MEMORANDUM OFFICE OF THE ATTORNEY GENERAL

TO: Rep. Patti Komline

FROM: Bill Griffin, Chief Assistant Attorney General

RE: Campaign Finance Litigation

DATE: February 5, 2008

This is in reply to your January 21 letter requesting information on costs that the State incurred defending Vermont's campaign finance laws. These laws were adopted in 1997 as part of Act No. 64, An Act Relating To Public Financing Of Election Campaigns, Disclosure Requirements And Limits On Campaign Contributions And Expenditures. The legislation and especially the ensuing litigation provide context for the information we have been able to compile.

Act No. 64 was introduced as a House Bill, H. 28, and initially passed the House by a 74 – 64 vote. The Senate approved the Bill in a different form, which the House rejected. The final version, crafted by a conference committee, was approved 121 – 17 in the House and 20 – 9 in the Senate.

The legislative history fairly described the constitutional landscape in 1997. Senator Doyle, a member of the conference committee, referred to the Supreme Court's decision in the case *Buckley v. Valeo.* As the Senator explained:

> Both sides [in the conference committee] knew that the U.S. Supreme Court decision in Buckley v. Valeo must be challenged if real reforms were to be implemented. ... The U.S. Supreme Court in 1976 was divided in its decision, and legal scholars continue to debate the Buckley decision.

The Supreme Court was indeed divided. The *Buckley* case produced six separate opinions, an outcome that was especially remarkable since one of the nine justices did not participate. In any event, the General Assembly made its own judgment about the constitutional requirements and approved Act 64.

The legislation was challenged by three entities who opposed the law: the ACLU, the Republican State Committee and the Vermont Right to Life Committee. The cases were filed and consolidated in the U.S. District Court for Vermont. The parties spent twelve months in trial preparation. The scale of the case was reflected

in the 37 depositions – including 6 expert witness depositions – that were conducted by the parties opposing the law and by the State itself prior to the trial.

The trial ran from May 8, 2000 until June 2, 2000 with several interruptions during that period. The State and the opponents presented 34 witnesses and 173 documentary exhibits. The State submitted 200 pages of findings and legal conclusions to the trial court (summarizing the testimony, the exhibits and the law), and the opponents made comparable submissions.

On August 11, 2000, the District Court issued a split decision, upholding the contribution limits established by the legislature but invalidating the expenditure limits. The opponents and the State appealed this decision to the U.S. Court of Appeals. The Court of Appeals recognized that the factual and legal issues in the case were substantial and so waived the standard page limits. The State's initial brief in the Court of Appeals was 89 pages and its reply brief was 101 pages. The opponents filed comparable briefs.

The initial course of events at the Court of Appeals was very unusual. The Court issued a decision on August 7, 2002, but withdrew that decision almost two months later, on October 3. The Court issued an amended decision on August 18, 2004, more than two years after its initial ruling. The amended decision, approved by two of the three judges on the hearing panel, upheld most of the Vermont law. The Court held that "*Buckley* permits spending limits that are narrowly tailored to secure clearly identified and appropriately documented compelling governmental interests" and found that the Vermont Legislature had established two such limits. Underscoring the complexity of the issues, the Court's decision was 149 pages and the dissenting opinion ran 62 pages.

The opponents then asked the entire Court of Appeals to hear the case. This resulted in another round of briefing and judicial opinions. On February 11, 2005 the Court of Appeals denied rehearing by a 7 – 4 vote that was explained in five separate opinions.

The case was then appealed to the United States Supreme Court. Vermont and the law's opponents filed briefs in the Supreme Court as did thirteen parties (including other States) who supported Vermont and four parties who supported the opponents. On June 26, 2006 a divided Supreme Court invalidated the law, expressing its views in six separate opinions. The objections raised by the Justices who voted against the Vermont law are summarized in Attachment A to this memorandum. Attachment A also explains how S. 164 responds to those objections.

Your letter requests information on costs incurred by the State in the defense of the 1997 Act. Attachment B to this memorandum lists the costs that we have been able to document or reconstruct. The largest item by far is the $1,395,000 in

attorneys fees awarded to lawyers for the law's opponents. These amounts were paid just last year and the itemized amounts are complete and accurate.

The next largest expense is the amount paid to expert witnesses who testified at trial and to a law firm that advised us on the Supreme Court appeal. The $83,903 amount shown on the list may be slightly higher than the actual expense because it was reconstructed from both contracts and invoices. In some instances we listed the contract maximum amount, which may have exceeded the amount actually billed and paid.

The other items – $11,235 for transcripts and printing and $10,875 for travel – are understated because many of these expenses were incurred as long as eight years ago and the documents are no longer readily available if they are available at all. Staff costs cannot be calculated because State employee time records are not kept in a case-by-case manner unless a case offers the potential for the State to recover attorney's fees. This was not such a case.

Attachment C to this memorandum is a brief summary of amounts that the Attorney General's Office recovered for the State of Vermont last year. It cost the State $1,501,012 to defend the campaign finance law. The Attorney General recovered $33,927,616 in other litigation in 2007.

You have also requested an estimate of the costs that the State might incur if S. 278 or something similar were enacted. Given the vagaries of litigation generally and especially litigation of this nature, as shown by the above history, we cannot calculate that estimate. The unknown variables include whether one or more suits would be filed, whether the cases would be decided on motions or by trials, how many witnesses and days any trials might require, whether there would be appeals and so forth.

However, we have evaluated the *Randall* case very carefully. We have compared the terms of that decision to the provisions of S. 278. As explained in detail in Attachment A, "S. 164 represents a sound and thoughtful response to the concerns raised by the Court in the *Randall* case."

