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ZARELLA, J., with whom SULLIVAN, C. J., joins, dissenting. When the constitution clearly commits a function to the legislative branch, ''[w]e must resist the temptation . . . to enhance our own constitutional authority by trespassing upon an area clearly reserved as the prerogative of a coordinate branch of government.'' (Internal quotation marks omitted.) *Nielsen* v. *State*, 236 Conn. 1, 10, 670 A.2d 1288 (1996). Because I believe that the majority has succumbed to that temptation in the present case, I dissent. The majority today eviscerates the political question doctrine, which has, in the past, effectively protected both the executive and legislative branches from unwarranted interference by the judiciary.[1] This court repeatedly has recognized that, ''[a]lthough it is widely assumed that the judiciary, as ultimate arbiter of the meaning of constitutional provisions, must determine every constitutional claim presented and provide appropriate relief, some constitutional commands fall outside the conditions and purposes that circumscribe judicial action.'' (Internal quotation marks omitted.) Id., 8–9. We also have recognized that when a plaintiff has ''raised a claim that inextricably presents a political question not amenable to judicial resolution and . . . seeks relief that a court cannot provide without an impermissible intrusion upon the prerogatives and functions of the coordinate branches of government,'' the claim is nonjusticiable. Id., 9.

I begin by addressing the mootness issue. As the majority recognizes, because the defendant committee has represented that it would not seek to enforce the subpoena through contempt proceedings or a capias, the only consequence to the governor of his refusal to comply with the subpoena would be impeachment on that ground. The majority concludes that the governor's appeal is not moot only because of that potential collateral consequence. Thus, the sole issue before the court is whether the defendant constitutionally may issue a subpoena to the governor when the subpoena is enforceable only by the threat of impeachment. Whether the legislature constitutionally may arrest the governor if he refuses to comply with the subpoena and compel his attendance before the defendant, and whether the courts may enforce the subpoena in contempt proceedings, are not at issue. In my view, the mere issuance of the subpoena does not constitute a harm to the governor sufficient to invoke judicial review,[2] and the threat of impeachment if the governor refuses to comply does not permit the courts to intervene because it involves a political question that is purely within the legislative sphere.

"Chief Justice Marshall proclaimed two centuries ago [that] . . . '[i]t is emphatically the province and duty of the judicial department to say what the law is.' *Marbury* v. *Madison*, [5 U.S. (1 Cranch)] 137, 177, 2 L. Ed. 60 (1803). Sometimes, however, the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights. . . . Such questions are said to be 'nonjusticiable,' or 'political questions.' " (Citations omitted.) *Vieth* v. *Jubelirer*, U.S. , 124 S. Ct. 1769, 1776, 158 L. Ed. 2d 546 (2004) (plurality opinion). In *Baker* v. *Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962), the United States Supreme Court held that a question is nonjusticiable when there exists a "textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." Id., 217.

Applying this standard, the majority concludes that this case does not present a nonjusticiable political question because this court held in *Kinsella* v. *Jaekle*, 192 Conn. 704, 721, 475 A.2d 243 (1984), that, although impeachment is a legislative function, judicial intervention in impeachment related proceedings is permitted in certain limited circumstances. See footnote 22 of the majority opinion. I disagree with the majority's characterization of the holding in *Kinsella*. In *Kinsella*, this court held that the legislature had exclusive jurisdiction over an investigation to consider the institution of impeachment proceedings against the plaintiff, an elected probate judge, and that the trial court, therefore, should have dismissed the plaintiff's complaint, in which the plaintiff alleged that the impeachment investigation procedures adopted by the legislature were unconstitutional. *Kinsella* v. *Jaekle*, supra, 731. This court did state in dictum, however, that, in carrying out its impeachment duties, the legislature could not "ignore individual rights with impunity"; id., 727; and that, if the legislature committed acts that constituted "egregious and otherwise irreparable violations of constitutional guarantees," such acts would be subject to judicial review. Id., 726. I agree that this court has jurisdiction to adjudicate individual rights. If the legislature were, for example, to imprison the subject of impeachment proceedings for his refusal to testify, I believe that this court would have jurisdiction over a constitutional

challenge to that act. To the extent that we suggested in *Kinsella* that there may be circumstances under which this court would have jurisdiction to determine the legality of an impeachment itself,[3] however, I disagree. I also believe that that is the only question implicated by the governor's claim in the present case. Accordingly, I would conclude that the case presents a nonjusticiable political question.

