司法院大法官 107 年度憲一字第 10 號補充鑑定意見

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July 1, 2019

鈞院 107 年度憲一字第 10 號立法委員江啟臣、李鴻鈞、高金素梅等 38 人就中華民國 107 年 6 月 21 日修正公布之陸海空軍軍官士官服役條例（以下簡稱系爭條例）第 3 條、第 26 條、第 29 條、第 34 條、第 46 條第 47 條及第 54 條等規定聲請解釋案，囑託本人擔任鑑定人，並經中華民國 108 年 6 月 24 日憲法法庭言詞辯論終結。本人以下針對　鈞院在言詞辯論過程中所提示之爭點，以及聲請人與有關機關所提主張中所顯現之疑問，進一步敬提鑑定意見書如下：

一、美國 21 世紀各州年金改革概況

自 2007 年之金融海嘯，導致全球股市的重挫，導致美國各州政府公務員退休年金基金資產價值，從 2007 年的 31.5 億美金，至 2009 年 3 月時，縮水到 21.7 億美金。受到全球股災影響，政府公務員退休基金之營運收益顯著下降。因此 2009 年開始，美國各州陸續進行公務員年金改革（詳見以下圖示）[1]。

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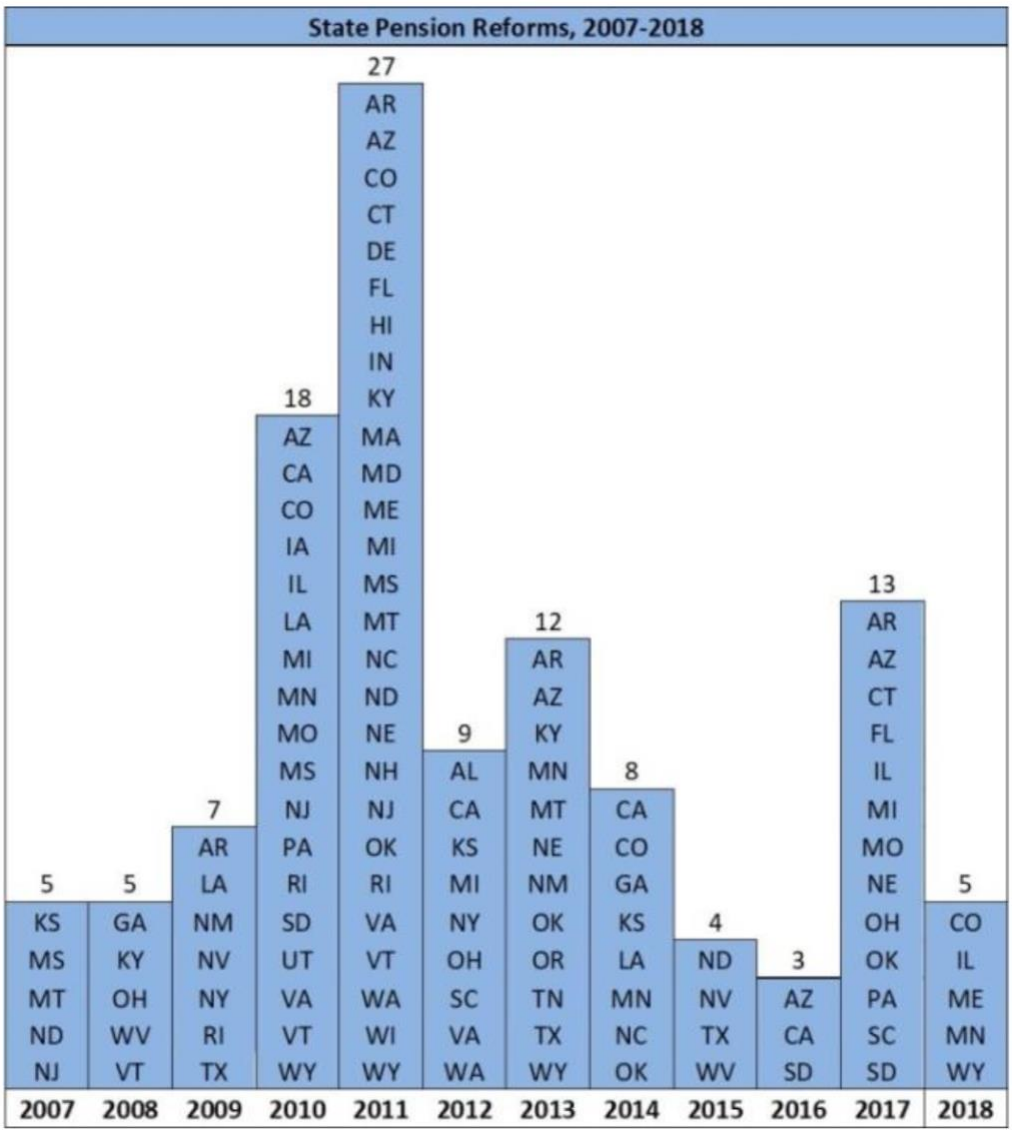
[1] 出處：Keith Brainard & Alex Brown, *Spotlight on Significant Reforms to State Retirement Systems*, NATIONAL ASSOCIATION OF STATE RETIREMENT ADMINISTRATORS (DEC. 2018), *available at* https://www.nasra.org/files/Spotlight/Significant%20Reforms.pdf?fbclid=IwAR3psnDtvEWiEo3HI4C2rM13bzskEYRDJlcU51B04PGJTIQUvjjA3CFbHm8 (visited June 24, 2019).



整體而言，美國各州年金改革的方向，主要可以分為：提高政府公務員自行繳納金額，降低公務員可享之退休金請領金額，廢除或降低生活成本調整指數（cost-of-living adjustment，簡稱 COLA）等措施；各州有單獨採取其一者，也有數者並採的實例。根據統計，目前美國共有 39 州提高政府在職公務員及新進公務員的繳納金額（詳見 Figure 1），共有 41 州是採行減少政府公務員之退休金請領金額的改革措施（詳見 Figure 2），另外有 31 州則是採行降低 COLA 的調整手段（詳見 Figure 3）[2]。由此顯然可見，政府公務員退休金之調整，已

[2] 以上出處均為：Keith Brainard & Alex Brown, *Spotlight on Significant Reforms to State Retirement Systems*, NATIONAL ASSOCIATION OF STATE RETIREMENT ADMINISTRATORS (DEC. 2018), *available at* https://www.nasra.org/files/Spotlight/Significant%20Reforms.pdf?fbclid=IwAR3psnDtvEWiEo3HI4C2rM13bzskEYRDJlcU51B04PGJTIQUvjjA3CFbHm8 (visited June 24, 2019).

