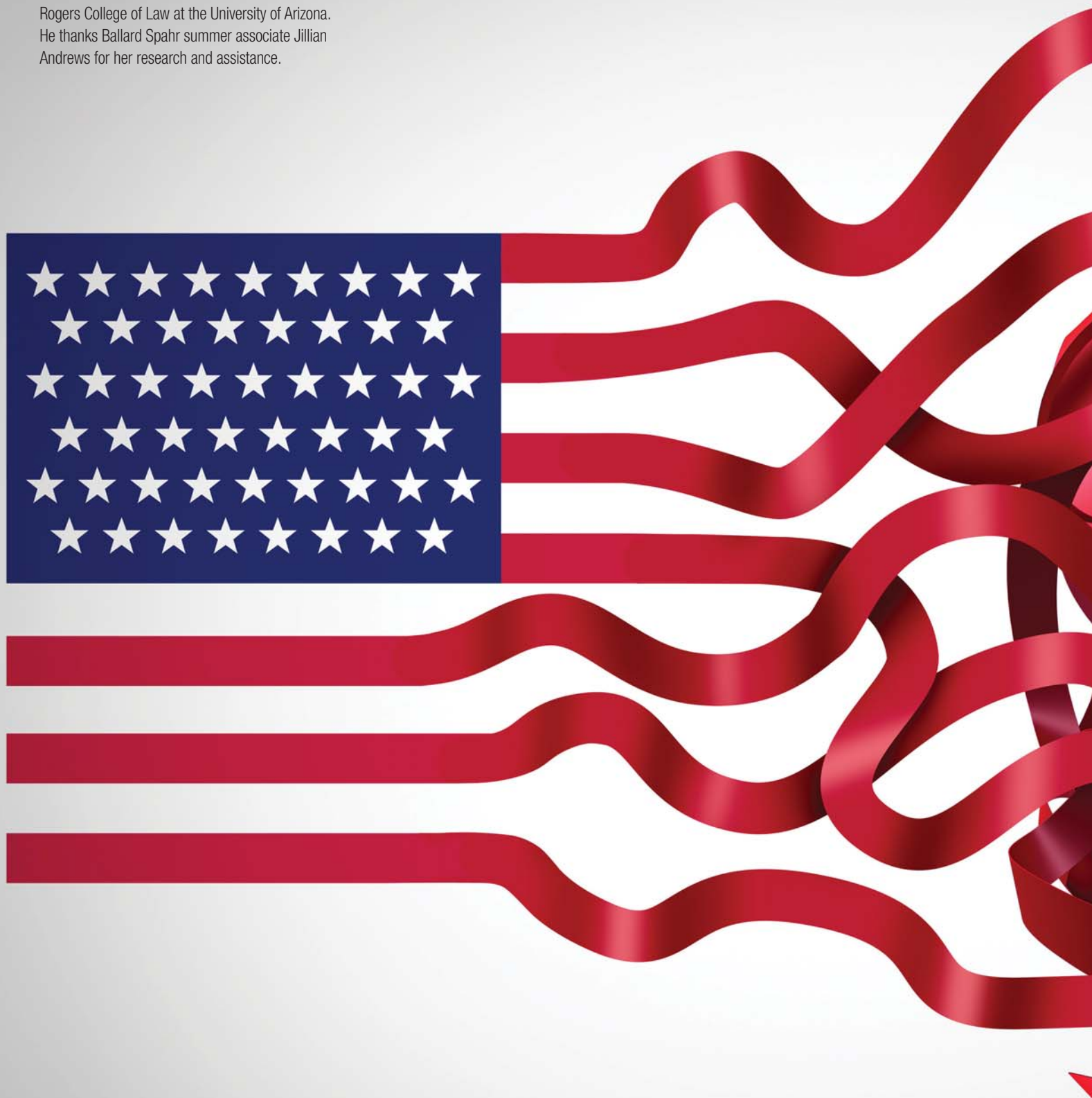


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The Consequences of Election Administration Errors

HISTORY REVISITED

BY JOSEPH KANEFIELD

The Arizona Secretary of State faces scrutiny after failing to distribute voter-information pamphlets in advance of an election as required by law. A concerned citizen fears that voters casting ballots for a controversial education proposition will be uninformed and files a complaint to postpone the election. The Secretary responds and urges the election to proceed.

