

## Hon. Andrew Hurwitz<sup>1</sup>

Andy Hurwitz has been a force in Arizona law, politics, higher education, and the judiciary, from 1974 to now. He will undoubtedly be a force long after this book goes to print. When W. Gurney Benham, the author of *Putnam's Complete Book of Quotations, Proverbs, and Household Words*,<sup>2</sup> said in 1927, "The law aims at perfection," he must surely have had the inestimable Andrew David "Andy" Hurwitz in mind. Every lawyer knows there is no such thing as perfection in the legal profession. Even so, Andy Hurwitz comes to mind when lawyers approach perfection.

### Education and Clerkships

He graduated *cum laude* and Phi Beta Kappa from Princeton University<sup>3</sup> in 1968 with an *Artium Baccalaureus* degree in public and international affairs. While at Princeton, he earned the ignominious distinction of participating in the longest winless streak of the men's soccer team, as part of the 0-7-3 squad in 1966.<sup>4</sup> He earned his juris doctor from Yale Law School in 1972, where he served as a member of the board of editors and the note and comment editor of the *Yale Law Journal*.

As expected after law school, with stellar grades, and the right temperament, he clerked for Judge Jon O. Newman of the United States District Court for the District of Connecticut,<sup>5</sup> and for Judge John Joseph Smith<sup>6</sup> of the United States Court of Appeals for the Second Circuit. From 1973 to 1974, he clerked for Associate Justice Potter Stewart of the United States Supreme Court.<sup>7</sup>

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<sup>1</sup> There are several online resources scripting Judge Hurwitz's personal, legal, and judicial history. His *Wikipedia* is a chronological and incisive look at his major mileposts from Princeton in 1968 to the Ninth Circuit in 2014. Some of that information is copied here. See, [https://en.wikipedia.org/wiki/Andrew\\_D.\\_Hurwitz](https://en.wikipedia.org/wiki/Andrew_D._Hurwitz)

<sup>2</sup> [https://en.wikipedia.org/wiki/William\\_Gurney\\_Benham](https://en.wikipedia.org/wiki/William_Gurney_Benham)

<sup>3</sup> Princeton University is a private Ivy League research university in Princeton, New Jersey. Founded in 1746 in Elizabeth as the College of New Jersey, Princeton is the fourth-oldest institution of higher education in the United States and one of the nine colonial colleges chartered before the American Revolution. The institution moved to Newark in 1747, then to the current site nine years later, and renamed itself Princeton University in 1896. <https://www.princeton.edu/>

<sup>4</sup> Princeton Tigers Men's Soccer Record Book. ([http://www.goprincetontigers.com/fls/10600/pdf/MSOC\\_Record\\_Book\\_10.pdf](http://www.goprincetontigers.com/fls/10600/pdf/MSOC_Record_Book_10.pdf) Archived ([https://web.archive.org/web/20110725083927/http://www.goprincetontigers.com/fls/10600/pdf/MSOC\\_Reco](https://web.archive.org/web/20110725083927/http://www.goprincetontigers.com/fls/10600/pdf/MSOC_Reco)

<sup>5</sup> [https://en.wikipedia.org/wiki/Jon\\_O.\\_Newman](https://en.wikipedia.org/wiki/Jon_O._Newman)

<sup>6</sup> John Joseph Smith (January 25, 1904 – February 16, 1980) was an American lawyer, a United States Representative from Connecticut, a United States Circuit Judge of the United States Court of Appeals for the Second Circuit and a United States District Judge of the United States District Court for the District of Connecticut. [https://en.wikipedia.org/wiki/J.\\_Joseph\\_Smith](https://en.wikipedia.org/wiki/J._Joseph_Smith)

<sup>7</sup> Potter Stewart was an Associate Justice of the United States Supreme Court, serving from 1958 to 1981. During his tenure, he made, among other areas, major contributions to criminal justice reform, civil rights, access to the courts, and Fourth Amendment jurisprudence. [https://en.wikipedia.org/wiki/Potter\\_Stewart](https://en.wikipedia.org/wiki/Potter_Stewart)

## Legal, Higher Education, and Political Experience

He joined Meyer Hendricks Victor Osborn & Maledon<sup>8</sup> in 1974 and practiced law until 2003. His practice included commercial litigation, administrative law, government affairs, and appellate law.<sup>9</sup> His Wikipedia page confirms his leave of absence from Osborn Maledon, 1980 to 1983, to serve as chief of staff to Governor Bruce Babbitt.<sup>10</sup> Among the many important projects he oversaw for Governor Babbitt was the creation of the Arizona Health Care Cost Containment System,<sup>11</sup> an innovative program to control Medicaid costs. In 1988, when Hurwitz had returned to practicing law at Osborn Maledon, the Arizona State Senate impeached Arizona's governor, Evan Mecham.<sup>12</sup> Then-Secretary of State Rose Mofford<sup>13</sup> chose Hurwitz to lead her transition team when she succeeded Mecham. He became her chief of staff.<sup>14</sup> Governor Janet Napolitano chose him to co-chair her transition team in 2003.<sup>15</sup>