ATTACHMENT A

Summary of U.S. Supreme Court concerns
about Vermont's prior limits on contributions to candidates
and how S. 164 responds to them

Limits on contributions to candidates have been upheld by the Supreme Court in other cases; see *Buckley v. Valeo* (1976) and *Nixon v. Shrink Missouri PAC* (2000). Contribution limits exist for federal elections and many state elections. The reason that Vermont's contribution limits were held unconstitutional in *Randall v. Sorrell* (2006) was because five factors, working together, presented danger signs.

Here are the five factors and the way that S. 164 addresses them. Although no one can predict with certainty what provisions will pass constitutional muster in the area of campaign finance law, S. 164 represents a sound and thoughtful response to the concerns raised by the Court in the *Randall* case.

1. The limits in our prior law were the lowest in the nation and significantly restricted the amount of funding available for challengers to run competitive campaigns. (The fact that the limits were per cycle, rather than per election, played into this.)

   - Addressed in S.164 by raising the limits for House candidates from $200/cycle to $250/election; for Senate from $300/cycle to $500/election; for statewide candidates (other than governor) from $400/cycle to $750/election; for governor from $400/cycle to $1,000/election.

2. Political parties were limited to the same low limits as other contributors. This threatened to harm the particularly important political right to associate in a political party (1st amendment right of association)

   - Addressed in S.164 by allowing political parties to contribute more than individuals, corporations, unions, or PACs to candidates; specifically, political parties may contribute $30,000 to governor/cycle; $10,000 to lt. gov./cycle; $5,000 to other statewide offices/cycle; $2,000 to senators/cycle; $1,000 to state representatives or local office/cycle.

   - Political parties may give in-kind contributions to candidates that are not counted toward the contribution limit. These include:
     - preparation and distribution of party candidate listings,
     - sharing of issue papers and voter identification lists,
     - services of party employees whose job responsibilities are not for the specific and exclusive benefit of a single candidate
     - campaign training sessions provided to three or more candidates
     - campaign events at which three or more candidates are present
     - use of offices, telephones, computers, and similar equipment

- get-out-the-vote activities

3. Prior Vermont law's treatment of volunteer services, requiring that they be counted toward the contribution limit, exacerbated the effect of the already very low limits in preventing challengers from running effective campaigns against incumbents

  - S.164 expands the range of volunteer activities that are excluded from the definition of contribution. Specifically, it exempts unreimbursed travel expenses by volunteers up to $500/election and volunteer time.

4. The contribution limits at issue in the *Randall* litigation were not indexed for inflation.
  - S. 164 indexes all contribution limits for inflation.

5. The record before the Legislature and the Court did not contain any special justification to support having the lowest, most restrictive limits in the nation. Because Vermont's limits so constrained the ability of candidates to amass sufficient funds to run effective campaigns, the Court believed there needed to be an especially strong history of corruption in Vermont. Despite the extensive record developed in the 1997 legislative hearings and by the State defendants in the trial court, the Court was bothered what it perceived to be relatively clean politics in Vermont.

  - The need for particular instances of corruption is lessened by the changes in all the provisions outlined above.

  - The Findings in S.164 reiterate the concerns over corruption and the appearance of corruption that continue to be present today.

Political party transfer issue
In addition, the issue of transfers of money from the national to state party was raised by the District Court and the Second Circuit Court of Appeals in the course of the *Randall v. Sorrell* litigation. This was addressed in S. 164.

- The ability of political parties to conduct party-building functions and to allocate finances and decision-making authority between the national and state affiliates was an issue identified by the Second Circuit Court of Appeals

  - S.164 allows national parties to contribute $30,000 to state parties
  - S.164 allows national parties to make certain in-kind contributions to state parties that are not counted as contributions (S.164 exempts

"compensation paid by a political party to its employees or consultants for the purpose of providing assistance to another political party")

- At the same time, the presence of a limit on national party contributions to state parties serves the purpose, as identified in the Second Circuit Court of Appeals decision, of preventing contributors from circumventing the $2000 limit on contributions to state political parties. (Individuals and PACs are permitted to give $28,500 to national parties. If there were no limit on what the national party could give to the state party, then this could be transferred through to state party, and thus create a potential for undue influence on the party leadership and its candidates.)

ATTACHMENT B

State's Expenses - Campaign Finance Litigation

Attorney Fees		
	Bopp Coleson & Bostrom	789,108
	Langrock Sperry & Wool	595,000
	Smith, Norman	10,892
	Subtotal	**1,395,000**
Experts		
	Professor Donald Gross	3,750
	Anthony Gierzynski	17,200
	Anthony Gierzynski - Amendment #1	1,565
	Anthony Gierzynski	4,500
	Thomas Stratmann	6,888
	Sidley, Austin, Brown & Wood	50,000
	Subtotal	**83,903**
Transcripts, Copies, Printing		
	Cockle Printing	844
	Filing Fee	300
	L Brown & Son	281
	Trial Transcript (Net of NVRI reimbursement)	6,474
	Transcripts	165
	Transcripts	225
	Transcripts	133
	Transcripts	387
	Green Mountain Reporters	1,518
	Green Mountain Reporters	908
	Subtotal	**11,235**
Out of State Travel		**10,875**
	Grand Total	**1,501,012**

ATTACHMENT C

Office of the Attorney General

Financial Recoveries for Calendar Year 2007

Public Protection

Tobacco Enforcement

- Annual Payment - Tobacco Settlement $24,765,062

Consumer Protection

- Attorney Fees & Reimbursements - $3,023,400

Environmental Protection

- Petroleum Cleanup Fund Settlements $3,487,800

Medicaid Fraud

- Global Multi-State Medicaid Settlements $1,617,777
- Global Multi-State Medicaid – receipt pending - $1,033,577

Total recoveries paid to the State of Vermont and State Agencies - $33,927,616