No, this story isn't about Secretary of State Michele Reagan in 2016—it's about Secretary of State James Kerby, 80 years earlier in 1936. But if the story sounds familiar, that is because history has indeed repeated itself.

So, what happens when an election official neglects to perform a mandatory duty required by the Arizona Constitution and state law? What are the consequences? What should they be?

This article addresses these questions by reviewing the respective situations in which Secretaries Kerby and Reagan found themselves when they neglected to deliver pamphlets to voters prior to the November 3, 1936, general election and the May 17, 2016, special election.





What the Law Requires

Before each election with a proposed citizen initiative on the ballot, the Arizona Constitution and state law require the Secretary of State to send a publicity pamphlet to every household with a registered voter.¹ Since statehood, these mandatory mailings have provided voters with important information about the proposition, including its proposed text and citizen arguments for and against the measure.

The Arizona Supreme Court noted long ago that this publicity requirement is “imperative,” as the voters must “be fully informed as to the nature and details of the measure upon which they are called to pass.”² To allow time for voters to inform themselves about the measure prior to voting, the pamphlets must arrive at voters’ homes before the receipt of early ballots.³

A special election held on May 17, 2016, asked voters to decide two proposed changes to the Arizona Constitution: The Arizona Education Finance Amendment (Prop 123) and the Arizona Public Retirement Benefits Amendment (Prop 124). Early ballots began to arrive on April 21, but more than 400,000 voters did not receive their pam-

phlets until at least May 7.

The mistake was the result of a computer programming error that excluded households that contained only voters on the Permanent Early Voting List.⁴ Maricopa and Pima County were not affected, as they use their own computer systems, but there are approximately 200,000 such households in the other 13 counties, which is why at least 400,000 voters were excluded from the pamphlet mailing.⁵ This meant that nearly 40 percent of households with registered voters received their pamphlets more than two weeks after the statutory deadline.⁶

It is not known how many voted without receiving or reviewing the pamphlet, or whether it would have made a difference.

The Yavapai County Recorder’s Office was the first to notice the glitch, and staff of the office contacted the Secretary’s office on April 22 to ask when pamphlets would be mailed.⁷ The error was not publicly acknowledged until May 6, but the Secretary of State’s Office did post a copy of the pamphlet on its website, and the county election officials directed voters to the online version.⁸ Ultimately, many voters cast ballots without having been mailed the voter pamphlet as required by law. The voters approved Prop 123 by a narrow margin of 536,365 votes in favor to 516,949 opposed.⁹

1936 Election Snafu

The 2016 special election pamphlet controversy is similar to events that occurred during the administration of Secretary of State James H. Kerby, who held the office for two separate four-year terms between 1923 and 1938.¹⁰

From statehood until 1935, the Secretary mailed publicity pamphlets for each election, much as is required today. But in 1935, the Legislature decided the pamphlets should instead be hand-delivered in person to every voter when they vote at the primary election.¹¹ This new measure, referred to as “Angius law,” was enacted to reduce state expenses.¹²

When an education initiative qualified for the 1936 general election ballot, Secretary Kerby failed to distribute the pamphlets to voters at the September 8, 1936, primary because he could not get any printer to do the work in the time required.¹³ Instead, he had the pamphlets delivered to him and intended to mail them before the general election as he had in the past, regardless of the new procedure.¹⁴ Because this violated the law, the state auditor refused to cover the expense for postage, and the pamphlets were never distributed.¹⁵

A. J. Griffin, a citizen from Yuma, brought suit to enjoin the state from placing the measure on the ballot for the general election.¹⁶ Secretary Kerby insisted the 1935 amend-

FROM: <http://www.azsos.gov/about-office/secretaries-since-statehood/james-h-kerby>

JAMES H. KERBY



- Name: James Hayden Kerby
- Name as Secretary of State: James H. Kerby
- Served as Secretary of State: 1923 – 1928; 1933 – 1938
- Born: April 30, 1881, Huntsville, Randolph County, Missouri
- Died: Sept. 11, 1957, Phoenix, Maricopa County, Ariz.
- Buried: Sept. 13, 1957, Greenwood Memorial Park, Phoenix, Maricopa County, Ariz.

