

陸海空軍軍官士官服役條例 釋憲案

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皮之不存，毛將焉附？

大法官是憲法守護者

軍人是人民生命財產及國家安全之捍衛者

沒有軍人的盡忠衛國，何來大法官守護憲法？

本案之憲法意義

軍人財產權、
生存權、
工作權之保障

國家國防
軍事安全
體制之維護

憲法特別保障條款

憲法增修條文第十條第九項

國家應尊重軍人對社會之貢獻，並對其退役後之就學、就業、就醫、就養予以保障。

當然違憲

系爭條例侵害退伍軍人財產權、生存權、工作權及就業與憲法基本權保障
牴觸憲法增修條文第十條第九項規定
當然違憲

軍人為廣義公務員

釋字第430號解釋

「軍人為廣義之公務員」

軍人為廣義公務

釋字第455號解釋

「國家對於公務員有給予俸給、退休金等維持其生活之義務。軍人為公務員之一種，自有依法領取退伍金、退休俸之權利，或得依法以其軍中服役年資與任公務員之年資合併計算為其退休年資；其中對於軍中服役年資之採計並不因志願役或義務役及任公務員之前、後服役而有所區別。」

釋字第715號解釋

「憲法第18條規定人民有服公職之權利，旨在保障人民有依法令從事於公務之權利。志願役預備軍官及預備士官為軍中基層幹部，係依法定程序選訓、任官，並依國防法等相關法令執行訓練、作戰、後勤、協助災害防救等勤務，自屬憲法第18條所稱之公職。」。

李震山大法官於釋字第730號解釋協同意見書

「『服公職權』所保障的俸給、退休金給與等權，則與生存權、財產權內涵難有重大區別。顯見，憲法第18條的服公職保障若失去第15條的生存、工作、財產等核心內涵，將成有體無魂的空洞規定。由此推知，憲法第18條是具問題意識地在一般人民之外，特別為與國家產生公法上職務忠誠關係，而衍生國家對公職人員生活照料義務所特設的規定，並使『服公職權』與『財產權』產生競合。」

公務人員退休給與之憲法地位



財產權
生存權
工作權

退休給與權利之憲法地位

財產權



既得權

既得權的憲法性質

具有「不可碰觸性」或「不可廢棄性」

「既得權尊重原則」

不僅為國際法上之一般法律原則

於法國，更被確認為公法之一般法律原則

波蘭法制

該國憲法法院1992年2月11日之判決 (KI4/1992)

認為退休年金不同於失業救濟金，蓋其享有一種特別保障之法律地位，其乃因退休金係以多年工作之貢獻及多年扣繳之部分薪資為基礎，退休人員與退休基金間之契約關係，完全建立於「信賴」之上，因此，新法溯及既往觸及已退休者之退休權益，而宣告大部分之規定為違憲

美國法制

美國New Jersey州最高法院於2015年針對Burgos v. State案

判決認為公部門退休人員對基金之請求，乃屬「不可被沒收之可領受給付權利（non-forfeitable）」，該權利一旦成就，即不得降低，退休基金成員以其公職服務生涯賺取之退休因為「遲延給付」，基於契約關係，法律創設基金成員之正當期待，使基金成員可信賴政府必及時依法撥付，並化解基金赤字問題。因基金成員與政府間已成立契約，如政府撥付不足，即構成損害契約之義務

美國法制

Illinois州最高法院

2016年Johes v. Municipal Employees' Annuity & Benefit Fund of Chicago案
憲法保證退休基金成員「受承諾應可領取之給付」，而非基金剩有多少款項，故不許政府逃避支付退休金予員工之義務

生存權危機！

- 退休時間越長，退休人員所需之長期老年醫療及照護等支出必然驟增，以需申請外籍勞工看護之退休人員為例，合計退休人員應支付外籍勞工看護人員之薪資、加班費、就業安定基金、健保費等，金額已逼近新台幣23,000元，而政府係經年提高外籍勞工之給付標準。
- 以目前新制雖號稱有「最低保障金額」，但該金額予以扣除申請外籍勞工看護支出計算，軍公教退休人員所得維繫生活之家庭支出，實已無幾！

