

UNPARALLELED POWER



*Commonwealth's Attorneys, Voters,
and Criminal Justice Reform in Virginia*

June 2016



ACKNOWLEDGEMENTS

The American Civil Liberties Union (ACLU) of Virginia is a private, non-profit organization that promotes civil liberties and civil rights for everyone in the Commonwealth through public education, litigation and advocacy with the goal of securing freedom and equality for all. In addition to the litigation for which the ACLU has been known, we also educate the public, inform the media, lobby legislators, organize grassroots activists, and disseminate information about our constitutional freedoms through our membership and volunteer chapters.

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The report was reviewed and edited by Bill Farrar and Claire Guthrie Gastañaga of the ACLU of Virginia. The report was inspired by a similar report, *Roadblocks to Reform: District Attorneys, Elections, and the Criminal Justice Status Quo*, produced by the ACLU of Oregon.

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INTRODUCTION

For the first time in a generation, America has turned a spotlight on its criminal justice system. 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. On the left, both Senator Bernie Sanders and Secretary Hillary Clinton have made reforms to America's criminal justice system part of their campaigns for the Democratic nomination for president.¹ On the right, billionaire Charles Koch has pledged tens of millions of dollars to the reform effort, investing in his belief that now is the time for real change.²

A December 2015 poll³ conducted by Prison Fellowship and the Charles Koch Institute found:

➤ **75 percent of Virginians believe the Commonwealth's prison system costs too much.**

➤ **75 percent of Virginians believe that prisons ought to prioritize rehabilitation.**

➤ **72 percent of Virginians believe judges should have more freedom to use forms of punishment other than prison.**

➤ **By a 3-to-1 margin, 64 percent to 21 percent, Virginians support reinstating a system of parole. (Virginia abolished parole in 1995.)**

In Virginia, where the state government spends more than \$1 billion a year on corrections, there is significant appetite for reforming the criminal justice system.

Despite the emerging national consensus and the widespread support among Virginians for criminal justice reform, one group has consistently resisted change: Virginia's prosecutors. For years, Commonwealth's attorneys (CAs) have opposed commonsense reforms to Virginia's criminal justice system. Instead, Virginia's prosecutors have lobbied the General Assembly to ramp up the failed War on Drugs.

CAs have an important self-interest at stake in their fight against criminal justice reform. 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 will carry mandatory minimum sentences. Because the vast majority of criminal cases are resolved by plea bargains,⁴ a prosecutor is more likely to decide a criminal defendant's sentence than a judge or jury.

With relatively few checks on their authority and the ability to lobby aggressively for changes to laws they don't like, CAs have unparalleled power over Virginia's criminal justice system.

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.⁵ Unfortunately, both in Virginia and across the United States, the vast majority of prosecutors run unopposed.⁶