“Kerby, who died yesterday at his Phoenix home, was first elected secretary of state in 1922 and served two separate terms of six years each.”

(“James Kerby Funeral Set Tomorrow.” Tucson Daily Citizen, Sept. 12, 1957, p. 16)

Kerby left the office twice—in 1928 and in 1938—to run unsuccessfully for the Democratic nomination for governor.

EDUCATION: Public school; a commercial course, Quincy, Illinois

OCCUPATIONS: A. C. Co. drug department, Clifton; Crompton & Shannon meat market bookkeeper, Clifton; deputy to Assessor John J. Birdno, Graham County 1907 – 1911; County Assessor, Greenlee County; farm owner; county contractor; real estate dealer

MEMBERSHIPS: Arizona County Assessors’ Association; Elks’ Lodge No. 1174, Clifton; Coronado Masonic Lodge No. 8, F. & A. M., Clifton

Sources: Birth and education: Who’s Who in Arizona, 1913, p. 566; middle name: name and clear signature on World War I draft registration; death and burial: AZ death record; occupations: Who’s Who in Arizona, 1913; World War I draft registration, 1920 U.S. AZ census, AZ death record.

Democrat

**Orders affecting elections
can themselves result in
voter confusion and
consequent incentive to
remain away from the polls.**

ment to the pamphlet procedure was void and unenforceable because he was unable to hand-deliver pamphlets to voters at the 1936 primary election.¹⁷ He also argued that the court lacked jurisdiction over the initiative because when the people petition for an initiative, they act in the place of the Legislature, and the court cannot infringe on that lawmaking ability.¹⁸

The court rejected Secretary Kerby's arguments, holding that it could exercise jurisdiction and must strike measures from the ballot when voting procedures are not followed.¹⁹ In finding jurisdiction, the court explained, "[T]o hold a court of equity could not intervene to prevent an election being held, when every constitutional and statutory provision

setting forth what must be done before holding a legal election had been violated, would result in an absurdity."²⁰ But the court noted the rarity of this relief, declaring it would only interfere with a scheduled election when "the constitutional and statutory rules ... have been so far

violated that there has been no substantial compliance therewith."²¹

Kerby argued that he had acted in "substantial compliance" with his duty, and that the pamphlets could have been distributed by mail, to the same effect as handing them out at the primary.²² But the court faulted his tardiness in printing the ballots and admonished that "any competent Secretary of State who desired, above all things, to comply with the law could easily have done so with the proper effort."²³

Modern-Day Snafu

Given this comparison and the relief that Mr. Griffin won in 1936 by striking the initiative from the ballot, it is not surprising that some

voters questioned the validity of the May 17, 2016, special election.

In fact, on May 10, 2016, one week before the special election, attorney Tom Ryan asked Attorney General Mark Brnovich to challenge the election, and he suggested that the two propositions be placed on the November 8, 2016, general election ballot instead.²⁴ Brnovich declined, concluding that to bring a challenge so close to the election "would only make matters worse."²⁵

Should the Attorney General have challenged the election? A lot has changed since *Kerby*, and the Attorney General most likely surmised that the modern Arizona Supreme Court would be hesitant to remedy the situation so close to the election. Precedent strongly suggests he made the right call. But what would have happened had the Attorney General decided to challenge the election?

The Lawsuit That Was Never Filed

Because the special election was only a week away, the Attorney General would likely have filed a special action in the Arizona Supreme Court seeking injunctive relief to



THE CONSEQUENCES OF ELECTION ADMINISTRATION ERRORS

cancel the election. Even though the court affirmed the superior court's decision to enjoin a school measure from the ballot 80 years earlier in *Kerby*, it would most likely have declined to do so here.

In his letter, Ryan points to A.R.S. § 19-101.01, which was enacted in 2015 to require all persons using the referendum process to strictly comply with its constitutional and statutory requirements.²⁶ But even if this heightened standard applies to election administrators, a challenge still stood little chance of success.