成為財政問題長期窘困和金融海嘯衝擊之後，全美各州的主要趨勢。

Figure 1. States that have increased employee contribution rates, 2009-2018

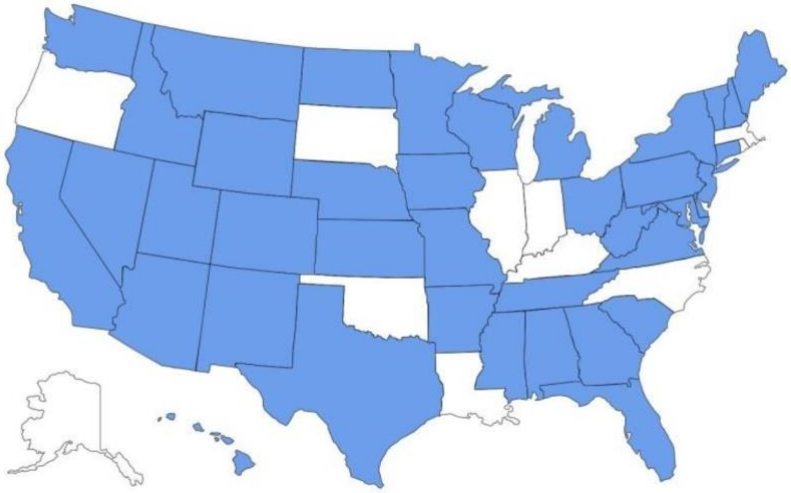
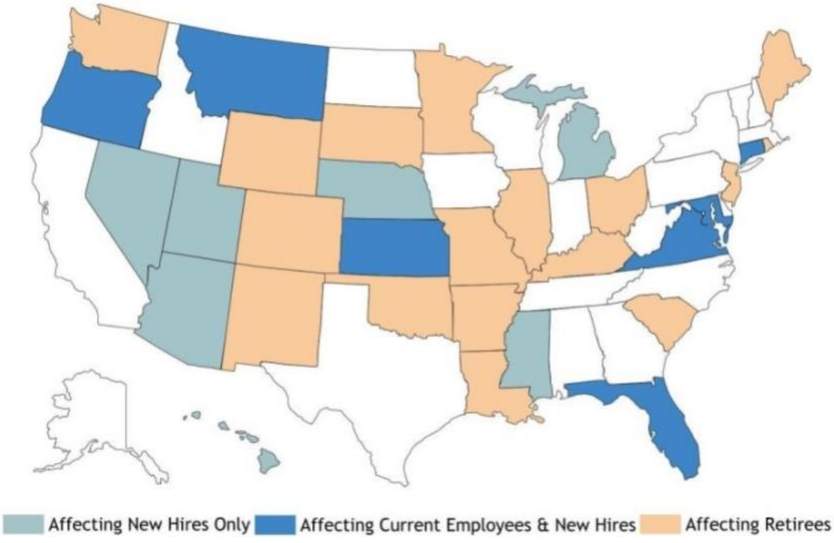
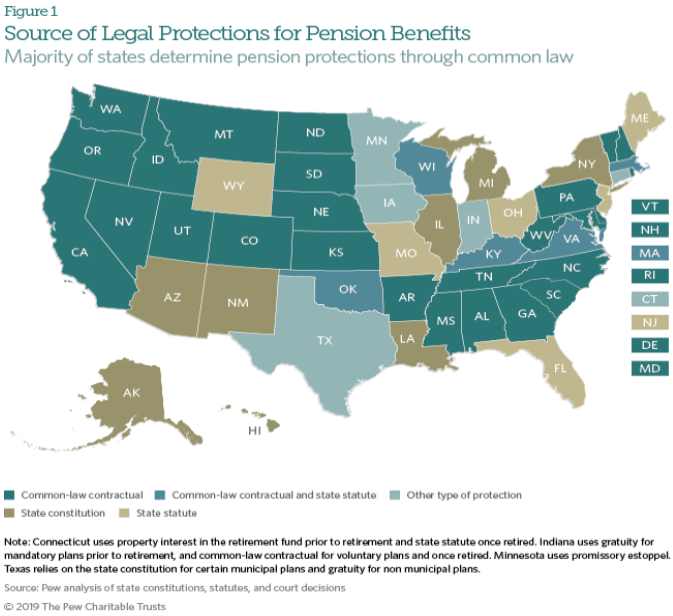


Figure 2. States that Reduced Pension Benefits, 2009-2018

Figure 3. State COLA Reductions, 2009-2018



然而，在各州政府執行政府公務員年金改革下的各種調整措施時，的確面對各州既存規範所形成的障礙。根據美國知名的 Pew Charitable Trust 所進行的調查所得之全美各州統計實證資料顯示[3]：目前有 8 個州在州憲法內具有明文的年金保障條款，有 6 州的州法保障年金權益，有 26 州透過則是以法律明訂政府公務員的退休金權益受契約（common law contract）保障，有 5 州則是透過司法判決與州法而受到保障，另有 1 州透過司法判決獲得保障，尚有 4 州是透過其他方式獲得保障（參見以下圖示）[4]。



進一步檢視上述 8 個州憲法中具有年金保障條款的州，則可以發現：就 New Mexico 州的州憲法而言，因為該州憲法第 20 條 22 項對於年金保障條款，設有例外規定[5]，因此該州之年金所受憲法保障，並非絕對性質。除此之外，Arizona 州雖在該州憲法第 29 條中，訂有年金保障條款，但是，該州在 2018 年底則是以通過公民投票的方式，修正該州憲法第 29 條[6]，使民選公職人員和刑

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[3] *See generally* The Pew Charitable Trust, *Legal Protections for state pension and retiree Health Benefits- Findings from a 50 state survey of retirement plans* (May 30, 2019*), available at* https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2019/05/legal-protections-for-state-pension-and-retiree-health-benefits?fbclid=IwAR2AYZTBpZa3n1uBURIyeRcT6ScjHouTQzww8CZykroajVqyHEH9wX_aQM4 (visited June 2, 2019).