國家不得主張窮困抗辯

系爭條例第36條第2項規定

「退伍除役人員擇領退除給與種類，除前項情形外，經審定生效後，不得請求變更。」

據此，學者指出退休為一極為重大且不得於事後再予變更之事，依世界銀行行政法庭之見解，退休條件當然屬於公務人員之「核心且基本權益」，未經其「事前同意」，不得予以單方變更，況人民按對前揭法律明文之理解與論知，人民何以可得想像其不得事後請求變更，而政府卻得以為之？

不存在之改革前提

國家未擲節支出

政府未依法足額提撥

缺失未改善(64項重大缺失)

破產之說詞並未舉證

沒有急需迫切的公共利益

蘇永欽前大法官

新法的改革真的已經達到為了追求公共利益，非常急需迫切，毫無迴旋餘的程度，必須重大溯及地剝奪既得權？

違反溯及既往原則

系爭條例第36條

拉近不同時期同階同年資之給付水準
不同時期同一樓地板
顯然溯及既往

違反溯及既往原則

系爭條例對於已退役軍人係屬「真正溯及既往」，應屬違憲

- 新法的要件回扣到施行前已經全部完成的事實，而其效果也延伸到施行前，而為「真正溯及」
- 系爭條例之退休俸請求權經主管機關審定後，至核定處分生效時，退休金請求權即已發生，不再需要任何其他要件事實的合致才告確定，則嗣後才調降退休金的規定，並適用於這些請求權人，當然就是真正溯及既往

違反溯及既往原則

退休給與本可一次領

(美國最新軍人退伍制度亦採取此制度)

既得權之總額已經獲得確定

月退給與為遞延之給付，對其剝奪仍為既得權之侵害

國家與軍人之關係建立在「雙向忠誠」之基礎

軍人對國家的忠誠義務

- 忠勇為國為民之義務
- 服膺及維護民主憲政秩序

國家對軍人的忠誠義務

- 對軍人的健康、安全
盡最大保護義務
- 對軍人的薪俸、福利及退休、
撫卹具有贍養與照顧義務

國家不能失信，對軍人不忠誠

美國軍人退休制度 採用不溯及既往原則

- 美國軍退制度：背景與最近發展
 - 美國國會研究室報告
- Military Retirement: Background and Recent Developments
 - Kristy N. Kamarck
 - Analyst in Military Manpower
 - April 6, 2016



Military Retirement: Background and Recent Developments

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Analyst in Military Manpower
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Prepared for Members and
Committees of Congress

美國軍人退休制度 所得替代率最高可達102%


MILITARY COMPENSATION

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Retirement

The following chart summarizes the differences between the four retirement plans.

Retirement Plan	Basis	Multiplier	COLA	Readjustment	Bonus
Final Pay	Final basic pay	2.5% per year	CPI	None	None
High-36	Average of highest 36 months of basic pay	2.5% per year	CPI	None	None
CBS/REDUX	Average of highest 36 months of basic pay	Same as High-36 with reduction of one percentage point for each year short of 30 years of service	CPI - 1%	At age 62, 1) retired pay made equal to High-36 2) future multiplier made equal to High-36 3) future COLA continues at CPR - 1%	\$30,000 at 15th year of service with obligation to serve 20 year career
Disability	Either Final Pay or High-36 as appropriate	2.5% per year of % of disability member's choice	CPI	None	None

The below chart provides the basic criteria to determine which retirement plan applies to you.