In *Kinsella*, this court recognized that the Connecticut constitution adopted by the constitutional convention in 1818 ''unequivocally commits the power of impeachment and removal from elected office to the General Assembly.'' Id., 713; see Conn. Const., art. IX, §§ 1 and 2.[4] We also noted that ''[t]he records of the constitutional convention of 1818 do not explain the framers' reasons for doing so.'' *Kinsella* v. *Jaekle*, supra, 192 Conn. 717. Consequently, we looked to ''the impeachment and removal power's history and . . . the words of the framers of the United States constitution'' to inform our understanding of our state constitution's impeachment provisions. Id., 717–18.

This history instructs us that the impeachment power is quintessentially political. As one scholar has stated, ''[f]ederalists viewed impeachments as inherently political in nature and hence committed to the complete discretion of the most political branch, the legislature.'' R. Pushaw, ''Justiciability and Separation of Powers: A Neo-Federalist Approach,'' 81 Cornell L. Rev. 393, 429 n.166 (1996). In support of this statement, Professor Pushaw cites Alexander Hamilton's view that impeachments should be left to the Congress because they ''may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.''[5] The Federalist No. 65, p. 396 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see also 1 L. Tribe, American Constitutional Law (3d Ed. 2000) § 2-7, pp. 152–53 (constitutional language delegating to Congress sole power over impeachment proceedings and role of impeachment as ''ultimate legislative check on the other two branches [of government]'' have removed impeachment process from judicial review); R. Pushaw, supra, 81 Cornell L. Rev. 429 n.166, citing 2 J. Story, Commentaries on the Constitution of the United States (1833) §§ 744 through 745, 748, 762 through 764, 783, 795, 798, 801, pp. 217–19, 220–21, 233–37, 252–53, 264–65, 268–69, 271–72,[6] 1 The Works of James Wilson (R. McCloskey ed., 1967) pp. 324, 399, and M. Gerhardt, ''Rediscovering Nonjusticiablity: Judicial Review of Impeachments After *Nixon*,'' 44 Duke L.J. 231, 255–57 (1994).

In *Nixon* v. *United States*, 506 U.S. 224, 233, 113 S. Ct. 732, 122 L. Ed. 2d 1 (1993), the United States Supreme Court noted that the framers had considered multiple proposals to delegate the impeachment power to the federal judiciary, but ultimately rejected those

proposals and delegated the power solely to Congress. The court identified several reasons that the framers had done so. First, the framers believed that ''the Senate was the 'most fit depositary of the important trust' [i.e., the sole power to try impeachments] because its Members are representatives of the people.'' Id., quoting The Federalist No. 65 (Alexander Hamilton).[7] Second, the framers believed that the Senate was a more appropriate body than the judiciary to try impeachments because they '' 'doubted whether the members of that tribunal would, at all times, be endowed with so eminent a portion of fortitude as would be called for in the execution of so difficult a task' or whether the [Supreme] Court 'would possess the degree of credit and authority' to carry out its judgment if it conflicted with the accusation brought by the Legislature—the people's representative.'' *Nixon* v. *United States*, supra, 233–34, quoting The Federalist No. 65. Third, the framers believed that the Supreme Court was too small a body to conduct an impeachment. *Nixon* v. *United States*, supra, 234. '' 'The awful discretion, which a court of impeachments must necessarily have, to doom to honor or to infamy the most confidential and the most distinguished characters of the community, forbids the commitment of the trust to a small number of persons.' '' Id., quoting The Federalist No. 65. Fourth, the framers recognized that misconduct that results in impeachment also would likely result in a criminal proceeding, and, if the court presided over the impeachment proceeding, it potentially could be biased in the criminal proceeding.[8] *Nixon* v. *United States*, supra, 234.

In light of this history, the court in *Nixon* deemed nonjusticiable the claim of the petitioner, a former United States District Court judge, that a rule adopted by the United States Senate, which allowed a committee of senators to receive evidence offered against an individual who has been impeached and to report that evidence to the full Senate, violated the impeachment trial clause of the federal constitution. Id., 227, 238; see U.S. Const., art. I, § 3, cl. 6. As Professor Pushaw notes, this is one of the very few questions that the United States Supreme Court has deemed to be purely political. R. Pushaw, supra, 81 Cornell L. Rev. 499; see also *Vieth* v. *Jubelirer*, supra, 124 S. Ct. 1778 (plurality opinion) (political gerrymandering claims are nonjusticiable); *Gillian* v. *Morgan*, 413 U.S. 1, 7, 93 S. Ct. 2440, 37 L. Ed. 2d 407 (1973) (constitution leaves military training and procedures entirely to legislative and executive branches); *Pacific States Telephone & Telegraph Co.* v. *Oregon*, 223 U.S. 118, 149, 32 S. Ct. 224, 56 L. Ed. 377 (1912) (claims arising under guaranty clause of article IV, § 4, of United States constitution are nonjusticiable); cf. *Schieffelin & Co.* v. *Dept. of Liquor Control*, 194 Conn. 165, 185, 479 A.2d 1191 (1984) (only remedy for violation of procedural rules of state Senate is political); *State* v. *Sitka*, 11 Conn. App. 342, 346–47, 527 A.2d

265 (1987) (claim that state Senate violated its own procedures does not present state constitutional question subject to judicial review).