Secretary Reagan's situation differs from Secretary Kerby's in several important ways.

First, Props 123 and 124 were the only matters on this 2016 special election ballot and involved proposed amendments to the Arizona Constitution. Had the Court struck these initiatives based on the pamphlet mailing error, it would have cancelled the entire election, a remedy any court would be loath to employ. In Secretary Kerby's case, there were other elections on the 1936 general election ballot, and while the Court struck the school law initiative, it was able to preserve the other elections, thereby making voter confusion less of a concern.²⁷

Second, the challenge in *Kerby* occurred before any votes were cast. The Court enjoined the school law after the primary election (when pamphlets should have been distributed), but before the general election.²⁸

And because there was no unexcused early voting in 1936, striking the initiative from the ballot was enough to correct the mistake without affecting any votes.²⁹ In contrast, while Mr. Ryan brought his complaint before the May 17 election, many early voters had already cast ballots.

In his response, Attorney General Brnovich noted that some voters may not have used the pamphlet anyway, but "there are ballots now in the County Records' offices across Arizona from pre-pamphlet delivery voters who would have reviewed the pamphlet had the law been faithfully executed."³⁰ If a court had granted injunctive relief, the ballots of those voters—whether they used the pamphlet or not—would be abandoned. And if Brnovich had filed a special action, the court would have had to choose which votes to prioritize—those that had yet to be cast or those that had already been and would then

be destroyed. The *Kerby* Court did not have to face that choice, and its decision may have come out differently if it had.

The third difference between Secretary Kerby's situation and the current one results from an intervening U.S. Supreme Court decision. In *Purcell v. Gonzalez*,³¹ a group of Arizona residents challenged Arizona's new voter-identification requirements.³² Just over two weeks before the 2006 general election, the Court overturned the Ninth Circuit's decision to enjoin the new law and likely postpone the election.³³ Hesitant to issue an injunction so close to the election, the Court found that "orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls."³⁴

Laying out what is now referred to as the "Purcell Doctrine," the Court held that imminent elections should rarely be disrupted, and that a ruling on the constitutionality of a proposed law is better made after the election, when it "will be resolved correctly on the basis of historical facts rather than speculation."³⁵ Attorney General Brnovich's decision to review the matter post-election is entirely consistent with this approach.

Despite this modern trend, Secretary Reagan still may have faced a tough battle had a special action been filed. Like Secretary Kerby, Secretary Reagan would likely have asserted the defense of substantial compliance. The substantial compliance standard requires "substantial, not necessarily technical, compliance with the requirements of the law."³⁶ This lower level of scrutiny allows the court to excuse minor errors so as not to disrupt the election. However, Secretary Kerby's argument that his plan to mail ballots substantially complied with the law ultimately failed, as the Legislature had explicitly rejected that mail method in favor of distributing pamphlets at the primary election.³⁷

Like Kerby, Secretary Reagan would likely have argued that despite the mistake, she could still substantially comply with the law, and in fact had done so by taking immediate steps to remedy the error as soon as it was brought to her attention. Attorney General Brnovich questioned whether this defense would have succeeded in his letter to Tom Ryan, where he said "it is not clear that any 'substantial compliance' defense by the Secretary of State would survive these circumstances."³⁸

Either way, a special action would have forced the Court to weigh the mistake against the confusion and discord that would have re-

December 2, 1936

vetoes Kerby Hit In Decision Of Bills On Publicity Pamphlets

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Confirming an earlier verbal decision, the state supreme court yesterday handed down a 2 to 1 written opinion upholding the constitutionality of the law providing for distribution of initiative and referendum publicity pamphlets and declaring "any competent secretary of state who desired to could have complied with that law."

The decision rejected all pleadings of James H. Kerby, secretary of state. The tribunals decision upheld the judgment of Judge M. T. Phelps in Maricopa County Superior Court enjoining Kerby from issuing pamphlets prior to the November 3 general election and placing on the ballot certain initiative measures.