[4] *See* The Pew Charitable Trust*, id.*

[5] *See* NM CONST. art. XX, § 22 : "*Nothing in this section shall be construed to prohibit modifications to retirement plans that enhance or preserve the actuarial soundness of an affected trust fund...*"

[6] *See* ARIZ. CONST. art. 29. 1. Public retirement systems. Section 1.
A. Public retirement systems shall be funded with contributions and investment earnings using actuarial methods and assumptions that are consistent with generally accepted actuarial standards.

事矯正系統人員的年金權益，不再受到該憲法條款保護[7]，也就是以修憲方式限縮年金權益的憲法保障範圍。因此，本鑑定人認為，目前美國各州政府公務員年金之調整，受憲法保留所拘束者，嚴格來說應該僅有 7 州[8]。

Legal basis	Accruals protected			
	Past and future	Past and maybe future	Past only	None
State constitution	AK, IL, NY	AZ	HI, LA, MI	
Contract	AL, CA, GA, KS, MA, NE, NV, NH, ND, OR, PA, TN, VT, WA, WV	CO, ID, MD, MS, NJ, RI, SC	AR, DE, FL, IA, KY, MO, MT, NC, OK, SD, UT, VA	
Property	ME, WY	CT, NM, OH	WI	
Promissory estoppel[a]	MN			
Gratuity				IN, TX[b]

本鑑定人認為特別值得注意者，乃是美國年改制度中的生活成本調整條款(COLA)。整體觀之，全美總共有 27 州認定 COLA 條款，並非政府與僱員之間的契約，亦即在這些州的法律體系下，COLA 並未受到任何憲法、法律或司法判決的保障（27 states lacking any constitutional, statutory, or judicial authority on the issues）。另外，有 6 個州自始未有 COLA 條款設計。僅有 5 個州是保障所有基金參與者自始受到 COLA 保障，另外，則有 4 個州保障已經生效之 COLA 條款相關權益，但是允許政府向未來就 COLA 予以調整（參見以下圖

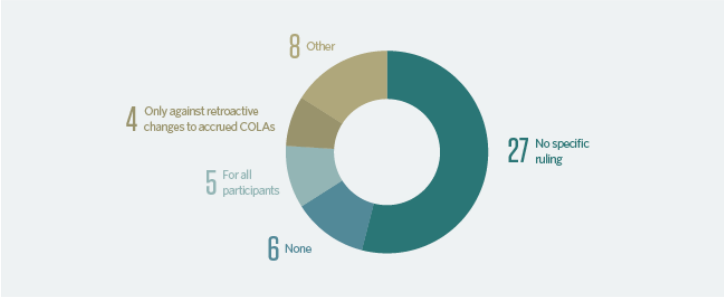
B. The assets of public retirement systems, including investment earnings and contributions, are separate and independent trust funds and shall be invested, administered and distributed as determined by law solely in the interests of the members and beneficiaries of the public retirement systems.
C. Membership in a public retirement system is a contractual relationship that is subject to article II, Section 25.
D. Public retirement system benefits shall not be diminished or impaired, except that:
1. Certain adjustments to the public safety personnel retirement system may be made as provided in senate bill 1428, as enacted by the fifty-second legislature, second regular session.
2. Certain adjustments to the corrections officer retirement plan may be made as provided in senate bill 1442, as enacted by the fifty-third legislature, first regular session.
3. Certain adjustments to the elected officials' retirement plan may be made as provided in house bill 2545, as enacted by the fifty-third legislature, second regular session.
E. This section preserves the authority vested in the legislature pursuant to this constitution and does not restrict the legislature's ability to modify public retirement system benefits for prospective members of public retirement systems.

[7] *See* Mark Glennon, *Arizona Amends its Constitutional Pension Protection Clause* (November 8, 2018), *available at* https://wirepoints.org/arizona-amends-its-constitutional-pension-protection-clause-world-doesnt-end-quicktake/?fbclid=IwAR1hRbRptirw8GFjoRO1B5x8UO3zQeH2b0VwyQS28zffydwIucUfexry-io (visited June 24, 2019).

[8] *See* Alicia H. Munnell and Laura Quinby, *Legal Constraints on Changes in State and Local Pensions, Center for Retirement Research at Boston College* (August 2012), *available at* http://crr.bc.edu/wp-content/uploads/2012/08/slp_25.pdf (visited June 24, 2019).

示）[9]。

Figure 4
Legal Protection for Cost-of-Living Adjustments
Majority of states lack legal framework to determine protections



Source: Pew analysis of state constitutions, statutes, and court decisions

二、美國憲法溯及既往原則的適用範疇

美國聯邦憲法本文的第 1 條第九項：「公權剝奪令[10]或溯及既往之法律不得通過之」，同條第 10 項則規定：「任何州不得…通過公權剝奪令，溯及既往之法律，或損害契約義務之法律」，然而，對於溯及既往之定義與適用範圍，在美國學界一向有廣義與狹義之爭。狹義說者認為憲法僅限制州立法者制定溯及既往的刑事法律[11]。廣義說者認為憲法限制州立法者制定回溯性的民事與刑事法律[12]。深究上述爭議的發展歷史，長期以來學說上容有不同意見，但是在 1798 年

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[9] *See* The Pew Charitable Trust, *Legal Protections for state pension and retiree Health Benefits-Findings from a 50 state survey of retirement plans* (May 30, 2019*), available at* https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2019/05/legal-protections-for-state-pension-and-retiree-health-benefits?fbclid=IwAR2AYZTBpZa3n1uBURIyeRcT6ScjHouTQzww8CZykroajVqyHEH9wX_aQM4 (visited June 2, 2019).

[10] *See* Calder v. Bull, 3 U.S. 386 (1798).