It was in recognition of the essentially political nature of impeachment that the judiciary committee of the United States House of Representatives concluded, during its investigation of alleged wrongdoings by President Richard M. Nixon, that impeachment was the *sole* remedy for the president's refusal to comply with certain subpoenas; see Judiciary Committee, House of Representatives, Impeachment of Richard M. Nixon, President of the United States, H.R. Rep. No. 93-1305 (1974) p. 4 (H.R. Rep. No. 93-1305); and that "it would be inappropriate to seek the aid of the courts to enforce its subpoenas against the President." Id., p. 210. The committee's analysis of this issue is worth quoting at length.

"The impeachment power is explicitly vested in the House of Representatives by the Constitution; its use necessarily involves the exercise of discretion by the House. While it is true that the courts may on occasion act as an umpire between Congress and the President, there are also many issues where the courts will decline to intervene because the question is one that has been constitutionally submitted to another branch.

* * *

"Litigation on the Committee's subpoenas would appear to be nonjusticiable on the basis of at least three of the criteria enumerated in *Baker* v. *Carr* [supra, 369 U.S. 186]. First, there is no question that there is a 'textually demonstrable constitutional commitment of the issue'—the extent of the power of inquiry in an impeachment proceeding—to the House of Representatives. Second, if a court were to resolve the question independently, it could not escape 'expressing lack of the respect due [a] coordinate [branch] of government.' Third, there is a significant 'potentiality of embarrassment from multifarious pronouncements by various departments on one question.'

"In deciding upon the validity of subpoenas in an impeachment inquiry, the court would necessarily have to determine whether the subpoenaed material was reasonably relevant to the inquiry. This, in turn, would lead it to pass, at least implicitly, on the scope of constitutional grounds for impeachment. While it may be argued that any judicial determination of the scope of impeachable offenses would not be binding upon either the House or the Senate in deciding whether to impeach or convict after trial, there is an obvious potential for conflict between 'various departments on one question.' Inevitably, there would be a serious impairment of the confidence of the people in the legitimacy of the impeachment process if the court's definition varied from those adopted by the House or the Senate in any

significant respect.

''The courts, moreover, do not have adequate means for enforcing a decision with respect to the validity of the subpoenas. The usual means of court enforcement, contempt, would be unavailing against a defiant President. The court would have to rely on impeachment to deal with noncompliance with its order requiring the President to surrender material in accordance with the subpoenas.

''An asserted advantage of a court decision affirming the validity of the subpoenas is that it would be an independent determination by an entity with no interest in the proceedings. But the impeachment process itself provides an opportunity for such a determination—initially by the House in deciding whether to prosecute the Article of Impeachment,[9] and, ultimately, by the Senate, the tribunal for an impeachment trial. Neither the Committee nor the House would be the final judge of the validity of the Committee's subpoenas. Whether noncompliance with the subpoenas is a ground for impeachment would ultimately be adjudicated in the Senate.

''Unless noncompliance is a ground for impeachment, there is no practical way to compel the President to produce the evidence that is necessary for an impeachment inquiry into his conduct, nor any means of assuring that the extent of the House's power of inquiry in an impeachment proceeding may be adjudicated and clarified. In the unique case of subpoenas directed to an incumbent President, a House adjudication of contempt would be an empty and inappropriate formality. As the Supreme Court said in *United States* v. *Nixon*, [418 U.S. 683, 691, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974)] in refusing to require a contempt citation against the President before the matter could be appealed, 'the [traditional] contempt avenue . . . is peculiarly inappropriate due to the unique setting in which the question arises.' '' H.R. Rep. No. 93-1305, supra, pp. 211–12.

