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**OPINION COMMITTEE**RQ-1135-6A FILE # ML-47321-13I.D. # 47321

July 9, 2013

The Honorable Greg Abbott  
Attorney General, State of Texas  
P.O. Box 12548  
Austin, Texas 78711-2548

Re: Attorney General Opinion request relating to Section 51.608, Tex. Gov't Code, as added by S.B. 389, 83rd Leg., R.S. (2013)

Dear General Abbott:

The Comptroller of Public Accounts (Comptroller) respectfully requests an Attorney General opinion relating to whether Section 51.608, Tex. Gov't Code, as added by S.B. 389,<sup>1</sup> violates the United States and Texas constitutional prohibitions on ex post facto laws.<sup>2</sup>

Under the recently enacted S.B. 389,<sup>3</sup> changes were made to the way in which court costs are assessed. The bill adds Section 51.608, Tex. Gov't Code, to require that the amount of a court cost imposed on a defendant in a criminal proceeding be the amount established under the law in effect on the date the defendant is convicted of the offense.<sup>4</sup> This means that upon conviction, a defendant could be assessed a higher court cost than that which he would have been assessed at the time the crime was committed. As the agency that ultimately collects these court costs, we are concerned that Section 51.608, Tex. Gov't Code, may violate the prohibition on ex post facto laws because upon conviction a criminal defendant could be charged court costs that were not attached to the offense at the time it was committed.

In a 1986 opinion, the Attorney General addressed a similar issue and found that the prohibition against ex post facto laws is violated when the law inflicts a punishment that is greater than the punishment for the crime at the time the crime is committed:

<sup>1</sup> Act of May 25, 2013, 83rd Leg., R.S., S.B. 389, § 1 (to be codified at Tex. Gov't Code § 51.608).

<sup>2</sup> U.S. Const. art. I § 10, cl. 1. & Tex. Const. art. I, § 16.

<sup>3</sup> Act of May 25, 2013, 83rd Leg., R.S., S.B. 389, § 1 (to be codified at Tex. Gov't Code § 51.608).

<sup>4</sup> House Comm. on Judiciary & Civil Jurisprudence, Bill Analysis, Tex. S.B. 389, 83rd Leg., R.S. (2013).



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“It is well settled that a law that inflicts a greater punishment than that annexed to a crime when committed is an ex post facto law. *Ex parte Alegria*, 464 S.W.2d 868, 872 (Tex. Crim. App. 1971). Court costs are part of punishment. *Ex parte Carson*, 159 S.W.2d 126, 129 (Tex. Crim. App. 1942). Therefore, upon conviction a criminal defendant can only be charged those court costs that were attached to the offense at the time it was committed.”<sup>5</sup>

In addition, in a 1997 opinion the Attorney General opined on what constitutes a “retroactive law” in contravention of article I, section 16 of the Texas Constitution:


“A law is impermissibly retroactive if it “substantially alters the consequences attached to a crime already completed, and therefore changes ‘the quantum of punishment.’” *Weaver v. Graham*, 450 U.S. 24 (1981), citing *Dobbert v. Florida*, 432 U.S. 282, 293-94 (1977).”<sup>6</sup>

Based on these prior opinions, it appears that Section 51.608, Tex. Gov’t Code, may violate the prohibition on ex post facto laws. The Comptroller seeks clarification from the Attorney General on the following:

Does Section 51.608, Tex. Gov’t Code, as added by SB 389,<sup>7</sup> violate the constitutional prohibition on ex post facto laws<sup>8</sup> because upon conviction a criminal defendant could be charged court costs that were not attached to the offense at the time it was committed?

Thank you for your assistance on this question. The Comptroller is available to provide any other information or assistance you need to facilitate a response.

Sincerely,



Martin A. Hubert  
Deputy Comptroller

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<sup>5</sup> Op. Tex. Att’y Gen. No. JM-443 (1986).

<sup>6</sup> Op. Tex. Att’y Gen. No. DM-464 (1997).

<sup>7</sup> Act of May 25, 2013, 83rd Leg., R.S., S.B. 389, § 1 (to be codified at Tex. Gov’t Code § 51.608).

<sup>8</sup> U.S. Const. art. I § 10, cl. 1. & Tex. Const. art. I, § 16.