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<sup>8</sup> The firm became Osborn Maledon in 1995. <https://www.omlaw.com/about-the-firm/>

<sup>9</sup> Among many other areas of law, he will be remembered for co-teaching appellate advocacy with the author at the ASU College of Law.

<sup>10</sup> Bruce Edward Babbitt is an American attorney and politician from the state of Arizona. A member of the Democratic Party, Babbitt served as the 16th governor of Arizona from 1978 to 1987, and as the United States Secretary of the Interior from 1993 through 2001. He won election as Arizona Attorney General after graduating from Harvard Law School. He became Governor of Arizona after the death of his predecessor, Wesley Bolin. Babbitt won election to a full term in 1978 and won re-election in 1982. He helped found the Democratic Leadership Council and sought the 1988 Democratic presidential nomination, but dropped out of the race after the first set of primaries.

After his presidential campaign, Babbitt served as head of the League of Conservation Voters. He served as the Secretary of the Interior for the duration of Bill Clinton's presidency. Clinton also strongly considered nominating Babbitt to the Supreme Court after vacancies arose in 1993 and 1994. After leaving public office in 2001, Babbitt became an attorney with Latham & Watkins. [https://en.wikipedia.org/wiki/Bruce\\_Babbitt](https://en.wikipedia.org/wiki/Bruce_Babbitt)

<sup>11</sup> The Arizona Health Care Cost Containment System is the name of the Medicaid program in the state of Arizona. As with all Medicaid programs, it is a joint program between the state and the Centers for Medicare and Medicaid Services. It became the final such state Medicaid program to implemented under Title XIX when it began in October 1982 as a section 1115 demonstration project. The program acronym, AHCCCS, is frequently pronounced like the word "access."

<sup>12</sup> Evan Mecham. Having served from January 5, 1987, to April 4, 1988, Mecham was removed from office following conviction in his impeachment trial on charges of obstruction of justice and misuse of government funds – funds that Mecham maintained were private. A later criminal trial acquitted Mecham of related charges. [https://en.wikipedia.org/wiki/Evan\\_Mecham](https://en.wikipedia.org/wiki/Evan_Mecham)

<sup>13</sup> Rose Perica Mofford was an American civil servant and politician of the Democratic Party whose career in state government spanned 51 years. Beginning her career with the State of Arizona as a secretary, Mofford worked her way up the ranks to become the state's first female secretary of state and first female governor. [https://en.wikipedia.org/wiki/Rose\\_Mofford](https://en.wikipedia.org/wiki/Rose_Mofford)

<sup>14</sup> Kamman, Jon (April 25, 2007). "Bio - Rose Mofford". The Arizona Republic. Retrieved March 14, 2012.

<sup>15</sup> Janet Ann Napolitano is an American politician, lawyer, and university administrator who served as the 21st Governor of Arizona from 2003 to 2009 and as the United States Secretary of Homeland Security from 2009 to 2013, under President Barack Obama. She has been president of the University of California system since September 2013, shortly after she resigned as Secretary of Homeland Security. [https://en.wikipedia.org/wiki/Janet\\_Napolitano](https://en.wikipedia.org/wiki/Janet_Napolitano)

While continuing to practice law, he was very active in higher education circles and the public sector from 1988 to 2003. In addition to his work for three Arizona governors, Hurwitz has held many other public service positions. In 1988, Governor Mofford appointed, and the State Senate confirmed, his appointment to an eight-year-term on the Arizona Board of Regents.<sup>16</sup> He was ABOR president from 1992 to 1993.<sup>17</sup>

Hurwitz was active in municipal government from 1986 to 1990, chairing two City of Phoenix committees focused on neighborhood improvement and street environment. He also served on the boards of directors of the Arizona Center for Law in the Public Interest<sup>18</sup> (1986–1988) and the Children's Action Alliance<sup>19</sup> (1999–2003).