More recently, one commentator has drawn similar conclusions in an article in which he argues that Congress does not have the power to bring criminal contempt proceedings against a president for his failure to comply with a legislative subpoena. See T. Peterson, ''Prosecuting Executive Branch Officials for Contempt of Congress,'' 66 N.Y.U. L. Rev. 563, 626 (1991). Professor Peterson argues that, because ''courts are ill-equipped to resolve executive privilege disputes and the political process is a better mechanism for accommodating this particular type of constitutional conflict . . . Congress *simply has no need* for this type of sanction and can rely on the political process to protect itself. Careful consideration of the mechanics of congressional inquiries . . . reveals both that Congress has adequate political powers to obtain the documents it needs, and that the political process balances legisla-

tive and executive interests in individual cases more adeptly than would the courts.'' (Emphasis added.) Id. ''[E]ven if the parties reach an initial impasse and a congressional subpoena is ignored pursuant to presidential order, Congress is not without weapons that will aid it in obtaining the [information]. Once a dispute reaches the subpoena level, the press becomes a major factor in the political conflict. Past experience suggests that Congress can use the press as a substantial weapon to obtain requested [information]. As long as the need to uncover information within the executive branch has appeared legitimate, the press has been sympathetic to [the] interests [of Congress] and quite skeptical of claims of executive privilege.'' Id., 628–29.

Addressing the argument that such pressures might not be adequate when the president's own conduct is questioned, Peterson agreed that ''Congress must have an additional weapon to obtain the documents. The political process alone would be insufficient. Congress, however, already has such a weapon: the power of impeachment.[10] If the dispute involves potential misconduct of the President and if the President is willing to risk an extended executive privilege dispute, then it is likely that the potential misconduct is of a magnitude that may implicate the impeachment process. Once the impeachment process has commenced, Congress has plenary power. It is generally recognized that executive privilege will not shield a President from producing documents relating to an impeachment inquiry. Presidential refusal to comply with a request for production of documents by a congressional committee investigating potential impeachment may itself become a ground for impeachment, as was the case with President Nixon.'' Id., 630.

Thus, although Peterson accepts the premise, on which the defendant relies in the present case, that, under our system of law, the executive privilege cannot be invoked to shield the chief executive from a legislative request for information relating to his misconduct, Peterson argues that impeachment was intended to be the *sole* sanction for nondisclosure. He notes that ''history provides some affirmative evidence that members of Congress believed they had no sanction [for a chief executive's refusal to produce subpoenaed documents] *other than the ultimate power of impeachment*, and additional evidence by implication that Congress did not believe contempt to be within its powers.'' (Emphasis added.) Id., 624. ''[I]n the [congressional] debates concerning presidential disclosure of executive branch information there is no recorded instance of any discussion of the use of such contempt sanctions.'' Id., citing 9 Annals of Cong. (1807) pp. 337–52, and 4 Annals of Cong. (1796) pp. 426–83. ''Indeed, when Congress claimed an absolute right to the documents, it stopped short of asserting the power to impose contempt sanctions and claimed only the power of impeachment.'' T.

Peterson, supra, 66 N.Y.U. L. Rev. 624. ''For example, in [an] investigation during the . . . administration [of President John Tyler], the House of Representatives asserted that the power of impeachment included the power to compel production of documents. It concluded that the President should not be able to assert executive privilege, but claimed only the ultimate sanction of impeachment, and not the right to impose any criminal sanctions on executive officials.'' Id., 624 n.342.

I recognize that Peterson focuses on the impropriety of Congress' use of the sanction of contempt as a tool for obtaining information from the executive branch and does not directly address the issue before us in the present case, namely, whether the legislature constitutionally may use the threat of impeachment to enforce any demand for information from the chief executive relating to his wrongdoing. Instead, Peterson simply assumes that that is the case. In my view, that assumption is well founded in light of Peterson's persuasive argument that disputes between Congress and the president over congressional requests for information should be resolved through the political process and that Congress has plenary power over impeachment proceedings. If Congress cannot enlist the courts in an attempt to enforce a subpoena through contempt proceedings, then the president should not be able to seek judicial validation of his position that an impeachment threat is unwarranted.[11] The same political pressures that ensure that the president cannot ignore congressional demands for information with impunity protect the president from being impeached on the basis of noncompliance with unreasonable demands for information.

With these authorities in mind, I would conclude that the present case satisfies at least four of the criteria for nonjusticiability set forth in *Baker* v. *Carr*, supra, 369 U.S. 217. First, there clearly is ''a textually demonstrable constitutional commitment of the issue to a coordinate political department . . . .''[12] Id.; see *Nixon* v. *United States*, supra, 506 U.S. 229–36 (concluding that impeachment power is textually committed to Congress); *Kinsella* v. *Jaekle*, supra, 192 Conn. 713 (''the [state] constitution unequivocally commits the power of impeachment and removal from elected office to the General Assembly''). Indeed, there are few, if any, constitutional provisions that more clearly commit an issue to a single branch of government than our state constitution's impeachment provisions. See Conn. Const., art. IX, §§ 1 and 2. Moreover, as we recognized in *Kinsella*, the preliminary investigatory power of a legislative committee is ''squarely within the legislature's jurisdiction under [those provisions].'' *Kinsella* v. *Jaekle*, supra, 723.