[11] *See id. See also* Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HASTINGS CONST. L.Q. 525, 531 n.29 (1987); Robert G. Natelson, *Statutory Retroactivity: The Founders' View*, 39 IDAHO L. REV. 489, 521, 523 (2003); Duane L. Ostler, *The Forgotten Constitutional Spotlight: How Viewing the Ban on Bills of Attainder as a Takings Protection Clarifies Constitutional Principles*, 42 U. TOL. L. REV. 395, 417 (2011).

[12] *See, e.g.*, Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 GEO. L.J. 1015, 1054 (2006); Oliver P. Field, *Ex Post Facto in the Constitution*, 20 MICH. L. REV. 315, 321 (1922); Harold J. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking*, 84 GEO. L.J. 2143 (1996); Jane Harris Aiken, *Ex Post Facto in the Civil Context: Unbridled Punishment*, 81 KY. L.J. 323, 326 (1992); Michael S. Rafford, Note, *The Private Securities Litigation Reform Act of 1995: Retroactive Application of the RICO Amendment*, 23 J. LEGIS. 283 (1997); Evan C. Zoldan, *The Civil Ex Post Facto Clause*, 2015 WISC. L. REV.727, 730 (2015); Paul D. Reingold & Kimberly Thomas, *Wrong Turn on the Ex Post Facto Clause*, 106 CALIF. L. REV. 593

美國聯邦最高法院於 Calder v. Bull 案，此後兩百多年來的最高法院始終認定：聯邦憲法對州立法者所制定之非懲罰性民事法律(non-punitive civil statute)，縱使有回溯既往之法律效果，亦不違憲[13]，則是肯定的規範現實。其後，美國聯邦各級法院，也陸續就剝奪法官對於驅逐出境的裁量權[14]、課與外國公司罰金[15]等具有回溯性法律效果之規定，認定合憲。

換言之，在美國司法實務上，截至目前為止，可說只有具刑事效果的法律，才適用上述聯邦憲法中所規定的禁止溯及既往條款。至於在刑事領域以外的其他性質法律領域中，多認定無溯及既往條款之適用。美國這個兩百多年來未曾改變見解；幾乎已經具有憲政傳統意義的司法判決前例，和以歐陸法系傳統為主或受其影響的國家或許有別，和我國大法官對於禁止溯及既往原則的詮釋，也有不同。所以，本鑑定意見認為，執上述美國聯邦憲法本文第 1 條第 9 項和第 10 項的規定，過度解讀美國聯邦憲法中的禁止溯及既往原則適用範圍，率爾套用在我國聲請釋憲的案件中，極不妥適。尤其，在美國司法者未曾明確表達立場的爭議類型上，更不宜過度援引。基於以上說明，本鑑定意見認為，我國大法官釋字第 717 號對於真正溯及既往與非真正溯及既往的區別，在本案中不但仍具有可操作性，而且也是本案應該優先遵循的有效司法前例。

三、美國軍事人員之退休金保障與祖父條款之迷思

美國軍人年金，依法每四年由總統檢視軍人津貼系統後，送交國會審議。在 2005 年之第 10 屆軍人津貼系統審議中，檢視已退休與將退休軍人對於退休金之改變期待與後續效應。其後，依據美國國防授權法（The National Defense Authorization Act, 簡稱 NDAA）之規定，美國政府設立軍人薪俸與退休金現代化委員會，對總統與國會提供建言，以利美國軍隊在 21 世紀，能維持國防現代

(2018). *See also* E.g., Satterlee v. Matthewson, 27 U.S. (2 Pet.) 380, 416 app. at 683–84 (1829) (Johnson, J., concurring)

[13] *See, e.g.*, Kansas v. Hendricks, 521 U.S. 346, 369 (1997); Landgraf v. USI Film Prods., 511 U.S. 244, 270 (1994).

[14] *See* United States v. Bodre, 948 F.2d 28, 30–31 (1st Cir. 1991).

[15] GPX Int'l Tire Corp. v. United States, 893 F. Supp. 2d 1296, 1309–11 (Ct. Int'l Trade 2013).

化與財政永續性之雙重目標。值得注意的是：該委員會於 2015 年 1 月 29 日，對總統與國會所提出建議報告之 Public Law 112-239(b)(2)中的 Section 674[16]，建議維持現役服役人員與已退伍人員在既有的退休系統（grandfather existing retirees into the retirement system）。依據同條（e）的規定，該委員會於作出建議後，於作出正式報告前，尚應舉行公開聽證[17]。

至於聲請方訴訟代理人所提及之既往不咎原則（grandfather）[18]，本意並非追究與否的意思，而是由上述 總統特別諮詢委員會所提出之建議原則。因為此一委員會提出的建議均須送總統與國會同意，在總統與國會同意之前，委員會隨時可以修改，而正因為其在法律屬性上為建議性質，所以並不具有強制性的拘束力，遑論具有憲法層次的效力。

進一步言之，祖父條款未見諸於美國聯邦憲法與州憲法條文中，原始意義的祖父條款在 1890 年至 1910 年間出現在美國南方各州的 Jim Crow laws 當中，目的是為了防止非裔美國人、美洲原住民、墨西哥裔美國人及非盎格魯撒克遜人等族群擁有投票權，以便保障大部分白人的投票權和政治優勢。因此，這類祖父條款在美國聯邦最高法院判決中出現時，絕大多數是和嗣後一連串的非裔美國人平權判決有關，從 1915 年 Guinn v. United States[19]這個宣告以讀寫識字能力限制投票權、唯一例外為在南北戰爭前已經擁有選民資格者及其後代的規定違憲的判決起，因為表面上看來雖係種族中立，但卻幾乎毫無例外地侵害了少數族裔的權利，所以幾乎都遭到違憲宣告的命運。換言之，「祖父條款」本質上應該是創設法律上例外狀態的立法手段，該條款應該從未被美國聯邦最高法院賦予「基本權利」的地位。尤其是涉及軍事相關事務或軍人權益的美國聯邦最

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[16] National Defense Authorization Act for Fiscal Year 2013, Public Law 112–239, Section 674 (b) (2) (2013).

