

Module 9 Study Guide: Executive Power and Enforcement

The Law of Force and the Limits of the Arm of the Creature

Lesson Summary

Module 9 examines the structural nature of executive power, metaphorically described as "the arm of the creature." While the legislative branch acts as the mind and the jury acts as the conscience of the government, the executive is the only branch possessing the authority to use physical force against a citizen's body or property. This power is inherently dangerous, requiring strict containment within the "walls" of the Constitution and the separation of powers. The module emphasizes that in a free society, the executive possesses ministerial rather than discretionary power; it is authorized to move only after a lawful judgment has been rendered through the proper chain of due process.

The module further explores the historical and legal requirements for the restraint of liberty, specifically focusing on the necessity of warrants and the narrow common-law exceptions for felonies and breaches of the peace. It contrasts "lawful authority," which is traceable back to the people and the law, with "color of authority," which relies on the mere appearance of power through titles and uniforms. Ultimately, the document asserts that due process is a condition precedent to any government action, and the preservation of liberty depends on citizens who understand the structure and are willing to stand at the "gates" of the grand and petit juries to prevent the exercise of arbitrary power.

Key Maxims

The following maxims serve as the "bones of reason" and structural constraints within the architecture of law:

- **Delegatus non potest delegare:** A delegated power cannot be delegated again.
- **Force Follows Judgment:** The government may only use physical force after a lawful judgment has been established.
- **Liberty is the Rule; Restraint is the Exception:** The burden of proof always rests on the government to justify the deprivation of liberty.
- **Office Does Not Create Authority; Law Creates Authority:** Positions and titles do not grant power; only the law can authorize the use of force. Quiz: Executive Power and Enforcement

Questions:

1. What is the definition of "ministerial power" in the context of the executive branch?

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2. How does Article 30 of the Massachusetts Constitution of 1780 define the purpose of the separation of powers?
3. In legal terms, what constitutes an "arrest"?
4. What was the common law requirement for a lawful arrest, and what were the primary exceptions?
5. Explain the "Statutory Arrest Trap" as described in the module.
6. What is the significance of the maxim *delegatus non potest delegare* regarding administrative agencies?
7. How does the law define "false imprisonment"?
8. What is a "condition precedent" in the context of due process?
9. Distinguish between "lawful authority" and "color of authority."
10. What are the three structural questions used to test the lawfulness of any government action?

Answer Key

1. **Ministerial power** is authority exercised in obedience to legal mandates and prescribed facts without regard to the officer's personal judgment or opinion. The executive acts as a servant of the law, carrying out decisions already made by the legislature and the courts rather than deciding what the law should be.
2. **Article 30** states that the legislative, executive, and judicial departments must never exercise the powers of the others. This structural wall ensures a "government of laws and not of men," preventing the concentration of power that leads to arbitrary decisions.
3. An **arrest** is defined as any restraint of a person's liberty or freedom of movement. It does not require physical contact or handcuffs; it occurs the moment a person is no longer free to walk away and submits to the control of an officer.
4. The general **common law rule** required a warrant issued by a neutral magistrate before an arrest. The narrow exceptions allowed for warrantless arrests only if a felony had actually been committed or if there was an immediate breach of the peace occurring in the officer's presence.
5. The **Statutory Arrest Trap** occurs when a legislature passes statutes authorizing warrantless arrests for non-violent regulatory or traffic offenses. This creates a structural conflict because a statute cannot override the fundamental constitutional requirement that force must follow judicial authorization.
6. The maxim *delegatus non potest delegare* means a delegated power cannot be delegated again. This prevents the legislature from handing its core powers to administrative agencies, which often collapse the separation of powers by writing, enforcing, and judging their own regulations.