While practicing law and serving on public boards, he taught law students at ASU's College of Law as an adjunct and visiting professor. He taught classes from 1977 to 2014, including Appellate Advocacy, Civil Procedure, Ethics, Federal Courts, Legislative Process, and Supreme Court Litigation. And while teaching law, he practiced what he taught at high levels. He tried cases, argued appeals, and nurtured clients and young lawyers at his firm. While his courtroom experience was wide and varied, one case stands out as his acme. *Ring v. Arizona*.<sup>20</sup> This 2002 US Supreme Court case changed death-penalty sentencing in Arizona and many other states. Hurwitz represented Timothy Ring and 20 other death row inmates. He filed a writ of *certiorari* to the Arizona Supreme Court, challenging the holding that Ring's death sentence for murder and other crimes was consistent with the Sixth Amendment. The United

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<sup>16</sup> The Governor of Arizona appoints eight volunteer members for staggered eight-year terms; two students serve on the Board for two-year appointments, with the first year being a non-voting apprentice year. The Governor and the Superintendent of Public Instruction serve as voting ex officio members. The ABOR provides "policy guidance" and oversight to the three major degree-granting universities, as provided for by Title 15 of the Arizona Revised Statutes.

The Board of Regents is a constitutionally created body corporate. It exists on a plane equivalent to that of the Legislature. Arizona universities have no independent legal existence, but are extensions of the Board. [https://en.wikipedia.org/wiki/Arizona\\_Board\\_of\\_Regents](https://en.wikipedia.org/wiki/Arizona_Board_of_Regents). In 1864, the first Territorial Legislature authorized the establishment of the University of Arizona and provided for the management, direction, governance, and control by a Board of Regents. The state colleges, one in Tempe and one in Flagstaff, were then governed by a three-member State Board of Education that included the Superintendent of Public Instruction and two members appointed by the Governor. <https://www.azregents.edu/>

<sup>17</sup> <https://lib.asu.edu/archives/quick-reference/regents#2000>

<sup>18</sup> The Arizona Center for Law in the Public Interest (ACLPI) is a nonprofit law firm dedicated to ensuring government accountability and protecting the legal rights of Arizonans. <https://aclpi.org/>

<sup>19</sup> Through research, publications, media campaigns, and advocacy, CAA seeks to influence policies and decisions affecting the lives of Arizona children and their families on issues related to health, child abuse and neglect, early care and education, budget and taxes, juvenile justice, children and immigration, and working families. <http://azchildren.org/>

<sup>20</sup> 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556, 2002 U.S. LEXIS 4651, 70 U.S.L.W. 4666, 2002.

States Supreme Court granted the petition for a writ of certiorari to allay uncertainty in the lower courts caused by the manifest tension between *Walton v. Arizona*,<sup>21</sup> and *Apprendi v. New Jersey*.<sup>22</sup>

Hurwitz argued that in murder cases, the Sixth Amendment requires juries, rather than judges, make factual determinations that aggravating circumstances exist, to qualify defendants for the death penalty. The question before the US Supreme Court was whether the judge, as Arizona law specified, or whether the Sixth Amendment's jury trial guarantee, made applicable to the states by the Fourteenth Amendment, required that the aggravating factor determination be entrusted to the jury, may find an aggravating factor. The Court concluded that the *Walton* decision and the *Apprendi* rule were irreconcilable because there was no specific reason for excepting capital defendants from the constitutional protections extended to defendants generally. Because Arizona's enumerated aggravating factors operated as the functional equivalent of an element of a greater offense, the Sixth Amendment required that a jury find them. The Court overruled *Walton* to the extent that it allowed a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty.<sup>23</sup>

## Judicial Arizona Supreme Court

Inevitably, Andrew David Hurwitz eventually left the pit of the courtroom to a seat on the bench. His three clerkships with prestigious judges aimed him that way. His practice focus sharpened both his capacity and his trajectory. Governor Janet Napolitano appointed him to the Arizona Supreme Court in 2003. In his 2006 retention-election, he received another six-year term, with over 77% of Arizona voters casting ballots for his retention in office.<sup>24</sup> Besides his judicial duties, Judge Hurwitz served as a member

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<sup>21</sup> 497 U.S. 639, 1990.

<sup>22</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 2000. Apprendi pleaded guilty to two counts of second-degree possession of a firearm for an unlawful purpose and one count of the third-degree offense of unlawful possession of an antipersonnel bomb. The state trial court judge enhanced the sentence . . . finding by a preponderance of the evidence that petitioner acted with a purpose to intimidate an individual or group of individuals because of race. The sentence was affirmed on appeal to the New Jersey Supreme Court. On writ of certiorari, the US Supreme court reversed the judgment because the procedure was an unacceptable departure from the jury tradition. The Due Process Clause of U.S. Const. amend. XIV required that a jury, on the basis of proof beyond a reasonable doubt, make the factual determination authorizing an increase in the maximum prison sentence.