Retirement Plan	Criteria to Receive
Final Pay	Entry before September 8, 1980
High-36	Entry on or after September 8, 1980, but before August 1, 1986 OR Entered on or after August 1, 1986, and did not choose the Career Status Bonus and REDUX retirement system
CBS/REDUX	Entered on or after August 1, 1986, AND elected to receive the Career Status Bonus (if you do not elect to receive the Career Status Bonus, you will be under the High-3 retirement system)
Disability	Determined medically unfit for continued service with a DoD disability rating of at least 30%

Service members who remain on active duty or serve in the Reserves or Guard for a sufficient period of time (usually a minimum of 20 years) may retire and receive retired pay. Members who become disabled while on duty may be medically retired and receive a disability retirement. There are four basic retirement plans: Final Pay, High-36 Month Average, REDUX and Disability.

All four of the retirement plans determines initial monthly retired pay by taking the member's retired pay base and subjecting it to a percentage multiplier:

Retired Pay Base X Multiplier %

Retired Pay Base

There are two methods for determining the retired pay base. They are the final pay method and the high-36 month average method. The final pay method, as the name implies, establishes the retired pay base equal to final basic pay. The high-36 method is the average of the highest 36 months of basic pay divided by 36. This is generally the last 3 years of service and is sometimes called high-3. The method used depends upon when the member first entered military service.

To decide which method applies to you, you must determine the date that you FIRST entered the military. This date is called the DIEMS (Date of Initial Entry to Military Service) or DIEUS (Date of Initial Entry to Uniformed Services). The date you first entered the military is the first time you enlisted or joined the active or reserves. This date is fixed—it does not change. Departing the military and rejoining does not affect your DIEMS.

Some individuals have unique circumstances that complicate determining their DIEMS. Here are a few examples:

- The DIEMS for Academy graduates who entered the Academy with no prior service is the date they reported to the Academy, not the date they graduated.
- Beginning an ROTC scholarship program or enlisting as a Reserve in the Senior ROTC program sets the DIEMS, not the graduation or commissioning date.
- Members who entered the military, separated, and then rejoined the military have a DIEMS based on entering the first period of military service.
- The DIEMS for members who enlisted under the delayed entry program is when they entered the delayed entry program, not when they initially reported for duty.
- For those who joined the Reserves and later joined the active component, their DIEMS is the date they joined the Reserves.

Be aware that your pay date may be different than your DIEMS. Also, your DIEMS does not determine when you have enough time in the service to retire—it only determines which retired pay base method applies to you.

Not all Services have their DIEMS dates properly defined in their personnel records. If you have unusual circumstances and are unsure of when your DIEMS date is or believe your records show an incorrect DIEMS date, contact your personnel office to discuss your particular situation.

Now, based upon the date you initially entered the military, you can determine which retired pay base method applies to you.

Retired Pay Base Method	Criteria to Receive
Final Pay	Entry before September 8, 1980
High-36	Entry on or after September 8, 1980

Retired Pay Multiplier

For both the Final Pay and High-36 retired pay plans each year of service is worth 2.5% toward the retirement multiplier. For instance, 20 years of service would equate to a 50% multiplier. The years of service creditable are computed differently depending upon whether retirement is from full time active duty or from a reserve career. These differences are explained under the **Active Duty Retirement** and **Reserve Retirement** pages.

For the REDUX retirement plan, which applies only to an active duty retirement, the High-36 multiplier is reduced by one percentage point for each year that the member has less than 30 years of service at retirement. For instance, 20 years of service would equate to a 40% multiplier. This is discussed more fully under the **Active Duty Retirement** page.

For the Disability retirement plan, the multiplier may be the higher of 2.5% for each year of service or the disability percentage assigned by the Service at retirement. However, note that the disability retirement multiplier is capped at 75%.

