

FALL 2018

# FIGHTING FOR PROSECUTORIAL REFORM



Did you know that the most powerful person in Virginia's criminal system is not the judge who enters a verdict against defendants? It is actually the local prosecutor, called the Commonwealth's Attorney in Virginia. This issue brief is intended to highlight the critical role Commonwealth's Attorneys play, and how voters can influence the decisions they make.

**ACLU**  
Virginia



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AMERICAN CIVIL LIBERTIES UNION  
Virginia  
AMERICAN CIVIL LIBERTIES  
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**SAVE THE DATE!**

**ACLU of Virginia Annual Member  
Forum: Shenandoah**

**Thursday, November 8, 7:00-8:30 p.m.  
Blue Ridge Community College**

This is the last of five Member Forums the ACLU of Virginia is conducting across the Commonwealth in 2018. We will share our top priorities for protecting and expanding civil liberties in Virginia for the coming years, and invite you to ask questions and tell us what is important to you in your own communities.

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# INTRODUCTION

Commonwealth’s Attorneys (CAs) in Virginia have vast discretion over dozens of factors that may come into play before someone is charged with a crime or ever brought to trial. They are elected every four years, usually run unopposed, often retain their seats for decades without opposition, and count their success by convictions, not how well they served the needs of the communities they were elected to represent.

Through their lobby organization, the Virginia Association of Commonwealth’s Attorneys, they also are among the most effective opponents of common-sense reforms that would help reduce the number of people who are wrapped up in the system and incarcerated.

CAs are the key to criminal justice reform and ending over-incarceration. Virginia’s draconian sentencing laws – from mandatory minimums to the abolition of parole to jury sentencing – fundamentally shift influence over outcomes from judges to prosecutors. Only CAs have the authority to decide how many charges a person will face at trial, and whether those charges are ones that carry mandatory minimum sentences. Since the vast majority of criminal cases are resolved by plea bargains, a prosecutor is more likely to decide a criminal defendant’s sentence than a judge or jury.



95%

of Virginia voters understand that CAs have some or a great deal of power over the criminal justice system.

These are critical issues that affect individuals, families and communities all across Virginia. With relatively few checks on their authority and the ability to lobby aggressively for or against changes to laws they don’t like, CAs have unparalleled power over Virginia’s criminal justice system.

# CANDIDATE QUESTIONNAIRE

Here are some of the most important questions you should ask the CA candidates in your locality:

1. Would you share police reports, witness lists and witness statements with defense attorneys before trial?
2. Would you support creation and funding of a statewide investigative and prosecutorial unit to handle cases of police use of force resulting in death or serious injury? Lacking such a unit, would you investigate a fatal shooting of someone by police in your locality, or would you ask another prosecutor who has no relationship with local law enforcement to do it?
3. Does prosecuting people for marijuana possession make our community safer, or would time and resources be better spent on more serious crimes? Would you support decriminalization of marijuana?
4. Would you seek misdemeanor convictions for all people who steal property worth less than \$1,500?
5. Would you support elimination of cash bail, as it often results in people being imprisoned for their inability to pay?
6. Would you support requiring a criminal conviction before someone’s money or property (civil asset forfeiture) can be converted to cash that funds law enforcement?
7. At what age do you believe it’s appropriate to try a juvenile as an adult? Why, and for which offenses?
8. Would you recommend that a juvenile defendant be sentenced to life without parole?
9. Would you support the creation of diversion programs that would allow defendants with substance abuse problems to get treatment instead of being charged with a crime?
10. Would you support the creation of mental health diversion centers that would allow defendants with mental illnesses to get treatment in a secure facility instead of being charged with a crime?



# SPOTLIGHT ON CHESTERFIELD COUNTY

Every CA's seat in Virginia's counties will be up for election on Nov. 5, 2019 and in cities in 2021. Between now and then, the ACLU of Virginia will be ramping up its advocacy efforts to let voters statewide know how important those elections will be for our families and communities, and to make their voices known.

Chesterfield\*, located south of the City of Richmond in Central Virginia – will have a special election this November to replace outgoing CA Billy Davenport who announced in June his early retirement from the position he has held since 1988.


Chesterfield voters thus will have a choice between Democrat candidate Scott Miles and Republican John Childrey when they go to the polls on Nov. 6, 2018

The ACLU of Virginia is non-partisan and does not endorse candidates for any public office. However, we do encourage voters to understand the offices up for election and challenge candidates to take positions that will benefit the community.

Chesterfield County  
Commonwealth's Attorney Candidates:



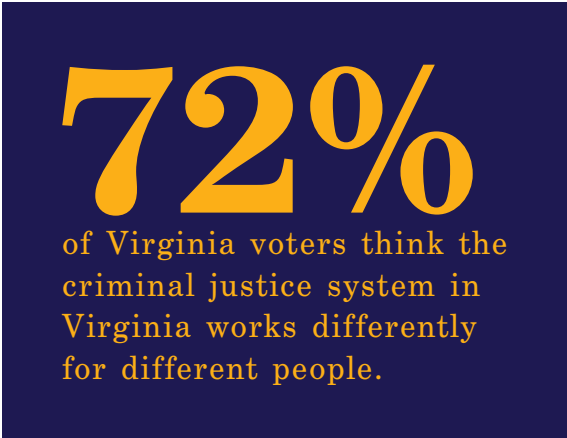
Scott Miles (D)



John Childrey (R)

Who will commit to changing  
the criminal justice system?

Find out where they stand at the CA Candidate Forum on Oct. 23  
& Vote on Tuesday, Nov. 6!