<sup>23</sup> In an opinion by Ginsburg, J., joined by Stevens, Scalia, Kennedy, Souter, and Thomas, JJ., it was held that: (1) Capital defendants, no less than noncapital defendants, were entitled under the Sixth Amendment to a jury determination of any fact on which a legislature conditioned an increase in the defendants' maximum punishment. (2) Given the Arizona Supreme Court's authoritative interpretation of the state's death-penalty law, Arizona's judge-alone scheme for finding aggravating factors was invalid under the Sixth Amendment, at least to the extent that, as in the case at hand, the aggravating factors asserted by the state did not relate to past convictions. (3) The decision in *Walton v Arizona* (a) could not be reconciled with the decision in *Apprendi v New Jersey*, and (b) was overruled to the extent that *Walton v Arizona* had allowed a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for the imposition of the death penalty. See, Court Summary, 536 U.S. 584 (2002)

<sup>24</sup> Unofficial results of 2006 General Election at Arizona Secretary of State's Office—Arizona Secretary of State. 2006-11-28. Archived from the original on November 1, 2011. Retrieved March 14, 2012.

of the Advisory Committee on the Federal Rules of Evidence.<sup>25</sup> Chief Justice Rehnquist appointed him in 2004. Chief Justice John G. Roberts re-appointed him in 2007.

He authored many Arizona Supreme Court opinions in his seven years on the court. His Wikipedia page summarizes five significant cases.<sup>26</sup>

### US Court of Appeals for the Ninth Circuit

President Obama nominated Hurwitz to be a United States Circuit Judge of the Ninth Circuit in 2011. On June 7, 2012, Senate Majority Leader Harry Reid filed for cloture on Hurwitz's nomination. On June 11, 2012, cloture was invoked by a vote of 60 ayes to 31 nays. He was confirmed by voice vote on June 12, 2012, and confirmed by voice vote and received his commission on June 27, 2012.<sup>27</sup>

Hurwitz has sat often in the seven years he's been on the Ninth Circuit. He authored more than a dozen, and wrote two "landmark" opinions: A 2016 case in which a federal circuit court, for the first time, expressly held that the public disclosure of an SEC investigation could form the basis of a viable loss causation theory, if the defendant also made a subsequent corrective disclosure.<sup>28</sup> And a 2015 case legal commentators consider a "landmark" antitrust-healthcare ruling because the Court rejected using quality care improvements standing alone to defend a merger that created market power that may lead to higher prices.<sup>29</sup>

There's an old saying about lawyers—"He that loves the law will get his fill of it."<sup>30</sup> Andy's many friends and colleagues know he loves it, but he hasn't yet gotten his fill.

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<sup>25</sup> The Advisory Committee Notes still function as an important source of material used by courts to interpret the Rules. Even though the Federal Rules of Evidence are statutory, the Supreme Court is empowered to amend the Rules, subject to congressional disapproval. [https://en.wikipedia.org/wiki/Federal\\_Rules\\_of\\_Evidence](https://en.wikipedia.org/wiki/Federal_Rules_of_Evidence)

<sup>26</sup> (1) Citizen Publishing Co. v. Miller ex rel Elleithee, (2005) holding that a newspaper that ran a letter to the editor advocating the random murder of Muslims in retaliation for American deaths in the Iraq War could not be sued for intentional infliction of emotional distress because the letter qualified as political speech protected by the First Amendment. (2) Kromko v. Arizona Board of Regents, 216 Ariz. 190, 2007, dismissing a lawsuit alleging that a university tuition increase violated the constitutional requirement that education be "as nearly free as possible" as a non-justiciable political question. (3) The Lofts at Fillmore v. Reliance Commercial, 218 Ariz. 574, 2008, holding that homebuilders can be sued by buyers for breach of the implied warranty of workmanship and habitability even if the homebuilder did not sell the home to the buyer. (4) Seisinger v. Siebel, 220 Ariz. 85, 2009, holding that a statutory requirement for expert witnesses in medical malpractice cases did not violate the constitutional separation of powers doctrine. (5) Turken v. Gordon, 223 Ariz. 342, 2010, commonly known as the "CityNorth" case, which clarified the requirements of the Gift Clause of the Arizona Constitution.

<sup>27</sup> Hurwitz, Andrew David - Federal Judicial Center. [www.fjc.gov](http://www.fjc.gov)

<sup>28</sup> Lloyd v. CVB Fin. Corp., 811 F.3d 1200, (9th Cir. 2016).

<sup>29</sup> Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, (9th Cir. 2015).

<sup>30</sup> The Quotable Lawyer, David S. Shrager and Elizabeth Frost, New England Publishing Associates, Inc., 1986, quote 78.1, page 196.