In any case, the longer an individual serves, the higher the multiplier and the higher the retirement pay. For example:

Years of Service	10	15	20	21	22	23	24	25	30	35	40	41
Final Pay	25%	37.5%	50%	52.5%	55%	57.5%	60%	62.5%	75%	87.5%	100%	102.5%
High-36	25%	37.5%	50%	52.5%	55%	57.5%	60%	62.5%	75%	87.5%	100%	102.5%
REDUX*	N/A	N/A	40%	43.5%	47%	50.5%	54%	57.5%	75%	87.5%	100%	102.5%

*The multiplier does not apply to the REDUX retirement plan at under 20 years of service since REDUX is only an active duty retirement plan.

All military retirements are protected from inflation by annual Cost of Living Adjustments (COLAs), based on changes in the Consumer Price Index (CPI) as measured by the Department of Labor. Under the **Final Pay** and **High-36** retirement plans, the annual COLA is equal to percentage increase in the CPI year over year. This is a different index than the one used for active duty annual pay raises. The index used for active duty pay raises are based upon average civilian wage increases. Thus, retirement pay COLAs and annual active duty pay raises will differ. Also note; the annual COLA for the REDUX retirement method is reduced by one percentage point below the increase in the CPI.

Military retired pay is subject to a dollar for dollar offset when the retired member is also in receipt of VA disability compensation. However, there are two programs that restore partial or full retired pay when a member is eligible for concurrent DoD and VA payments. See the **Concurrent DoD and VA Payment** page for details.

Additionally, all retirees may choose to participate in the Survivor Benefit Plan (SBP) or the Reserve Component Survivor Benefit Plan (RCSBP), which enable the member to provide a continuing annuity to their family after death, based on the retired pay. The SBP and RCSBP programs are discussed in the **benefits section**.

Finally, remember that after age 62, Social Security will likely provide additional retirement benefits.

Select one of the following topic areas:

- **Active Duty Retirement**
- **Reserve Retirement**
- **Disability Retirement**
- **Concurrent DoD and VA pay**
- **Retirement COLA**

再任禁止之違憲理由

未盱衡軍職服務期限之特質

按系爭條例第6條規定

- 「軍官、士官服現役最大年限或年齡如下：一、士官與除役年齡同。二、少尉、中尉十二年。三、上尉十七年。四、少校二十二年。五、中校二十六年。六、上校三十年。七、少將五十七歲。八、中將六十歲。九、上將六十四歲。（第1項）
- 前項服現役最大年限，自任官之日起算；服現役最大年齡，依其出生年月日計算至足齡之年次月一日止。但留職停薪期間，不列計服現役最大年限期間。（第2項）
- 一級上將服現役最大年齡，不受第一項第九款之限制。（第3項）」

再任禁止之違憲理由

未盱衡軍職服務期限之特質

按系爭條例第6條規定

除一級上將外，其餘之軍士官若無法晉升上階，即則必須退伍

受限於此，軍人平均退伍年齡僅約43歲，正值壯年，倘不能再投入社會工作，繼續服務社會、貢獻所長，祇得賦閒在家，空耗月退俸度日，顯然為人力資源之浪費，對社會國家均非有利，更非正確之法政策。

具軍事暨相關專長之軍職人員依法退役後，如具學術專長者不能於國內學術及專業機構（尤其至國內大學）再任其他職務，則無非令有學術自我實現能力之人員被逼遠赴國外之大學或相關機構任職，豈非更不利於我國之學術研究發展及國防安全！國家中山科學研究院研發人員外流之例，前車之鑑不遠！

再任禁止之違憲理由

違反體系正義

以私立學校觀之，僅限「私立大學」，
排除私立專科院校、中小學等，
第以，系爭條款亦排除再任私立大學之其他職務者，
有違反體系正義

再任禁止之違憲理由

私立大學並非國家唯一有捐助之財團法人

以退役人員再任私立大學專任教師作為停俸之理由
顯然違反憲法平等原則

再任禁止之違憲理由

私立大學並非國家唯一有捐助之財團法人

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顯然違反憲法平等原則

依銓敘部統計至107年3月28日公告之法人清冊彙整資料，政府「原始捐助(贈)之財團法人」計305個，「捐助(贈)經費累計20%以上之團法人」計27個，兩者中均無任何私立學校。由此可見，私立大學並非國家捐助對象之最大對象，是以，對於國家財政支出並無排擠效應