Outgrowth Of Yuman's Suit The appeal was the outgrowth of a suit instituted by A. J. Griffin of Yuma against Kerby in connection with the certification of an initiative measure increasing the per capita school apportionment.

The opinion was written by Chief Justice Alfred C. Lockwood and was concurred in by Associate Justice Henry D. Ross. The 10-page dissenting opinion was prepared by Associate Justice A. G. McAllister.

The Angius law, passed by the 12th legislature, changed the former method of distributing publicity pamphlets by mail to distribution directly to voters at the polling place. Certain time limits were prescribed in the act in which the pamphlets must be forwarded to county supervisors in order that the pamphlets could be delivered to the polls.

Mailing Plan Hit Griffin had attacked Kerby's plan of mailing the pamphlets as not complying with the act and therefore the per capita measure should not be certified to clerks of county boards of supervisors for inclusion on the ballot. Two other initiatives were kept off the ballot under the same contention.

In the majority opinion the court said "an examination of the various steps which he (Kerby) alleges he took to comply with the law convinces us that any competent secretary of state who desired, above all things, to comply with the law, could easily have done so with the proper effort."

"We hold, therefore, that chapter 62, supra, (Angius law) was constitutional in all respects, within the power of the legislature to enact, and within the power of the executive officers of the state to carry out," the court ruled.

Among the objections filed by Kerby in his demurrer in the superior court suit was one of jurisdiction, charging that the courts have no more authority to enjoin the will of the people as expressed through the initiative than they have to enjoin the legislature.

Overlooks "Vital Point" To this the court said that "Kerby in attempting to apply the doctrine overlooked one vital point.

"Our duty and our privilege is to carry out the will of the people" and "that will is found in the constitution adopted by the people of the state and there, and there only, is the true will of the whole people expressed."

"When, therefore, a matter comes before this court and it is urged that we have no jurisdiction nor authority to deny the people the right to vote, we answer by saying that we never arrogate to ourselves such authority."

"We merely look to the places where the people themselves have declared under what circumstances they will vote and follow that declaration; and, indeed, it seems to us that to hold a court of equity could not interfere to prevent an election being held, when every constitutional and statutory provision setting forth what must be done before holding a legal election has been violated, would result in an absurdity," the majority said.

The court remarked concerning Kerby's plea that he did not have time to comply with provisions of the Angius law: "It would seem x x x that a conscientious officer, zealous to comply with the law, would have made these arrangements (obtaining contract and preparing the measures for printing) in ample time so that all that would have been necessary after the 24th day of July would have been to deliver a copy of the proposed initiatives and referendum, and the arguments thereon, to his chosen printer, so that the actual printing could be done immediately."

Another contention by the secretary of state that mailing was "ade-

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Pork and Beans 1 lb. 5c	COFFEE 25c
Camay Face Soap 5c	1 lb. 25c 2 lb. 40c

Arizona Republican, Dec. 2, 1936.

sulted from a last-minute election cancellation. The balance seems to tip in favor of proceeding with the election. And ultimately, although the election was not cancelled, there are post-election remedies that may come into play.

Post-Election Remedies

On June 2, 2016, the Attorney General appointed attorney Michael Morrissey as independent counsel to conduct an investigation and “shed additional light on the events surrounding the May 2016 special election.”³⁹ That investigation was still underway at the time this article was going to press.

Mr. Morrissey could recommend criminal charges be pursued for failure to perform a duty required by law—but this is highly unlikely and should not happen.⁴⁰ Secretary Reagan has insisted that these errors were not committed knowingly, and there is no reason to doubt her explanation.⁴¹ Still, Secretary Reagan could possibly face political consequences as a result of this situation.⁴²

The independent counsel report could find

Elections are rarely perfect endeavors. Mistakes happen, and the best election officials are adept at addressing them quickly and efficiently.

that Secretary Reagan was not at fault and that she responded appropriately to the mistake as soon as it was brought to her attention, effectively exonerating her from any wrongdoing. The report also could be critical of Secretary Reagan and the manner in which the error was handled. Although the report may not result in any legal action, it could conclude that Secretary Reagan violated the law and thereby create a campaign issue should she choose to run for reelection.