Second, there is ''a lack of judicially discoverable and manageable standards for resolving'' the issue raised by the governor. *Baker* v. *Carr*, supra, 369 U.S. 217. As

I have indicated, the issue before this court is whether the defendant may issue a subpoena to the governor that it seeks to enforce through the threat of impeachment. Traditionally, courts assessing the validity of a legislative subpoena directed to the chief executive balance the legislature's need for the information against the intrusion on the executive branch that compliance with the subpoena will occasion. See *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (*Senate Select Committee*) (information sought in legislative subpoena must be ''demonstrably critical to the responsible fulfillment of the Committee's functions'');[13] see also *Nixon* v. *Sirica*, 487 F.2d 700, 717–18 (D.C. Cir. 1973) (grand jury's need for information in criminal case outweighed president's interest in confidentiality); *Halperin* v. *Kissinger*, 401 F. Sup. 272, 275 (D.D.C. 1975) (plaintiff's need for former president's testimony in civil case outweighed former president's interest in confidentiality when he was ''uniquely capable of clarifying certain . . . issues''). Thus, in the present case, in order to assess the defendant's need for the information it seeks, the courts either must (1) defer to the legislature's determination that it has a critical need for the governor's testimony concerning his suspected wrongdoings, regardless of the nature of the wrongdoings or the evidence thereof—which would be tantamount to conceding that there are no ''judicially discoverable and manageable standards for resolving [the issue]''; *Baker* v. *Carr*, supra, 217—or (2) evaluate the substance of the demand for testimony, which would entangle the courts in the impeachment process, a matter that is inherently beyond their purview.[14] See H.R. Rep. No. 93-1305, supra, p. 212 (judicial review of judiciary committee's subpoena to president was inappropriate because ''the court would necessarily have to determine whether the subpoenaed material was reasonably relevant to the inquiry . . . [which], in turn, would lead it to pass, at least implicitly, on the scope of constitutional grounds for impeachment''). As the court in *Nixon* v. *United States*, supra, 506 U.S. 224, stated, ''the concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.'' Id., 228–29. I believe that this principle applies in the present case. The fact that the courts of this state never have developed standards for evaluating the need for evidence in impeachment proceedings itself suggests that it involves a purely legislative function. Cf. 1 L. Tribe, supra, § 2-7, p. 152 (''[a]lthough the impeachment process has been used periodically since 1789, there has been no judicial attempt to define its limits'').

Third, the courts cannot resolve the issue raised in

this appeal ''without expressing lack of the respect due coordinate branches of government . . . .'' *Baker* v. *Carr*, supra, 369 U.S. 217. The defendant has determined that it needs the governor's testimony to carry out its impeachment related duties in a responsible manner. In my view, that determination is well within the core of the impeachment power, which, as I have indicated, is solely committed to the legislature. I believe that a court demonstrates a lack of respect for the legislative branch by taking the position that judicial validation of the defendant's determination is required in order to protect the legitimacy of the impeachment process. Such a position suggests that the legislature, in contrast to the judiciary, is incapable of determining, intelligently and in good faith, whether the governor's noncompliance with the subpoena is a proper ground for impeachment.

Finally, judicial resolution of this issue entails ''the potentiality of embarrassment from multifarious pronouncements by various departments on one question.'' Id. If, for example, this court had determined that the issuance of the subpoena unconstitutionally interfered with the governor's performance of his executive duties, the defendant nevertheless could have recommended the drafting of an article of impeachment on the basis of the governor's refusal to comply.[15] Thus, it is clear that the court's opinion as to the constitutionality of the subpoena is merely advisory.

I would conclude that the courts lack jurisdiction over this case because it presents a nonjusticiable political question. Accordingly, I dissent.

[1] In our preliminary dissenting opinion in this case, Chief Justice Sullivan and I stated that we believed that this case should be dismissed as premature under the speech or debate clause of our state constitution and under the separation of powers doctrine. See *Office of the Governor* v. *Select Committee of Inquiry*, 269 Conn. 850, 853, 850 A.2d 181 (2004) (*Sullivan, C. J.*, and *Zarella, J.*, dissenting). I continue to believe that the case should be dismissed as premature. Upon further reflection, however, I now believe that this case should be dismissed for the more basic reason that it presents a nonjusticiable political question.

