

# Appendix A:

## Methodology

The following methodology has been used in compiling this work:

1. The criteria for inclusion of an ACLU / US Supreme Court case is when the ACLU was involved in the case when it went before the US Supreme Court and the Court issued an opinion between January 19, 1920, and January 19, 2020, the first 100 years of the ACLU.

"ACLU involvement" in a US Supreme Court case includes when the ACLU was a party, filed (or is on) an amicus brief, and/or when an ACLU attorney argued the case or was listed on a brief in the case. An ACLU attorney's involvement includes an ACLU attorney being listed on a party's brief, whether or not the attorney's affiliation with the ACLU is noted on the brief itself.<sup>27</sup>

Such involvement of an ACLU attorney also includes instances where the ACLU partnered with one or more outside attorneys not necessarily employed by the ACLU, but who worked with the ACLU on the case. Involvement also includes cases where the ACLU has made public statements referencing the case as an ACLU case (because the ACLU has deeper records of its involvement in cases than is often available through Court documents and other public records).

This criterion excludes cases where the ACLU was only involved when the case was before a lower court, and cases where the writ of certiorari was denied or granted but then later dismissed (meaning

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<sup>27</sup> Attorney involvement includes an ACLU attorney who was noted on a brief before the Supreme Court but who may not have been noted as being affiliated with the ACLU. For example, Osmond K. Fraenkel, ACLU chief counsel 1954 to 1977; Melvin Wulf, ACLU legal director 1962 to 1977; or Steven R. Shapiro, ACLU associate legal director 1987 to 1993 and legal director 1993 to 2016 were listed on a party's brief before the US Supreme Court, even though their ACLU affiliation was not always mentioned on the brief itself.

the Court never issued an opinion deciding the case itself), or where the ACLU's request to file an amicus was denied or withdrawn.

Also excluded from this work are nine split decision *per curiam* cases.<sup>28</sup> Those cases are composed of one 3–3 and eight 4–4 votes. Those nine cases are excluded because it's not clear which justices voted on which side of those cases, and because the Court didn't come to a clear decision on any of them. A split decision has a similar effect as cert in those cases being denied, in that those nine split decisions leave the lower court ruling in place.

Cases are cited by the party names as listed in the US Supreme Court's decision. Party names sometimes changed over the course of litigation.

Occasionally, I have been told a particular US Supreme Court case was an ACLU case but our research could not prove that claim. When that happened, such cases have not been listed in this work although it is possible with more research we might have discovered ACLU connections.

## 2. Win/Loss Definition

This work defines "winning" or "losing" by whether or not the ruling of the Supreme Court was "with" or "against" the side the ACLU was on, even though in some instances the ACLU was on the "winning side" but some considered it an ACLU loss. Conversely, at times the Union was on the "losing side" but some considered the Union to receive a net benefit from the decision.

Therefore, the above definition of wins and losses may not account for some nuanced or argued results.

For example, this work records the case win/loss definitions count *Staats v. ACLU*, 422 U.S. 1030 (1975) as a loss for the ACLU

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<sup>28</sup> See footnote on page 113.

because in *Staats*, the Supreme Court voted 8–0 against the side the ACLU was on. However, Ira Glasser, former Executive Director of the ACLU, considers the *Staats* decision a victory for the ACLU on the merits, because the practical effect of the case achieved the ACLU's goal in bringing it.

Although such nuanced or argued effects about certain case results are interesting and important to some, second guessing or arguing about the outcome of such cases would add a subjectiveness that I chose to avoid.

I have no reason to believe there are many such *Staats* cases, where a loss could reasonably be considered an ACLU win, or a win could be considered a loss. Even if there were, I don't believe the ACLU's win/loss ratio would be changed in any significant way.

For example, if there were, say, a net difference of 20 such cases in this work, and if all those 20 cases increased or decreased the ACLU's wins or losses by that amount, its win ratio of 53.39% in its first 100 years<sup>29</sup> would only increase to 55.07% or decrease to 51.71%.<sup>30</sup>

In the case of ties by the Court, where the lower court's ruling was affirmed by an equally divided Supreme Court, "winning" or "losing" is decided by whether or not the divided decision had the effect of ending the issue "with" or "against" the side the ACLU was on.

### 3. The Supporting Data

Supporting data for the cases came from ACLU websites and reports; GALE's US Supreme Court Records and Briefs 1832—1978 online; Oyez Project at IIT Chicago-Kent College of Law

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<sup>29</sup> On page 24, 637 wins of 1,193 cases is 53.39%.

<sup>30</sup> 657 wins of 1,193 is 55.07%; 617 wins of 1,193 is 51.71%.

(oyez.org), which was useful in determining the votes of the justices; FindLaw (findlaw.com); and Westlaw (westlaw.com).

Where minor errors were found or when questions arose, and for some clarification, the print version of the *United States Supreme Court Reports, Lawyer's Edition*, was used to ensure the most accurate quotation possible when copies of the *United States Reports*, the official record for Supreme Court cases, were not available.

Quotations without citation come directly from the cases. Quotations from other sources, such as prior opinions from lower courts or party briefs, are noted with a footnote citing the source of the quotation.

Citations to cases or statutes within the quoted material are omitted, without notation, although single quotation marks designate quotations from another source.

Please refer to the print version of the *United States Reports* for a complete reporting of each case in its entirety as the print version of the United States Reports is the official source of Supreme Court cases.

4. [sic]—*intentionally so written*—Used after a printed word or passage to indicate that it is intended exactly as printed or to indicate that it exactly reproduces an original <said he seed [sic] it all> <sup>31</sup>
5. Regarding rounding of percentages for the wins/losses, if the extra number is a 5, 6, 7, 8 or 9, the preceding number has been raised by one. Example: if we want one decimal point, the number 45.55 would become 45.6; if we want two decimal points, the number 56.574 would become 56.57.

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<sup>31</sup> Merriam-Webster online, s.v. "sic," accessed 1/7/2021

6. Editing style—This work uses a combination of styles based mainly on Chicago Manual of Style standard style, but AP Style is used for numbers, where numbers nine and under are written out unless they are part of a vote count.

## 7. Abbreviations Used

Definitions for O, CO and DO below were taken from *Black's Law Dictionary; Revised Fourth Edition*; published 1968.

A. W = Voting with the ACLU

B. L = Voting against the ACLU

C. Oth = Other—Vacant seat; abstention from vote; etc.

D. O = Opinion—The statement by the Court of the decision reached in regard to the case, setting forth the law as applied to the case and detailing the reasoning upon which the decision is based.

E. CO = Concurring Opinion—An opinion separate from that which embodies the view and decision of the majority, prepared and filed by a judge who agrees with the general result of the decision and which either reinforces the majority opinion or voices disapproval with the reasoning behind the opinion but approves of its final result.

F. DO = Dissenting Opinion—An opinion separate from that which embodies the views and decision of the majority, prepared and filed by a judge who disagrees with the decision of the Court and who expresses his or her own views/reasoning on the case.

G. CDO = Concurring/Dissenting Opinion—An opinion separate from that which embodies the views and decision of the majority, prepared and filed by a judge who agrees with only a portion of

the decision of the majority (in cases involving more than one issue).<sup>32</sup>

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<sup>32</sup> Definition obtained by calling the United States Supreme Court.