. Revised and Clarified Order Defining Action on Request for Second Extension of Assignment of a State Attorney and Continuing Grand Jury Investigation of Certain Matters, *In re* Executive Assignment of State Attorney, 298 So. 2d 382, 384 (Fla. 1974). See notes 8-10 and accompanying text *supra*.

In fact, the order suggests that the chief justice can act even though no party is before the court.<sup>30</sup> Furthermore, the order places upon the grand jury the burden of affirmatively showing that "the public welfare requires such investigations or that law enforcement would be hampered" in order to continue its investigation.<sup>31</sup>

Using this precedent, a legitimate investigation of, for instance, the governor could be stayed for any period of time. In order to exercise his administrative power to stay the investigation, the chief justice need only reason that the governor could not perform his constitutional duty "to take care that the laws be faithfully executed."<sup>32</sup>

Restoration of the balance of control is necessary. There are three possible alternatives available to the legislature. It could repeal the Adkins order, amend chapter 905 to define more clearly the chief justice's power, or seek a constitutional amendment limiting the role of the judiciary with regard to the grand jury system.

The first alternative could be accomplished by passing a general law repealing the order.<sup>33</sup> This assumes, however, that the Adkins order is a "rule of procedure or practice" within the meaning of article V, section 2.<sup>34</sup> Were the court to determine that the Adkins order was actually a "writ" issued under the court's authority to issue

---

30. Revised and Clarified Order Defining Action on Request for Second Extension of Assignment of a State Attorney and continuing Grand Jury Investigation of Certain Matters, *In re* Executive Assignment of State Attorney, 298 So. 2d 382, 384 (Fla. 1974). The order never makes specific mention of O'Malley's petition to intervene. See note 5 *supra*. It simply states that "it has been called to the attention of the Chief Justice of Florida that there exists in some areas of the state and particularly in Leon County, Florida, situations where grand juries and their attending legal advisors have elected to conduct investigations of the conduct of certain incumbent public officials and other citizens who have qualified for election . . ." *Id.* at 385 (emphasis added). The order suggests the chief justice may base a grand jury stay on information from any source, or simply on judicial notice.

The dissenting opinions in this case all criticized this aspect of Adkins' order. Justice Ervin thought it improper to stay the grand jury proceedings "[except upon] a showing to us in a proper case by any aggrieved person or persons that such action is necessary to insure in his or their situations a fair campaign and election." 298 So. 2d at 387. Justice Boyd stated simply, "Courts should not interfere with grand jury probes without proof of unlawful abuse of discretion." *Id.* at 388. Justice Overton wrote, "I do not believe that this Court or its Chief Justice has any authority to generally terminate grand jury investigations concerning candidates for office without a showing of illegality or improper conduct in a particular and specific case." *Id.* at 388.

31. *Id.* at 386-87.

32. FLA. CONST. art. IV, § 1(a) (1973).

33. FLA. CONST. art. V, § 2(a) (1973) provides that the Supreme Court is to adopt rules for the practice and procedure in all courts. These rules are repealable by two-thirds vote of the membership of each house of the legislature. A bill has been pre-filed for the 1975 legislative session to reduce the number of votes needed to a simple majority. Fla. H.R.J. Res. 35 (1975).

34. See note 33 *supra*.

"all writs necessary," the legislature would be powerless.<sup>35</sup> Furthermore, a repeal law would be limited to the specific rule promulgated—that political candidates who have qualified for an election cannot be investigated until after the election.<sup>36</sup> The repeal would not curtail the potential power of the chief justice to stay grand jury proceedings under different circumstances.

The second alternative is to amend chapter 905 to define more clearly the limitations on the court's power. In affirming the Adkins order, however, the court agreed that Chief Justice Adkins was exercising his constitutional power.<sup>37</sup> The court demonstrated quite clearly that, despite the statutory mandate that it not "restrict an investigation of any matter into which the grand jury is by law entitled to inquire,"<sup>38</sup> it would allow the chief justice to do so. Thus, a new statute might be invalidated as being in conflict with the court's constitutional power or the constitutional power of the chief justice.<sup>39</sup>

The third method, amending the constitution, is the most viable. Unlike the other two possibilities, it would encompass any attempt by the court to stay proceedings and would limit the constitutional authority upon which the order and its affirmance were based. The amendment should allow *the court* to stay grand jury proceedings only upon an affirmative showing that an individual's constitutional rights were being impaired; the chief justice should have no in-

35. FLA. CONST. art. V, § 3(b)(4) (1973) provides: [The supreme court] [m]ay issue . . . all writs necessary to the complete exercise of its jurisdiction."

36. The operative language of a sample repeal bill might read:

Be It Enacted by the Legislature of the State of Florida:

Section 1: Pursuant to the provisions of Section 2 of Article V of the State Constitution, the Rule of Procedure promulgated by the Supreme Court in the order styled "*In re* Executive Assignment of State Attorney," 298 So. 2d 382 (Fla. 1974), which provides that it is the general policy of the State of Florida that grand juries desist from proceeding with investigation of any state, county or municipal officer who has qualified for reelection or any citizen who has qualified for election until the day following the election, is hereby repealed.

Section 2: If enacted by two-thirds vote of the membership of each house of the legislature, this act will take effect upon becoming a law.

37. 298 So. 2d at 384.

38. FLA. STAT. § 905.18 (1973).

39. A sample amendment to chapter 905 might read:

Be It Enacted by the Legislature of the State of Florida:

Section 1: Section 905.18, Florida Statutes, 1973 is hereby amended to read  
905.18 Duty of Court

When requested, the court shall advise the grand jury about its legal duties. In its original charge or thereafter the court shall not restrict an investigation of any matter into which the grand jury is by law entitled to inquire, nor shall it stay such an investigation except upon clear showing that rights protected by the Constitution of the United States or the Constitution of the State of Florida are being violated.

dividual power to stay proceedings under any circumstances. It is essential that such an amendment only restrict judicial review and not eliminate it.<sup>40</sup> Elimination of judicial review would impair the judiciary's power to check the other branches of government. If, for example, a grand jury were being used by the state attorney to harass an individual, the supreme court should have the power to stay the proceeding, but it should do so only upon substantial proof of the harassment. Vague allegations should not suffice, as they might if the power used by Chief Justice Adkins is left intact. Careful consideration must be given to implementing a constitutional check on judicial power over the grand jury.

The effectiveness of the grand jury in a democratic system is a function of its political independence. Affirmance of the Adkins order creates a need for restoring a system of balanced control over the grand jury. When the legislature acts, the goal must be to maximize the effectiveness of the grand jury while assuring the rights of the persons investigated by providing for workable controls.

BRUCE A. ALTER

---

40. The following amendment is proposed:

Be It Resolved by the Legislature of the State of Florida:

That the creation of Section 21 of Article V of the State Constitution set forth below is agreed to and shall be submitted to the electors of Florida for approval or rejection at the general election to be held in November 1975:

*Article V*

*Judiciary*

Section 21. Duty of court to instruct grand jury. When requested, the court shall advise the grand jury about its legal duties. In its original charge or thereafter the court shall not restrict or enjoin an investigation of any matter into which the grand jury is by law entitled to inquire.