[2] In the majority's mootness analysis, the majority concludes that the governor's appeal is not moot and is ripe for review because he may be subject to the collateral consequence of impeachment if he refuses to comply with the subpoena. The majority also concludes that the appeal is reviewable because, if a separation of powers violation occurred at all, it occurred when the defendant issued the subpoena. If that is the case, however, then the majority need not invoke the collateral consequence rule to conclude that the appeal is not moot; in its view, the mere existence of the subpoena colorably constitutes an ongoing injury to the governor justifying intervention by the judiciary.

I do not agree that the mere issuance of the subpoena constitutes such an injury. See *United States* v. *House of Representatives of the United States*, 556 F. Sup. 150, 152–53 (D.D.C. 1983) (*House of Representatives*) (courts will not intervene in dispute between Congress and executive branch regarding legislative subpoena before Congress attempts to enforce subpoena in contempt proceedings); cf. *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 498 F.2d 725, 733 (D.C. Cir. 1974) (court considered legality of legislative subpoena compelling president to deliver certain materials in context of *enforcement* proceeding and affirmed dismissal of enforcement proceeding because legislative committee did not have sufficient need for requested materials). I cannot fathom how the mere issuance of a subpoena, which the executive branch is determined to ignore and which the

legislature has not attempted to enforce through contempt proceedings or a capias, could interfere with executive functions. If the rule adopted by the court in *House of Representatives* does not apply in the present case, it is only because this case involves the threat of impeachment. Thus, properly understood, the issue before this court is whether the legislature constitutionally may issue a subpoena to the governor that it seeks to enforce through the threat of impeachment.

[3] This court stated in *Kinsella* that the plaintiff's action was premature because "[a]ny harm, as claimed by the plaintiff, to his liberty interest in his reputation or his occupational pursuit hinges on whether the House of Representatives presents articles of impeachment and whether the Senate convicts him." *Kinsella* v. *Jaekle*, supra, 192 Conn. 728. Thus, we suggested that, *after* articles of impeachment had been adopted, this court could review the constitutionality of the impeachment process. See id. I disagree. Any infringement of the plaintiff's liberty interest that occurred during the process could not be remedied at that point and would, therefore, be moot. Any injury caused by the impeachment itself would, as the majority in the present case concedes, be nonjusticiable. See footnote 21 of the majority opinion ("[I]f the governor were required to wait until an article of impeachment was issued against him, and the governor challenged that issuance in this court, then the court would be required to evaluate a discretionary function of the House, namely, the substantive grounds on which the article of impeachment was based. Such a scenario undoubtedly would pose issues of nonjusticiability."). Thus, the majority itself disavows the suggestion in *Kinsella* that an impeachment would be reviewable, a conclusion that I agree with for all of the reasons set forth in this opinion. Accordingly, in the absence of a claim that a legislative body is currently and egregiously violating the liberty or property rights of the subject of impeachment proceedings, I believe that claims challenging the legality of such proceedings are nonjusticiable. As I have indicated, I do not believe that the governor has raised a colorable claim of a current and egregious constitutional injury in the present case. See footnote 2 of this opinion.

[4] The constitution of Connecticut, article ninth, § 1, provides: "The house of representatives shall have the sole power of impeaching."

The constitution of Connecticut, article ninth, § 2, provides in relevant part: "All impeachments shall be tried by the senate. . . ."

It is interesting to note that article fourth, § 18, of the Connecticut constitution, as amended by article twenty-two of the amendments, provides in relevant part that "[t]he supreme court shall have original and exclusive jurisdiction to adjudicate disputes or questions arising under this section." Article fourth, § 18, deals specifically with the transfer of the governor's authority, powers and duties to the lieutenant governor in cases of the governor's death, resignation, refusal to serve, impeachment or incapacity. In contrast, article ninth, § 2, contains no provision for the involvement of the judiciary in the adjudication of disputes arising from impeachment.

[5] This statement by Alexander Hamilton also was cited by this court in *Kinsella* in support of its conclusion that, "although the [impeachment] process is obviously adjudicative, and the sanctions imposed inescapably penal, [the process] is not a purely judicial function." *Kinsella* v. *Jaekle*, supra, 192 Conn. 720. Rather, the "true nature of impeachment and removal"; id.; is political. Id., 721.