[17] National Defense Authorization Act for Fiscal Year 2013, Public Law 112–239, Section 674 (e) (2013).
(e) COMMISSION HEARINGS ON RECOMMENDATIONS OF SEC-
RETARY.—After receiving from the Secretary the recommendations of the Secretary for modernization of the military compensation and retirement systems under subsection (d), the Commission shall conduct public hearings on the recommendations.

[18] 此處聲請方訴訟代理人所指者，應該是所謂的「祖父條款」(grandfather clause)，此一條款的主要內容，乃是和「溯及既往」相對的概念。此一條款的原始意義，是指容許在舊有制度下已經存在的事物，不受新通過的法令所約束的特別例外。

[19] 238 U.S. 347 (1915). *See also* Lane v. Wilson, 307 U.S. 268 (1939).

高法院判決，應該是少之又少。

因此，此一由立法者授權成立的特別委員會，基於祖父條款概念所建議的不溯及既往原則，應該是建議為美國軍人的退休相關權益，創設出法律上的例外狀態，希望總統與國會能予以同意。此一作法或可視為美國總統制下行政權內部的裁量空間，但該委員會建議本身並無任何憲法層次的效力，同理，無論我國軍改方向或內容是否曾經參考或仿照美國軍改相關制度或措施，也難以進一步推論出我國也應該完全遵循此一特別委員會建議原則的結論，否則即屬嚴重誤解美國憲法的意旨與美國軍改的內涵。

四、美國憲法契約條款之各州適用狀況

針對本次年改釋憲案辯論過程中，聲請人方曾經提及的美國近年來有數州法院適用契約條款，作為判決年改措施違憲的依據，鑑定人認為：此一主張除了未曾明確清楚地說明美國各州公務員大致上是以契約關係為基礎的工作者（contract workers）此一特性，和我國公務人員的服公職關係相較之下，有相當程度的差異之外，針對美國幾個州的判決內容，也有闡釋稍嫌偏誤之虞，本鑑定意見認為有進一步澄清之必要，因此特別就以下幾州的判決，敬提簡要說明與分析，供大法官參考：

Moro v. State. 357 O.R. 167 (2015)

Oregon 州最高法院對於該州年金改革，曾於 2015 年做出部分合憲與部分違憲判決。本鑑定人認為值得注意之處有三：首先、Oregon 州最高法院認為年金調整部分，是否屬於契約條款的舉證門檻（clear and unmistakably contractual intent）為明確無誤準則。亦即，原告必需舉證立法者已經清晰地表明訂立契約的意向（unmistakability doctrine; clearly indicated standard）。因此並非所有訂於年金法律之條款，均為立法者明示同意之契約內容，且若有疑義，亦推定該立法者並無訂立契約之意向。且在個案判斷上，法院必須衡酌個別給付條款之給付，是否具有強制義務？抑或是僅為選擇性或裁量性給付？

其二、Oregon 州認為對退休公務員之租稅減免，乃優惠措施，並非契約內容。因此，州立法者嗣後廢除部分退休公務員之租稅減免優惠，並無違反契約義務。

其三、Oregon 州最高法院宣告對於州立法者調整退休公務員之 Cola 條款違憲，係因該州最高法院對於該州政府公務員僱傭契約，定性為民事契約，且認定該僱傭契約自公務員正式上班之日起，需要每日更新。亦即，每日政府機關對於公務員發出邀約，公務員到班值勤，視為承諾。因此在公務員受雇期間之僱傭期約，僅得隨時向後生效地予以調整。該州公務員雇用與僱傭契約，不僅與美國多數州之僱傭制度有別，更與我國現行公務員任用制度與民事僱傭契約均有重大扞格，是否值得比較或引進，甚至變更 鈞院已踐行多年有關溯及既往原則實質內涵之解釋，本鑑定人認為猶有疑慮。

Burgos v. State, 222 N.J. 175 (2015)

此處附帶一提者，是本鑑定人在鑑定意見書註 30 中已經提及的 New Jersey 州最高法院在 2015 作成的 *Burgos v. New Jersey State* 判決。在該案中，該州公共年金基金的參與者，針對州政府未對退休基金提撥足夠款項一事提起訴訟，並主張未撥付足額款項已侵害退休基金參與者憲法所保障之契約權利 。New Jersey 最高法院判決指出：契約是否成立，需檢驗兩個要件：1. 立法者是否表達訂約的清晰且無誤之立約意向(clear and unmistakably intention)？2. 州憲法是否授權立法者訂立具拘束力之契約？州最高法院指出：州議會所制定之系爭退休金相關法律立法文字，雖然已經明確創造退休基金參與者的契約權利。然而，該州憲法 13 條第 2 項[20]，負債限制條款（Debt Limitation Clause）與撥款條

[20] N. J. CONST. art. VIII, § 2, ¶ 3.

3. a. The Legislature shall not, in any manner, create in any fiscal year a debt or debts, liability or liabilities of the State, which together with any previous debts or liabilities shall exceed at any time one per centum of the total amount appropriated by the general appropriation law for that fiscal year, unless the same shall be authorized by a law for some single object or work distinctly specified therein. Regardless of any limitation relating to taxation in this Constitution, such law shall provide the ways and means, exclusive of loans, to pay the interest of such debt or liability as it falls due, and also to pay and discharge the principal thereof within thirty-five years from the time it is contracted; and the law shall not be repealed until such debt or liability and the interest thereon are fully paid and discharged. Except as hereinafter provided, no such law shall take effect until it shall have been submitted to the people at a general election and approved by a majority of the legally qualified voters of the State voting thereon.

b. On and after the date on which this subparagraph b. becomes part of the Constitution, the Legislature shall not enact any law that, in any manner, creates or authorizes the creation of a debt or liability of an autonomous public corporate entity, established either as an instrumentality of the State or otherwise exercising public and essential governmental functions, which debt or liability has a pledge of an annual appropriation as the ways and means to pay the interest of such debt or liability as it falls due and pay and discharge the principal of such debt, unless a law authorizing the creation of that debt for some single object or work distinctly specified therein shall have been submitted to the people at a general election and approved by a majority of the legally qualified voters of the State voting thereon. Voter approval shall not be required for any such law providing that the ways and means to pay the interest of and to pay and discharge the principal of such debt or liability shall be subject to appropriations of an independent non-State source of revenue paid by third persons for the use of the single object or work thereof, or from a source of State revenue otherwise required to be appropriated pursuant to another provision of this Constitution.