We’ll have to wait and see how this plays itself out for Secretary Reagan, but it’s worth making one final observation. Elections are rarely perfect endeavors. Mistakes happen, and the best election officials are adept at addressing them quickly and efficiently. This

is especially true of high-turnout elections such as the presidential election, which strains every joint in the election system.

Most of these mistakes fly under the public radar because they are relatively minor in nature and usually can be remedied quickly. Secretary Reagan, however, has been subjected to increased public scrutiny as a result of

the special-election pamphlet issue. Therefore, in future elections she may spend more time explaining these minor election errors than she would like. Nevertheless, Secretary Reagan will administer several more elections during the remainder of her term, and if they run smoothly, she should be able to overcome past criticisms.

As for Secretary Kerby, his pamphlet mistake occurred while he was running for reelection to his sixth term as Secretary of State. The Arizona Supreme Court was harshly critical of Kerby, but mercifully waited until December 1, 1936, to issue its opinion, which came after he won his reelection on November 3, 1936.⁴³ That, however, would be Secretary Kerby’s last successful



election to public office.

Two years later, he would lose his bid to be the Democratic nominee for Governor at the 1938 primary election to R. T. Jones and then lose again to Jones when Kerby ran as an Independent for Governor in the 1938 general election.⁴⁴ But Kerby did not gracefully concede defeat to Governor-Elect Jones. Instead, he filed an election contest alleging fraud in the balloting, bribery on the part of Jones or persons acting for him, and misconduct on the part of election boards.⁴⁵

Kerby eventually dropped the contest and was praised by the *Arizona Republic* for

doing so.⁴⁶ In an editorial, the paper called Kerby's decision to drop his suit "[o]ne of the wisest political moves that [he] has made in his whole political career."⁴⁷ The editorial board made a perceptive observation that could have been written today with the same effect, when it said, "The suit, if continued, could only have engendered further political animosities in the state. There are too many such animosities in both major parties now for the good of either and the state."⁴⁸

In 1942, Kerby lost the Democratic primary for Congressional District 1.⁴⁹ His last election was in 1944, when he lost his quest for a seventh term as Secretary of State in the Democratic primary to Dan Garvey.⁵⁰

Conclusion

Unlike Secretary Kerby, Secretary Reagan's election error did not end with a cancelled election or harsh criticism from the Court. Even if a last-minute challenge had been filed, its chances for success were likely doomed by the timing itself. Here, the independent counsel will decide whether any post-election remedy will be pursued.

The Arizona voters, however, may ultimately have the final say regarding Secretary Reagan's mistake. But voters are often forgiving, and Secretary Reagan has plenty of time to restore their confidence. One has every reason to believe she will do just that. **AJ**