[6] United States Supreme Court Justice Joseph Story wrote that "[t]he offences, to which the power of impeachment has been, and is ordinarily applied, as a remedy, are of a political character. Not but that crimes of a strictly legal character fall within the scope of the power, (for, as we shall presently see, treason, bribery, and other high crimes and misdemeanours are expressly within it;) but that it has a more enlarged operation, and reaches, what are aptly termed, political offences, growing out of personal misconduct, or gross neglect, or usurpation, or habitual disregard of the public interests, in the discharge of the duties of political office. These are so various in their character, and so indefinable in their actual involutions, that it is almost impossible to provide systematically for them by positive law. They must be examined upon very broad and comprehensive principles of public policy and duty. They must be judged of by the habits, and rules, and principles of diplomacy, of departmental operations and arrangements, of parliamentary practice, of executive customs and negotiations, of foreign, as well as of domestic political movements; and in short, by a great variety of circumstances, as well those, which aggravate, as those, which extenuate, or justify the offensive acts, which do not properly belong to the judicial character in the ordinary administration of justice, and are far removed

from the reach of municipal jurisprudence. They are duties, which are easily understood by statesmen, and are rarely known to judges. A tribunal, composed of the former, would therefore be far more competent, in point of intelligence and ability, than the latter, for the discharge of the functions, all other circumstances being equal. And surely, in such grave affairs, the competency of the tribunal to discharge the duties in the best manner is an indispensable qualification.'' 2 J. Story, supra, § 762, pp. 233–34.

[7] Justice Story shared this view. He wrote: ''[T]he very functions, involving political interests and connexions, are precisely those, which it seems most important to exclude from the cognizance and participation of the judges of the Supreme Court. Much of the reverence and respect, belonging to the judicial character, arise from the belief, that the tribunal is impartial, as well as enlightened; just, as well as searching. It is of very great consequence, that judges should not only be, in fact, above all exception in this respect; but that they should be generally believed to be so. They should not only be pure; but, if possible, above suspicion. Many of the offences, which will be charged against public men, will be generated by the heats and animosities of party; and the very circumstances, that judges should be called to sit, as umpires, in the controversies of party, would inevitably involve them in the common odium of partizans, and place them in public opinion, if not in fact, at least inform, in the array on one side, or the other. The habits, too, arising from such functions, will lead them to take a more ardent part in public discussions, and in the vindication of their own political decisions, than seems desirable for those, who are daily called upon to decide upon the private rights and claims of men, distinguished for their political consequence, zeal, or activity, in the ranks of party. In a free government, like ours, there is a peculiar propriety in withdrawing, as much as possible, all judicial functionaries from the contests of mere party strife. With all their efforts to avoid them, from the free intercourse, and constant changes in a republican government, both of men and measures, there is, at all times, the most imminent danger, that all classes of society will be drawn into the vortex of politics. Whatever shall have a tendency to secure, in tribunals of justice, a spirit of moderation and exclusive devotion to juridical duties of inestimable value. What can more surely advance this object, than the exemption of them from all participation in, and control over, the acts of political men in their official duties? Where, indeed, those acts fall within the character of known crimes at common law, or by positive statute, there is little difficulty in the duty, because the rule is known, and equally applies to all persons in and out of office; and the facts are to be tried by a jury, according to the habitual course of investigation in common cases. . . . [F]rom [the cases involving impeachments for political offenses] 'it is apparent, how little the ordinary tribunals are calculated to take cognizance of such offences, or to investigate and reform the general polity of the state.' '' 2 J. Story, supra, § 764, pp. 236–37.

[8] The court in *Nixon* also noted that, in impeachment proceedings against a member of the judicial branch, judicial review would be ''counterintuitive because it . . . would place final reviewing authority with respect to impeachments in the hands of the same body that the impeachment process is meant to regulate.'' (Citation omitted.) *Nixon* v. *United States*, supra, 506 U.S. 235.

[9] In the present case, the defendant has not determined that the failure of the governor to honor the subpoena would categorically result in a recommendation of impeachment. Even if the defendant did recommend such action, it is merely speculative as to whether the state House of Representatives would adopt an article of impeachment. Thus, although I maintain that it is within the exclusive domain of the House to determine whether the governor's failure to comply is an impeachable offense under the circumstances of this case, it also is premature for the court to determine the issue.