c. No voter approval shall be required for any such law under subparagraphs a. or b. of this

款（Appropriation Clause），要求州立法者不得在未經選舉中過半數公民同意前，承擔長期且鉅額之財務負擔。因為，制憲者除了對於可能損害跨世代州政府財務健全之事務，認為應賦予人民最終決定權之外，也希冀限縮代議士之權力，以避免未來納稅人，必須長期承擔當代立法者之錯誤。此外，該州憲法之撥款條款[21]，也要求年度預算必須兼顧財政收支平衡。所以，最終該州最高法院的判決是：對於州政府違反契約，是否具有合理與必要目的，以及預算編列與撥款之優先順序，均應由承擔政治責任之行政與立法權共同決定，不宜由法院越俎代庖，該判決並認定州立法者與基金參與者所訂立之契約，已逾越憲法對立法者之授權，故該契約無效。

其次，聲請人方略而不提的是，美國州法院針對年改措施的判決，不乏合憲判決者，以最近五六年的判決趨勢來看，這些判決雖然也以聯邦憲法及州憲法中的契約條款當成審查重點，但是，其作成合憲判決的理由，卻相當值得舉例並供大法官參考，本鑑定人願意不厭其煩地整理分析如下：

Justus v. State, 336 P.3d 202 (Colo. 2014)

Colorado州議會曾修正州公務員退休協會（Public Employees' Retirement Association，簡稱PERA）的養老金計畫，以解決該計畫資金嚴重不足的情況。州議會採取的手段除了降低生活成本調整條款，更對年增長率設定上限。原告為退休公務員，主張他們與Colorado州政府間有契約，退休後自有依據生活成

paragraph authorizing the creation of a debt or debts in a specified amount or an amount to be determined in accordance with such law for the refinancing of all or a portion of any outstanding debts or liabilities of the State, or of an autonomous public corporate entity, established either as an instrumentality of the State or otherwise exercising public and essential governmental functions, heretofore or hereafter created, so long as such law shall require that the refinancing provide a debt service savings determined in a manner to be provided in such law and that the proceeds of such debt or debts and any investment income therefrom shall be applied to the payment of the principal of, any redemption premium on, and interest due and to become due on such debts or liabilities being refinanced on or prior to the redemption date or maturity date thereof, together with the costs associated with such refinancing.

d. All money to be raised by the authority of such law shall be applied only to the specific object stated therein, and to the payment of the debt thereby created.

e. This paragraph shall not be construed to refer to any money that has been or may be deposited with this State by the government of the United States. Nor shall anything in this paragraph contained apply to the creation of any debts or liabilities for purposes of war, or to repel invasion, or to suppress insurrection or to meet an emergency caused by disaster or act of God.

[21] N. J. CONST. art. VIII, § 2, ¶ 2.

2. No money shall be drawn from the State treasury but for appropriations made by law. All moneys for the support of the State government and for all other State purposes as far as can be ascertained or reasonably foreseen, shall be provided for in one general appropriation law covering one and the same fiscal year; except that when a change in the fiscal year is made, necessary provision may be made to effect the transition. No general appropriation law or other law appropriating money for any State purpose shall be enacted if the appropriation contained therein, together with all prior appropriations made for the same fiscal period, shall exceed the total amount of revenue on hand and anticipated which will be available to meet such appropriations during such fiscal period, as certified by the Governor.

本調整條款，於每年請領經調整後之養老金，州政府不能片面更動該契約。在歷經訴訟後，上訴至該州最高法院，Colorado州最高法院針對更動生活成本調整條款，是否違反憲法契約條款，認為應依次檢驗以下三個要件：(1)是否存在契約關係？(2)法律制定或變更是否構成重大減損？(3)該法律是否具備合理且必要的目的，以達公共目的？

Colorado州最高法院在詳細檢視並分析該州養老金計劃相關規定與制定脈絡後，認為州政府與州議會並無締結契約之明確真意，而且系爭法律在過去曾經多次更改生活調整條款計算方式，該立法中並無契約性用語，無法證明立法機關有意拘束自身，並永久受特定時間之生活成本調整條款（COLA）計算公式所拘束[22]。

Berg v. Christie, 225 NJ 245 (2016)

New Jersey 州最高法院對於州政府調整 COLA， 是否違背聯邦憲法契約條款，做出合憲性解釋，並對我國有兩個重要啟發。

1. New Jersey 州的最高法院援引美國聯邦第一巡迴法院對於契約條款之判決先例[23]，指出：因為憲法契約條款，嚴格拘束後屆立法者，未來的完整規範權限範圍，因此對於是否系爭條款，是否已成立「契約」，原告必須付極高的舉證責任。亦即，原告必須舉證立法者已經清晰表達其具有訂立契約的意向（unmistakability doctrine; clearly indicated standard）[24]。畢竟，立法者的基本功能，在於制定政策，而非訂立契約。因此，為避免立法者輕易地交出主權，並剝奪後屆立法者之權力核心，因此司法者對於契約是否成立，應從嚴認定，並課與原告極高之舉證責任。當原告僅能援引曖昧不清的立法審議公聽會紀錄，原告顯然達到舉證門檻。
2. 立法文字表明：「所受利益，依退休系統或基金相關法令規定」（provided under the laws governing the retirement system or fund），因此 COLA 並非「不可剝奪之利益」（non-forfeitable right to receive benefits），亦不在憲法契約條款之保障範疇。

Bartlett v. Cameron, 316 P.3d 889 (N.M. 2013)

在 New Mexico 的年改訴訟，該州最高法院也認定生活成本調整條款不屬於

[22] Justus v. State, 336 P.3d 202 (Colo. 2014).
[23] Me. Ass'n of Retirees v. Bd. of Trs. of Me. Pub. Emps. Ret. Sys., 758 F.3d 23 (1st Cir.2014). (The threshold for recognizing the creation of legislative contracts, the First Circuit explained, "has been referred to as the 'unmistakability doctrine.)
[24] Berg v. Christie, 225 NJ 245, 264 (2016).