再任禁止之違憲理由

侵害人民工作權，且違反不當聯結之憲法原則

軍人之退休俸或贍養金並非薪水，退休金（俸）是以多年工作之貢獻與多年扣繳之部份薪資為基礎，而是其任職時國家強制從薪資單上預扣，軍人不僅有部分負擔，此退休俸或贍養金更彰顯國家對其退役後照顧之憲法義務，此為公法上之財產請求權。至於如軍人再任私立大學，係其與私立學校間為私法上之財產請求權，二者並無相關

再任禁止之違憲理由

政府對於私立學校補助款僅及於教學與學生獎補助金，並不包括人事費用

108年所修正之教育部獎勵補助私立技專校院整體發展經費核配及申請要點第九點第（五）項第1款第（1）目更就申請原則及注意事項更規定：「本獎勵補助經費經常門使用原則：本獎勵補助經費經常門以改善教學、教師薪資及師資結構為主，應優先保留經常門經費百分之六十以上供作下列經費所需：新聘(三年以內)且符合校內授課規定及有授課事實之專任教師薪資；校長、公立學校或政府機關退休至私校服務，領有月退俸之教師，其薪資應由學校其他經費支付。」

再任禁止之違憲理由

私立大學擔任專任教師之退伍軍人，其薪資主要來自私立大學，並未從政府領取雙份薪資。教育部對各大專院校專任教師薪資之個別補助僅限於國內極少部分之教師，不具普遍性，甚至排除退伍軍人在私立大專院校專任之教師。

再任禁止之違憲理由

過渡條款緩衝期間，明顯不足，是屬違憲

系爭條例修訂後於107年7月1日實施，旋即8月1日對任教於私立大學的退伍軍人停領退休俸，如此劇烈之變動卻僅有1個月5 緩衝期間，使其2/3極難調適與重新規劃自己之財務與生涯。按過渡期間條款之訂定，應就其內容實質審查，如有恣意裁量或顯非合理之情形，而不足以緩和軍人所受之過度侵犯，不利新法將有違憲之虞(參見司法院釋字第605號楊仁壽、王和雄大法官部分不同意見書)，故本規定明顯違憲

再任禁止之違憲理由

系爭條例之再任禁止條款成為國家干涉私立大學自治之違憲手段

政府獎補助私立大學和獎補助私人企業性質是一致的，都是在健全機構的發展與形成特色。今若以私立大學接受獎補助為由，以停俸方式限制或阻礙退伍軍人再任職私立大學教職，不啻妨害學校發展，干涉其人事、財務或業務，有違獎補助之初衷，違反大學自治精神，同時亦妨礙憲法保障契約自由權。不能以停俸方式限制退伍軍人到同樣接受政府獎補助之私人企業任職，卻單獨限制退伍軍人到私立大學任教，該限制條款顯然無理。

再任禁止之違憲理由

系爭條例限制剝奪退伍軍人再任職私立大學工作權

亦不利國家學術發展，危害於公益更重。

退休軍人再任私立大學專任教師，係因該退伍軍人具有大學教師任用資格，及具學術研究及教學能力，私立大學始可能予以聘任，並非軍人退伍即可均由私立大學照單全收，反之，私立大學校係盱衡其學術發展需要，且經過大學之聘任審查程序，始予聘任。具任教大學之退伍軍人，除具有前開學術研究及教學能例外，尚可傳授其實務經驗，提供學生就業所需及適應社會之知能，對學生之受教權極具助益。新制貿然以無任何立論基礎之修法手段，除斷然剝奪限制公立學校退休教師之工作權外，同時造成學生受教權之嚴重妨害，截然與公益原則相違。

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