[10] The majority disagrees ''with [my] suggestion . . . that the political pressure to testify would be sufficient to elicit the requisite testimony from a governor, without the need for a subpoena or judicial intervention validating the subpoena'' because that did not happen in this case. Footnote 23 of the majority opinion. I do not maintain, however, that political pressure always will be sufficient to force a chief executive to testify in impeachment proceedings. I maintain only that, if it is not, impeachment is the sole remedy and that remedy is within the exclusive jurisdiction of the legislature. The majority fails to recognize that, in the present case, the governor refused to testify up until the time that this court issued its preliminary decision because he maintained that the subpoena was invalid and hoped that this court would endorse that position, thereby reducing the political pressure

to testify. When the court determined that the subpoena was valid and the governor was faced with a choice between testifying or the possibility of being impeached for his refusal to testify, he resigned. If the majority had determined that the plaintiff's claim was nonjusticiable, the governor would have been faced with the same choice, albeit without the additional political pressure for impeachment that this court's preliminary decision generated. As the Chief Justice notes in his dissenting opinion, that additional political pressure was the only effect of the majority's decision. See footnote 4 of the Chief Justice's dissenting opinion.

[11] Arguably, the threat of a capias, which, under our statutes, does not require the intervention of the courts; see General Statutes § 2-46 (certain members of General Assembly ''shall have the power to compel the attendance and testimony of witnesses by subpoena and capias issued by any of them''); might be a sufficiently egregious interference with the function of the executive branch that the governor should be able to seek the intervention of the courts to enjoin it. As I have noted, however, there is no threat of a capias in the present case.

[12] The majority concludes that ''there has been no constitutional commitment of the impeachment authority to the legislature such that judicial review of the plaintiff's challenge is rendered inappropriate.'' Laying the groundwork for this conclusion, the majority first ''recasts'' this court's determination in *Kinsella* that a claim arising from the legislature's exercise of the impeachment power is justiciable only when the plaintiff has alleged that the legislature is ''violating his rights in an egregious way that cannot be repaired''; *Kinsella* v. *Jaekle*, supra, 192 Conn. 728; and then concludes that ''the appropriate standard by which to determine whether judicial review of the legislative exercise of the impeachment authority in connection with a sitting governor is warranted is whether the plaintiff has asserted, in good faith, a colorable claim of a constitutional violation.'' In support of recasting the court's determination in *Kinsella*, the majority claims that, unlike the due process violations alleged in that case, ''action by one branch of government that violates the separation of powers is, in and of itself, a harm, in that the branch whose sphere of authority has been encroached upon has neither remained independent nor free from the risk of control, interference or intimidation by other branches.'' As I have indicated, I do not agree with that conclusion, which is contradicted by relevant federal case law. Finally, I would note that, if the impeachment power is not ''textually committed'' to the legislature for purposes of justiciability analysis, it is difficult to conceive of any matter that is textually committed to another branch of government. Thus, the majority's analysis eviscerates the political question doctrine.

[13] In *Senate Select Committee*, the court determined that the legislative committee's need for the information that it sought from the president must be weighed against the president's interest in confidentiality. See *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, supra, 498 F.2d 730–31. In the present case, the governor's primary argument is that compliance with the subpoena would interfere with the performance of his constitutional duties. He does not rely on a claim of executive privilege. By analogy to *Senate Select Committee*, however, it seems clear that the defendant's need for information should be weighed against the governor's interest in precluding any interference with the performance of his official duties.

[14] The majority concludes that ''[t]here are no special impediments to our ascertainment and application of the standards by which to resolve this challenge; indeed, the matter raises questions of constitutional interpretation that, for more than two centuries, regularly have been reserved for the judiciary.'' The majority also appears to have concluded that it need not review the substance of the defendant's subpoena but simply should defer to the legislature's determination that the requested information is needed. It apparently bases this determination on ''the great importance of the impeachment process under our constitution'' and on its conclusion—unsupported by any citation to the record—that compliance with the subpoena will not place undue burdens on the governor's time and attention. Thus, the ''questions of constitutional interpretation'' that the majority believes this court is competent to answer are: (1) the importance of the impeachment process, a process constitutionally committed solely to the legislature; and (2) what constitutes undue interference with the chief executive. The issue before the court, however, is not whether the impeachment process is important, but whether the governor's testimony is necessary for the defendant's responsible performance of its impeachment related functions. In

failing to address that narrow issue, the majority implicitly holds that virtually *any* legislative demand for information in the context of an impeachment proceeding is valid, at least as long as it is not ''utterly offensive and irrelevant''; footnote 33 of the majority opinion; and that the only check on the legislature is political. If that is the case, however, then the entire issue is a nonjusticiable political question.

[15] As I have indicated, even the majority recognizes that the substantive grounds for an article of impeachment are not subject to review by this court. See footnote 21 of the majority opinion.