退休權益的範圍[25]，不受憲法之契約條款所保障。該案原告為退休教師、教授及其他公立學校教職人員，因為該案系爭法律修正，減少了全部退休教育人員，依據生活成本調整條款可請領之數額，因此原告乃向法院對於主管機關提出訴訟。然而，法院並不同意原告的主張，而是在本判決中則認定 COLA 不屬於受憲法保障的權利，故無違憲可言。本判決的主要理由，在於法院認為在本案中無從根據該州憲法規定之內容，將退休計畫定性財產權。該州最高法院在檢視州法與系爭退休計畫整體內容之後，認定生活成本調整條款不在原告退休權益的範圍內。再者，州最高法院進一步認定：退休人員所領取的基本退休金，受憲法財產權保障。至於立法者對退休者的免稅措施，雖然對於退休者之實質所得有助益，但該免稅政策，檢視立法者實現公共政策之工具，並未創造受益者受憲法保障之財產權。州最高法院亦認定該案中的係爭生活成本調整條款，與對退休者賦予免稅權益，具有手段相似性，均為立法政策工具，與公務員退休後享有之權益有別。換言之，立法者自得基於自身權力，於嗣後衡酌社會經濟條件與政府財政收支後，再行調整。倘司法者禁止立法機關行使上開權利，不僅有違權力分立，彼此制衡原理，也會剝奪後屆立法者因應社會條件與經濟狀況的應變權力。

Scott v. Williams, 107 So. 3d 379 (Fla. 2013)

至於在 Florida 州的年金改革爭議，該州最高法院則是認定：Florida 州議會對於 Florida 退休系統（the Florida Retirement System ，簡稱 FRS）條款的修正，從全由雇主提撥，修正為自特定日起，政府公務員必須提撥 3%、並廢除生活成本調整條款，並非溯及既往生效，也未逾越議會權限（were prospective changes within authority of legislature to make）[26]。 Florida 州最高法院，承認依據州憲法契約條款，州不能以政策為由，任意地影響其契約及其所形成之相關權利義務，也不允許州在有其它相同效果，但較溫和手段足以達到目的時，未採取最輕微之調整措施。然而，最高法院卻也認定：Florida 的退休系統 FRS 中的權利保留條款（preservation of rights provision），並未拘束未來立法者的調整空間[27]，就此而言，上述制度修正，並未逾越議會的權力行使權限。而且，權利保留條款並未創設或賦予現職政府公務員任何有關未來退休利益之權利，因

[25] Bartlett v. Cameron, 316 P.3d 889 (N.M. 2013).
[26] Scott v. Williams, 107 So. 3d 379 (Fla. 2013).
[27] 關於其文字內容，參見：F.S.A. § 121.011(3)(d): "The rights of members of the retirement system established by this chapter shall not be impaired by virtue of the conversion of the Florida Retirement System to an employee noncontributory system. As of July 1, 1974, the rights of members of the retirement system established by this chapter are declared to be of a contractual nature, entered into between the member and the state, and such rights shall be legally enforceable as valid contract rights and shall not be abridged in any way."

此係爭立法修正，並未影響政府僱員任何契約權利[28]。

CalFire v. CalPERS and the State of California (S239958. March 4, 2019)

這個判決是關於加州年改爭議的最新判決，此一判決雖然並未推翻知名的California Rule[29]，但是也對年改措施的合憲性表達了清楚的立場。該案原告主張兩個爭點：

1. California Public Employees' Pension Reform Act of 2013 （PEPRA）削減了加州公務員購買額外的退休服務點數（additional retirement service credit, 簡稱 ARS）的福利，究竟是不是侵害了加州公務員的既得權？
2. 若系爭年改措施侵害加州公務員的既得權，是否違反憲法契約條款而違憲無效？

加州最高法院在此一判決中指出：雖然 PEPRA 削減了加州公務員購買 ARS 此一和退休權益相關的福利，但是，此種權利並不是退休權益中的核心，無法被當成延後給付來看待，而且從系爭立法內容來看，也看不出立法者有意將 ARS 當成契約的內涵，所以加州最高法院認定加州公務員購買 ARS 的權利遭到年改措施的削減，並非侵害加州公務員的既得權。正因為 ARS 並非受保護的權利，所以法院也就明白表示不必處理關於是否違反憲法契約條款的第二個爭點，直接宣告本案系爭年改措施合憲。

Washington Educ. Ass'n v. Washington Dep't of Ret. Sys., 181 Wash. 2d 233 (2014)

Washington 州最高法院判決系爭年改立法合憲，其判決合憲的理由，是因為該州最高法院認為，雖然本案中的法律關係的確構成契約關係，但因系爭立法原本就保留了立法者可以調整與修正的權力，因此不侵害契約上的權利。

Swanson v. State, No. 62-CV-10-05285 (2011)

Minnesota 最高法院認定，該州立法機關並無意針對 COLA 訂定契約條款，即使退一步言，認定契約存在，COLA 之變更也僅屬於技術性之變更，或者立法者已經採取了最低限度的減少方法，並非嚴重損害契約權利。縱使認定是屬於實質減損了契約權利，仍屬於立法權行使之合理且適當之範圍之內。

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[28] *See supra* note 26.

[29] 關於 California Rule 及其影響與發展，可參見 Brian Beyersdorf, *The Fate of Public Employee Pensions: Marin's Revision of the "California Rule"*, 8 CAL. L. REV. ONLINE 62 (2018), *available at* https://scholarship.law.berkeley.edu/clrcircuit/102 (visited June 28, 2019).