endnotes

1. ARIZ. CONST. art. IV, pt. 1, § 1(11); art. 21; A.R.S. § 19-123.
2. *Kerby v. Griffin*, 48 Ariz. 434, 447 (1936).
3. A.R.S. § 19-123(B).
4. Letter from Kimberly A. Demarchi, counsel for Secretary Reagan, to Mark Brnovich, Ariz. Attorney General (May 24, 2016).
5. *IBM Says Michele Reagan Wrong to Blame Company for Arizona Voter Guide Delay*, ARIZ. REP., May 24, 2016, www.azcentral.com/story/news/politics/elections/2016/05/24/ibm-says-michele-reagan-wrong-blame-company-arizona-voter-guide-delay/84882240/.
6. Letter from Mark Brnovich, Ariz. Attorney General, to Michele Reagan, Ariz. Secretary of State (June 2, 2016).
7. Will Stone, *Concerns Build Over May 17 Arizona Election Pamphlet Glitch*, KJZZ, May 6, 2016, <http://kjzz.org/content/302795/concerns-build-over-may-17-arizona-election-pamphlet-glitch>.
8. See Demarchi, *supra* note 4.
9. ARIZ. SECRETARY OF STATE, STATE OF ARIZONA OFFICIAL CANVASS (May 26, 2016), <http://apps.azsos.gov/election/2016/special/canvass2016special.pdf>.
10. *Secretaries Since Statehood*, ARIZONA SECRETARY OF STATE, www.azsos.gov/about-office/secretaries-since-statehood/james-h-kerby (last visited Sept. 13, 2016).
11. *Kerby*, 48 Ariz. at 439.
12. *Supreme Court Kills Tax Act*, ARIZ. REP., Oct. 9, 1936, at 7.
13. *Kerby*, 48 Ariz. at 451.
14. *Id.* at 441.
15. *Id.*
16. *Id.* at 434; see also *Kerby Hit in Decision on Publicity Pamphlets*, ARIZ. REP., Dec. 2, 1936, at 4.
17. *Kerby*, 48 Ariz. at 439.
18. *Id.* at 441.
19. *Id.* at 444.
20. *Id.*
21. *Id.* at 445.
22. *Id.* at 449.
23. *Id.* at 451. Justice McAllister dissented because he felt the Court should have allowed Secretary Kerby to mail the pamphlets to voters in advance of the general election, which although not in technical compliance with the law, would have substantially complied with the publicity requirement. However, he noted that the validity of the measure would be "open to attack" if the Secretary failed to send out the pamphlets. *Id.* at 465 (McAllister, J., dissenting).
24. Letter from Thomas M. Ryan to Mark Brnovich, Ariz. Attorney General (May 10, 2016).
25. Letter from Mark Brnovich, Ariz. Attorney General, to Thomas M. Ryan (May 12, 2016).
26. Ryan, *supra* note 24. Secretary Reagan interprets A.R.S. § 19-101.01 as applying only to "popular" referenda, in which citizens petition to refer legislation approved by the Legislature to the ballot, and therefore not applicable. Demarchi, *supra* note 4.
27. *Kerby*, 48 Ariz. at 434.
28. *Id.* at 440-441.
29. Prior to 1997, voters could only vote absentee if they received prior permission. See 1997 Ariz. Sess. Laws, ch. 5.
30. Brnovich, *supra* note 25.
31. 549 U.S. 1 (2006).
32. *Id.*
33. *Id.*
34. *Id.* at 4-5.
35. *Id.* at 5 (Stevens, J., concurring).
36. *Kromko v. Superior Court*, 168 Ariz. 51, 57 (1991) (citing *State v. Osborn*, 16 Ariz. 247 (1914)).
37. *Kerby*, 48 Ariz. at 434.
38. Brnovich, *supra* note 25.
39. Brnovich to Reagan, *supra* note 6. (Brnovich announced the appointment of attorney Michael Morrissey as independent counsel to investigate the infraction and "shed additional light on the events surrounding the May 2016 special election.").
40. See A.R.S. § 38-443 (any public officer "who knowingly omits to perform any duty the performance of which is required of him by law" is guilty of a class 2 misdemeanor); A.R.S. § 16-1009 (making it a class 3 misdemeanor for an election official to knowingly fail or refuse to perform a duty in the manner prescribed by Title 16); A.R.S. § 16-1010 (making it a class 6 felony for an election official to knowingly refuse to perform a duty under any law relating to elections). These criminal statutes are quite broad and could be susceptible to a vagueness challenge.
41. See Demarchi, *supra* note 4.
42. The most severe political measures are impeachment and recall. The state Legislature has the power to impeach state officers "for high crimes, misdemeanors, or malfeasance in office," and Arizona voters have the recall power. These provisions are rarely employed and only in the most extreme situations. Thus, it is highly unlikely that Secretary Reagan would face such consequences, nor should she. "Political" as used in this context thus refers to public and electoral scrutiny. ARIZ. CONST. art. VIII.
43. *Kerby*, 48 Ariz. at 434.
44. *James H. Kerby*, WIKIPEDIA (last visited Sept. 13, 2016) https://en.wikipedia.org/wiki/James_H._Kerby.
45. *Kerby Threatens Recount*, ARIZ. REP., Sept. 18, 1938, at 1.
46. *Dropping of Suit Was Wise Move*, ARIZ. REP., Nov. 22, 1938, at 20.
47. *Id.*
48. *Id.*
49. *James H. Kerby*, *supra* note 44.
50. *Id.*