

**REMARKS ON THE ARMY
REGULATIONS AND
EXECUTIVE REGULATIONS
IN GENERAL**

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Remarks on the Army Regulations and Executive Regulations in General by G. Norman Lieber

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G. NORMAN LIEBER

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AND

EXECUTIVE REGULATIONS IN GENERAL.

BY

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TABLE OF CONTENTS.

	Page.
CHAPTER I.	
CLASSIFICATION AND SOURCE OF AUTHORITY OF ARMY REGULATIONS	5
CHAPTER II.	
EXECUTIVE REGULATIONS IN GENERAL	21
CHAPTER III.	
APPROVAL OF REGULATIONS BY CONGRESS	51
CHAPTER IV.	
THE DIFFERENT EDITIONS OF ARMY REGULATIONS	61
CHAPTER V.	
THE INTERPRETATION AND CONSTRUCTION OF REGULATIONS	85
APPENDIX A.—Letter of the Secretary of War with regard to General Order No. 32, Adjutant-General's Office, 1873.	
APPENDIX B.—Extract from the Judge-Advocate General's remarks on revocable licenses	108
APPENDIX C.—Opinion of Hon. J. M. Dickinson with reference to the constitutionality of the act of Congress giving the Secretary of War powers in regard to obstructions to navigation	121
APPENDIX D.—Extract from the Regulations for the Revenue-Cutter Service	129
	189

	Page.
APPENDIX E.—Explanation of General Scott with reference to the Army Regulations of 1821.....	145
APPENDIX F.—Letter of Secretary of War Belknap, accompanying proposed regulations of 1878.....	149
APPENDIX G.—Report of Military Committee of the House of Representatives, Forty-third Congress, first session, on "Revised Army Regulations".....	151
APPENDIX H.—Letter of General Schofield in regard to proposed regulations of 1876.....	185
APPENDIX I.—Remarks of Secretary of War McCrary in his annual report of 1877.....	187

CHAPTER I.

CLASSIFICATION AND SOURCE OF AUTHORITY OF ARMY REGULATIONS.

The words *regulate* and *regulation* are used in several places in the Constitution of the United States. Thus, Congress has power to "regulate" commerce, to "regulate" the value of money, to make rules for the government and "regulation" of the land and naval forces, to make "regulations" with regard to the elections of Senators and Representatives, to make "regulations" with reference to the jurisdiction of the Supreme Court in certain cases, and to make needful rules and "regulations" respecting the territory and other property of the United States. In all these cases regulation is legislation.

By virtue of its power to make rules and regulations for the land and naval forces, Congress covers a large field of legislation relating to the administration of military affairs. When this is done, there, however, remains a mass of matters appertaining to the military establishment, which it is necessary to "regulate." Legislation can not enter into all the details of this regulation, and, if it could, it would not be desirable, because a legislative code, controlling the whole subject of military administration, would not have the necessary elasticity. The Constitution provides a way of supplementing this power of Congress, the President, as Executive and Commander-in-Chief of

the Army, having the power to make regulations for its government.'

The regulations for the transaction of the public duties and business relating to the military establishment, adopted by the President in the exercise of this power, are designated as the Army Regulations. They may be divided into several classes, viz:

1. Those which have received the sanction of Congress. These cannot be altered, nor can exceptions to them be made, by the executive authority, unless the regulations themselves provide for it. In reality, the approval of Congress makes them legislative regulations, and they might therefore be more strictly classified with other statutory regulations with reference to subjects of military administration. They are, however, included under the general head of Army Regulations, as approved codes of executive regulations. Examples of regulations having this sanction are given *post*.

2. Those that are made pursuant to, or in execution of, a statute—meaning by the latter expression, those that are supplemental to particular statutes, and, in

¹ "Regulations are administrative rules or directions as distinguished from enactments. They exist in all the Executive Departments and are of very material service in the efficient administration of the Government. *Army regulations* are authoritative directions as to the details of military duty and discipline. The authority for Army regulations is to be found in the distinctive functions of the President as Commander in Chief and as Executive. His function as Commander in Chief authorizes him to issue, personally or through his military subordinates, such orders and directions as are necessary and proper to insure order and discipline in the Army. His function as Executive empowers him, personally or through the Secretary of War, to prescribe rules, where requisite, for the due execution of the statutes relating to the military establishment." (Winthrop's Abridgment of Military Law, p. 8.)

the absence of sufficient legislative regulation, prescribe means for carrying them out. These, if it be not prohibited by the statute, may be modified by the executive authority,¹ but until this is done they are binding as well on the authority that made them as on others. It has been held that a regulation of the Treasury Department, made in pursuance of an act of Congress, "becomes a part of the law, and of as binding force as if incorporated in the body of the act itself."² So it has been held that the civil service rules, promulgated under the Civil Service Act, "became a part of the law," and that removal from a position placed under the act and the rules can only be made agreeably to the terms and provisions of both the act and the rules,³ and an Army regulation made pursuant

¹ "The power to establish implies, necessarily, the power to modify or repeal, or to create anew." (*United States v. Eliason*, 16 Pet., 302.)

² *United States v. Barrows*, 1 Abbott, 351; 24 Fed. Cases, 1018.

³ *Butler v. White*, 83 Fed. Rep., 578. See also *United States v. Wade*, 75 Fed. Rep., 261; *Boody v. United States*, 3 Fed. Cases, 860; *United States v. Webster*, 38 Fed. Cases, 509; *Allen v. Colby*, 47 N. H., 544; *The Thomas Gibbons*, 8 Cr., 421; *Parker v. United States*, 1 P., 293, 297; *United States v. Freeman*, 25 Fed. Cases, 1211; *Lockington's Case*, Bright, 269; *Low v. Hanson*, 72 Me., 104; *United States v. Williams*, 6 Mont., 379; *Caha v. United States*, 152 U. S., 211, 221. But as to the conclusion in *Butler v. White*, in regard to removals from office under the civil service act and rules, see *post*, p. 29, note.

By act of Congress of March 1, 1823, it was prescribed, "That if any persons shall swear or affirm falsely, touching the expenditure of public money, or in support of any claim against the United States, he or she shall, upon conviction thereof, suffer as for willful and corrupt perjury." It was held by the Supreme Court that under this legislation the Secretary of the Treasury had the power to make a regulation authorizing justices of the peace of States to administer oaths to affidavits in support of claims, and that perjury might be assigned on an affidavit so taken, (*United States v. Bailey*, 9 Pet., 338). And see *United States v. Breen*, 40 Fed. Rep., 402.