In addition to the questions we encourage all voters across the state to ask their CA candidates, we would urge Chesterfield voters to ask those vying for office whether they would ever again seek felony charges against a woman who terminated her own pregnancy, thus criminalizing pregnancy. Such a case brought by Mr. Davenport was only recently dropped.

*\* Martinsville City, Botetourt, Northampton, Russell, and Wythe Counties are having special elections for CAs this November. Only the election in Wythe County is contested.*

## CHANGE IS COMING



Events in Virginia and across the country have sparked conversations about racial injustices, mental illness, the failure of the War on Drugs, and the enormous, unnecessary cost of mass incarceration. Despite the emerging national consensus and the widespread support among Virginians for criminal justice reform, one group continues to resist change: Virginia's prosecutors. For years, CAs have opposed common-sense reforms to Virginia's criminal justice system. Instead, Virginia's prosecutors have lobbied the General Assembly to ramp up the failed War on Drugs.

## WHAT YOU CAN DO TO HELP

There is one group of people who can act as a check on the enormous power of CAs: the registered voters of Virginia. The CA for each city and county in Virginia is popularly elected every four years. Unfortunately, both in Virginia and across the United States, the vast majority of prosecutors run unopposed. Most voters don't seem to know who CAs are, what they do, or the enormous power they have. Likewise, most prosecutors have grown accustomed to getting re-elected without having to campaign.

Add a prosecutor's immense power to the public's lack of awareness, and the result is a group of public officials who are largely unaccountable to the residents and taxpayers they serve. Using data from the Virginia Department of Elections website, we found that between 2005 and 2015, 72 percent of all CA elections in Virginia were uncontested. These uncontested elections deny the public a critical opportunity to question the most powerful decision makers in our criminal justice system. Instead of handing incumbent prosecutors re-election every four years, Virginians should use these elections to force prosecutors to answer important questions about criminal justice policy.

SAVE THE DATE!

**Chesterfield County Commonwealth's Attorney  
Candidate Forum**

Tuesday, Oct. 23, 6 p.m. – 8:00 p.m.

**Bishop Ireton Center**  
3300 Old Courthouse Rd., North Chesterfield, VA 23236

The event is FREE and open to all.  
More info: [bit.ly/ChesterfieldCAForum](http://bit.ly/ChesterfieldCAForum) (the link is case sensitive)

# THE ROLE OF THE COMMONWEALTH'S ATTORNEY



A CA is the top prosecutor in a city or county. A prosecutor is a law enforcement official and an attorney who represents the interests of the Commonwealth in a criminal case. A prosecutor has an ethical duty to seek justice in every case, whether that means putting a violent person behind bars, listening to the wishes of a crime victim, or dismissing charges against an innocent defendant.

The Virginia Constitution requires that CAs be elected by voters every four years. State law requires that each CA be a member of the Virginia State Bar, and that the person reside in the city or county he or she will serve for at least 30 days before the election.

Once elected, a CA appoints assistant prosecutors to help carry out the duties of the office. These obligations include the prosecution of all felony criminal offenses in the city or county, and the enforcement of all forfeiture actions. Felony offenses range from murder, rape, and robbery to drug possession and thefts of more than \$500, as well as arguably petty offenses like signing a job application for a state job that includes misinformation. CAs typically handle most misdemeanor prosecutions as well, though they are not required to do so.

**A prosecutor has an ethical duty to seek justice in every case, whether that means putting a violent person behind bars, listening to the wishes of a crime victim, or dismissing charges against an innocent defendant.**

Prosecutors are bound by ethical obligations, the Virginia Constitution, and the United States Constitution. For example, a prosecutor cannot ethically prosecute a case that is not supported by probable cause, nor coerce a defendant who does not have a lawyer into taking a plea agreement.

The Due Process Clause of the Fourteenth Amendment of the U.S. Constitution prohibits prosecutors from withholding certain information from criminal defendants if the information is favorable to the defendant.

92%

of Virginia voters agree that Virginia should work to change the criminal justice system so that people are not treated differently based on how wealthy they are.

# PROSECUTORIAL DISCRETION



With these responsibilities, however, comes enormous power. From the beginning of a criminal case to the end result, CAs have unparalleled authority to decide outcomes. Moreover, for a variety of reasons, prosecutors are rarely sanctioned for ethical or constitutional violations. The result is undeniable: in the criminal justice system, a prosecutor has far more power than any other public official.

These vast powers give prosecutors the ability to affect nearly every part of Virginia's criminal justice system. In Virginia, CAs have the power to:

- Decide whether a criminal case will go to trial.
- Determine whether a defendant is charged with a misdemeanor or a felony offense.
- Influence a defendant's decision to have a trial or plead guilty by determining the number and seriousness of the charges the defendant will face at trial.
- Insist that a defendant be kept in jail before trial without bail.
- Choose whether an arrested teen is diverted to community-based supervision, placed before a judge in juvenile court, or prosecuted as an adult.
- Elect a jury trial over the objection of a defendant.
- Decide whether to charge a capital offense and seek the death penalty.
- Withhold basic information about a criminal case from the defense, such as police reports, witness lists, and witness statements, until the day of trial, unless the judge approves a defendant's request for a court order to obtain that information.
- Decide whether to prosecute police officers for unjustified shootings and excessive use of force.
- Lobby members of the General Assembly and the governor for or against changes to the law.

CAs are rarely questioned about their oversized influence on criminal justice policy. Because nearly three-fourths of all CA elections are uncontested, Virginia voters seldom have the option of removing a CA from office.

A major problem with uncontested elections is that they are unlikely to produce robust debates about a candidate's worthiness for office or the policies the candidate supports. Voters have little incentive to engage in an election with a foregone conclusion.