最後，整體觀察，以憲法上的正當程序保障條款和徵收條款，對各州年改措施從財產權保護的角度提出憲法挑戰者，實際上幾無獲勝案例。換言之，在這種案例中，美國各州法院通常宣告年改措施合憲。例如 Connecticut 州、Maine 州、Tennessee 州等州的法院，均出現過類似的合憲判決。總而言之，即使在美國聯邦憲法及某些州憲法具有明文的契約條款的前提下，美國各州也不乏認定系爭退休權益不受契約條款保障者，認為系爭退休權益不受財產權保障者，也所在多有。

五、世界銀行案所謂「既得權」概念之澄清

在董保城教授、朱敏賢律師於本案中所提出的釋憲補充理由書第 45 頁中，曾提及世界銀行案中所確定的「既得權」概念，並指陳「退休條件」屬於公務員之核心且基本權益，未經事前同意，不得單方變更。關於此案之內容，本鑑定人認為有澄清之必要，此處謹提出幾個攸關本案的重點，敬供大法官審理本案之參考：

首先，世界銀行案乃是審理世界銀行對於其僱員之薪俸及津貼調整，並非處理個別國家公務員退休爭議，該案件與本次大法官審理之系爭案件之間，兩者是否具備可比較性，容有疑義。

再者，該案第 44 段雖曾提及「既得權」[30]之概念，但該裁定案的第 35 段及第 36 段[31]，明確指出：世界銀行具有單方調整契約的權力，且有立即針對受

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[30] WBAT, *de Merode and others v. World Bank*, 83 ILR 639 (1981), para 44. 世界銀行案中，雖然曾提到既得權，然該判決指出：於認定既得權時，應判斷是否核心且基本 (In describing the distinction between essential and non-essential elements, the Tribunal prefers not to use such terminology as "contractual rights" as opposed to "statutory rights". Some of the conditions contained in the "contract," that is, in the letters of appointment and acceptance, may be non-fundamental and nonessential, while some of the conditions lying outside the "contract", and therefore called "statutory", may be fundamental and essential. Likewise, the Tribunal prefers not to invoke the phrase "acquired rights" in order to describe essential rights. The content of this phrase is difficult to identify. It is not because there is an acquired right that there is no power of unilateral amendment. It is rather because certain conditions of employment are so essential and fundamental and, by reason thereof, unchangeable without the consent of the staff member, that one can speak of acquired rights. In other words, what one calls "the doctrine of acquired rights" does not constitute the cause or justification of the unchangeable character of certain conditions of employment. It is simply a handy expression of this unchangeable character, of which the cause and the justification are to be found in the fundamental and essential character of the relevant conditions of employment.)

[31] WBAT, *de Merode and others v. World Bank*, 83 ILR 639 (1981), para 35, 36. 本案法官認定：世界銀行不僅具有單方調整契約的權力，且有立即針對受雇職員調整的權力，只是權力的行使，受權力不可濫用原則的拘束。若否認銀行的單方調整權力，反將造成受雇成員間的不平等，且有害良善治理原則 (paragraph 35, 36) Para. 35. The Tribunal is of the view that the Bank has the power unilaterally to change conditions of employment of the staff. At the same time, significant

雇職員調整的權力，只是，在權力的行使上，並非毫無限制。而且，倘若完全禁止銀行具備單方調整權力，反而將造成世界銀行受雇成員間之不平等，有害世界銀行應該追求良善治理原則。

第三點，世界銀行裁定案的第 42 段與第 43 段也明確指出[32]，並非契約中所有條款，均具有核心且基本的性質。換言之，該案認為在審理時，不僅可以透過解釋契約中的抽象文字，認定該條款是否合理、公平與公正，而且必須在個案中，衡量具體脈絡，始能判斷。

第四點，該裁決案在第 87 段處[33]，指出調整僱員薪資及津貼，並不屬於核心且基本條款，世界銀行在衡酌平等性、行政便利性、成本、整體性及生活物

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limitations exist upon the exercise of such power. Para. 36. The existence of the Bank's power unilaterally to change conditions of employment rests on its implied power to pursue fully and efficiently the purposes and objectives for which it was created. As the legal relationship between the Bank and its staff does not rest on any national legal system, it is in the Bank's own internal law that the basis for the Bank's power must be found. To deny the existence of any power unilaterally to amend the conditions of employment of existing staff would lead to a situation in which there are as many rules as there are employees who entered the service of the Bank at different dates. This would create unjustifiable inequalities between the various staff members and would be contrary to the elementary requirements of good administration. The existence of objective rules of a general and impersonal character implies not only the power of the organization to change these rules, but also a power to decide that the new rules should apply immediately to personnel already employed.

[32] WBAT, *de Merode and others v. World Bank*, 83 ILR 639 (1981), para 42, 43. （Para. 42. The Tribunal considers that in examining the numerous and varied elements of the conditions of employment, a major distinction must be drawn. Certain elements are fundamental and essential in the balance of rights and duties of the staff member; they are not open to any change without the consent of the staff member affected. Others are less fundamental and less essential in this balance; they may be unilaterally changed by the Bank in the exercise of its power, subject to the limits and conditions which will be examined later. In various forms and with differing terminology this distinction is found in the Jurisprudence of other international administrative tribunals.
Para 43. The Tribunal recognizes that it is not possible to describe in abstract terms the line between essential and non-essential elements any more than it is in abstract terms possible to discern the line between what is reasonable and unreasonable, fair and unfair, equitable and inequitable. Each distinction turns upon the circumstances of the particular case, and ultimately upon the possibility of recourse to impartial determination. However, this difficulty has not prevented distinctions of this kind playing a central role in the application of the law generally and the Tribunal sees no reason for rejecting the relevance of such a distinction in the internal law of the Bank. Sometimes it will be the principle itself of a condition of employment which possesses an essential and fundamental character, while its implementation will possess a less fundamental and less essential character. In other cases, one or another element in the legal status of a staff member will belong entirely – both principle and implementation – to one or another of these categories. In some cases the distinction will rest upon a quantitative criterion; in others, it will rest on qualitative considerations. Sometimes it is the inclusion of a specific and well-defined undertaking in the letters of appointment and acceptance that may endow such an undertaking with the quality of being essential.

[33] WBAT, *de Merode and others v. World Bank*, 83 ILR 639 (1981), para 87. (Nevertheless, the Applicants express regret that once the Bank decided to change the method, it did not adopt the United Nations systems. According to them, this would have better achieved the objective of internal equity. The Applicants maintain that if the Executive Directors did not choose this system it was only because such a choice would have cost the Bank more. The choice of a particular method of tax reimbursement may properly be determined by several factors: equity, ease of administration, cost, comprehensibility, confidentiality. Thus, the cost of any particular system is one of several factors which the organization may take into account.)

價指數後，具有單方調整契約之權利。