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7. **False imprisonment** is the unlawful restraint of a person's liberty without valid authority. Because the law treats liberty as a fundamental form of property, any restraint lacking a warrant or a lawful common-law exception is considered a trespass against the individual.
8. A **condition precedent** is a requirement that must be satisfied before an action is legally permitted. In this structure, due process is the condition precedent to the use of force; the government must prove its authority through the chain of law before it can touch a citizen's body or property.
9. **Lawful authority** is power derived directly from the law and a completed chain of due process. **Color of authority** is the mere appearance of power—such as a badge, uniform, or title—exercised without the necessary legal foundations or conditions precedent.
10. The **three questions** are: 1) What is the law? 2) Did the government follow the chain of due process before it acted? 3) Did the arm move after judgment, or did the arm move first?

Essay Format Questions

1. **The Ministerial Executive:** Analyze the distinction between discretionary power and ministerial power. Why is it structurally essential for a free society that the executive branch possesses no independent mind or conscience?
2. **The Evolution of the Sheriff:** Discuss the historical role of the Sheriff as the "High Executive" of the county. How does the Sheriff's direct accountability to the people serve as a structural buffer against centralized administrative power?
3. **The Chain of Due Process:** Detail the steps from "Injury" to "Execution of Judgment." Explain why removing even a single link in this chain renders the resulting government action void rather than merely voidable.
4. **Administrative Agency Structure:** Evaluate the modern administrative state through the lens of the "Wall of Separation." In what ways does the merging of legislative, executive, and judicial functions within an agency bypass the "Two Gates" of the jury system?
5. **The Citizen at the Gate:** Reflect on the assertion that the structure of liberty is not maintained by documents but by the participation of citizens. How do the Grand Jury and Petit Jury function as physical barriers to the "arm of the creature"?

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Glossary of Key Terms

Term	Definition
Administrative Agent	An officer or employee of an agency who enforces internal regulations rather than common law or direct court orders.
Arrest	Any restraint of liberty or control of a person's freedom of movement by force or authority.
Breach of the Peace	A common law exception to the warrant requirement involving actual violence or an immediate threat of violence occurring in an officer's presence.
Color of Authority	The appearance of official power (via badge, uniform, or title) without the actual lawful foundation or satisfaction of due process.
Condition Precedent	A legal requirement that must occur or be satisfied before a subsequent act (such as the use of force) is authorized.
Due Process	The structural chain of lawful conditions (oath, magistrate, warrant, etc.) that must be satisfied before the government may deprive a person of life, liberty, or property.
Executive Power	The "arm" of the government; the power to execute or carry into effect decisions made by the law and the courts.
False Imprisonment	The unlawful restraint of a person's liberty; a trespass against the fundamental property of one's own body.
Felony (Common Law)	A serious crime involving violence or direct injury (e.g., murder, robbery, arson) that allowed for narrow warrantless arrest exceptions.
Ministerial Act	An act performed under a given set of facts in a prescribed manner in obedience to legal authority, without personal discretion.
Posse Comitatus	"The power of the county"; the authority of a sheriff to summon ordinary citizens to assist in the enforcement of the law.
Void	An act that has no legal authority from the beginning and is treated as if it never had any lawful force or effect.
Voidable	An act done with lawful authority but containing a procedural error that may be challenged or corrected.
Warrant	A written order from a neutral magistrate, based on a sworn complaint of probable cause, authorizing the executive to restrain liberty.

Homework Assignment

Objective: Internalize the structural test of executive authority and prepare for the transition to legislative analysis.

1. **The Three-Question Review:** Select a recent interaction between a government entity and a citizen (from a news report or historical case). Apply the "Three Questions" from Slide 42 to determine if the action was an execution of law or an exercise of power.
 - o *What is the law?*

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- *Was due process followed?*
 - *Did force come after judgment?*
2. **Structural Reflection:** Write a one-page summary on the importance of the "Two Gates" (Grand Jury and Petit Jury). Explain how the requirement of twenty-four citizens' agreement acts as a safeguard against the "arm of the creature."
 3. **Preparation for Module 10:** Based on the conclusion of Module 9, consider the following prompt: *If the legislature creates a statute that bypasses due process, is that statute truly "law"?* Be prepared to discuss the difference between an enactment and the Law of the Land in the next session.