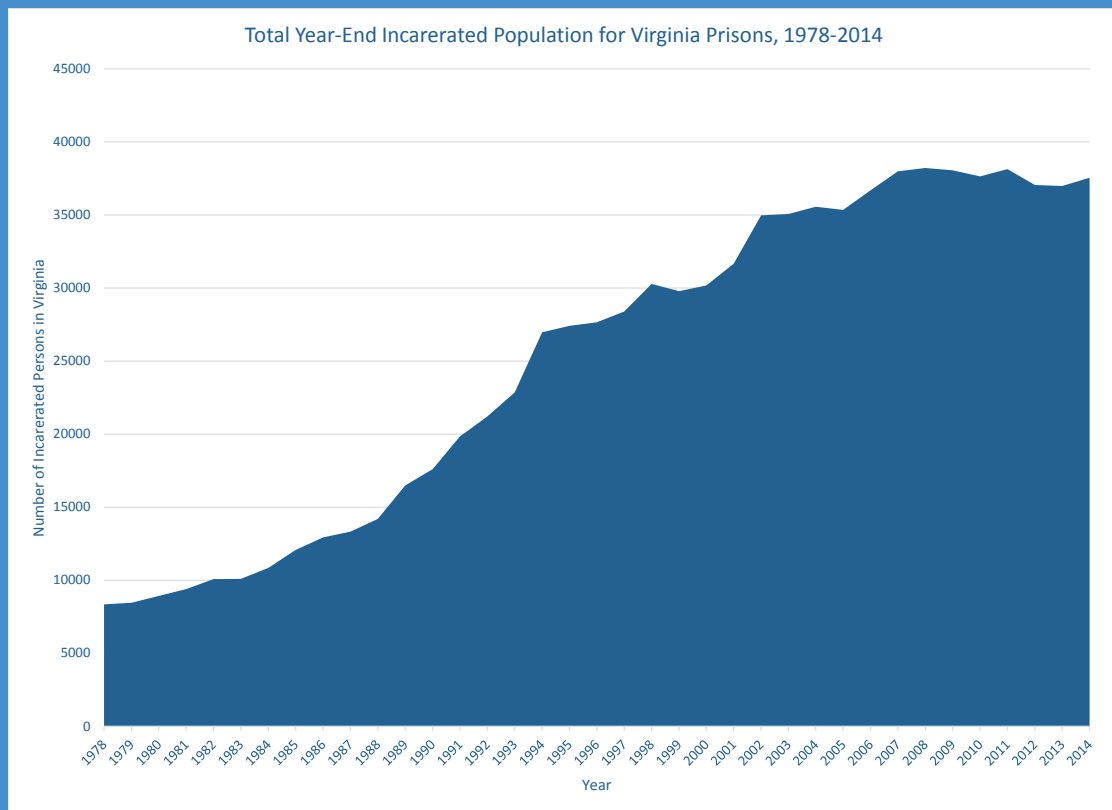
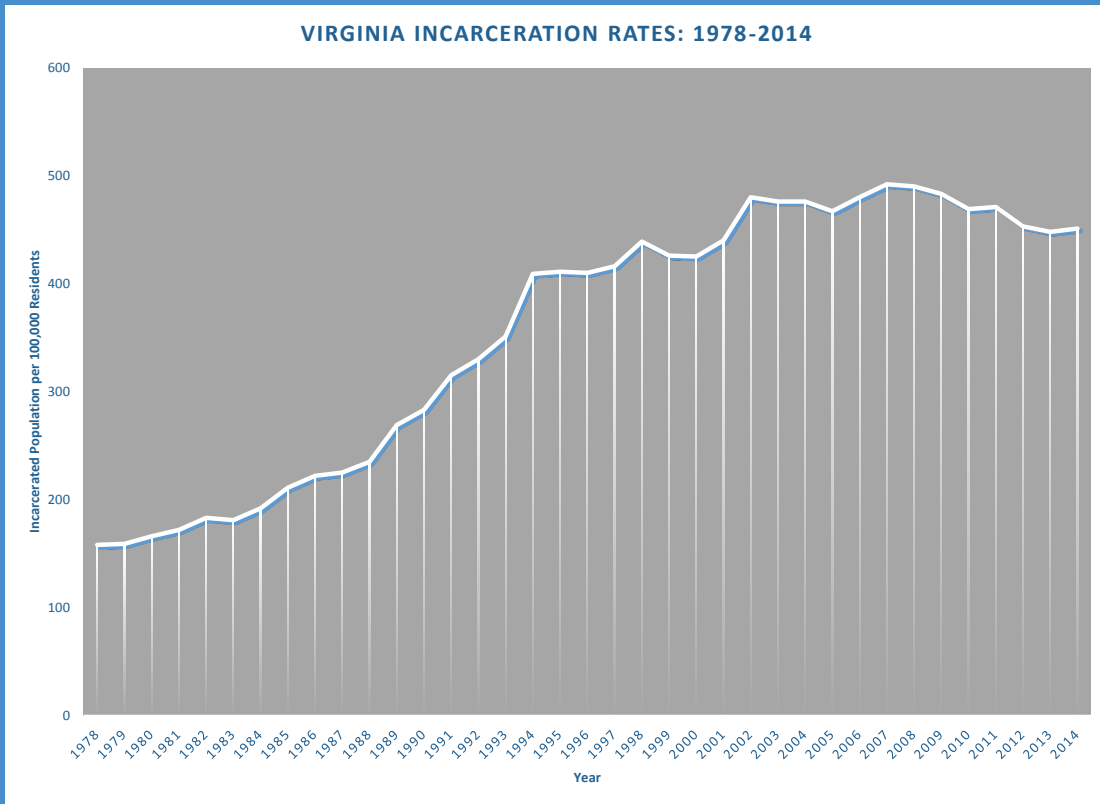
Most voters don't seem to know who CAs are, what they do, or the enormous power they have. Likewise, some prosecutors have grown accustomed to getting reelected without having to campaign. Paul Ebert was first elected Commonwealth's attorney for Prince William County in 1968.⁷ Last year, the 77-year-old Ebert drew his first reelection challenger since the 1980s. Ebert told the *Washington Post* that having to run for reelection was "demeaning" and made him feel "almost like I'm a beggar."⁸

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 Commonwealth's attorney 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 reelection every four years, Virginians could use these elections to force prosecutors to answer important questions about criminal justice policy.

This report examines how uncontested Commonwealth's attorney elections reinforce the status quo, bypassing public debate and engagement. This report also makes recommendations and offers concrete action steps to change this broken system.

THE STATUS QUO: VIRGINIA'S LONG-TERM PRISON GROWTH



WHO ARE COMMONWEALTH'S ATTORNEYS, ANYWAY?

A Commonwealth's attorney 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 a 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 Commonwealth's attorneys be elected by voters every four years.⁹ State law requires that each CA be a member of the Virginia State Bar,¹⁰ and that the person reside in the city or county for at least 30 days before the election.¹¹

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 \$200, 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.¹²

Prosecutors are also 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.¹³ 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.¹⁴

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.

Nonetheless, Commonwealth's attorneys 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.

UNPARALLELED POWER

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 child 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.
- Decide whether to prosecute police officers for unjustified shootings and excessive force.
- Lobby members of the General Assembly and the Governor for or against changes to the law.

UNCONTESTED ELECTIONS

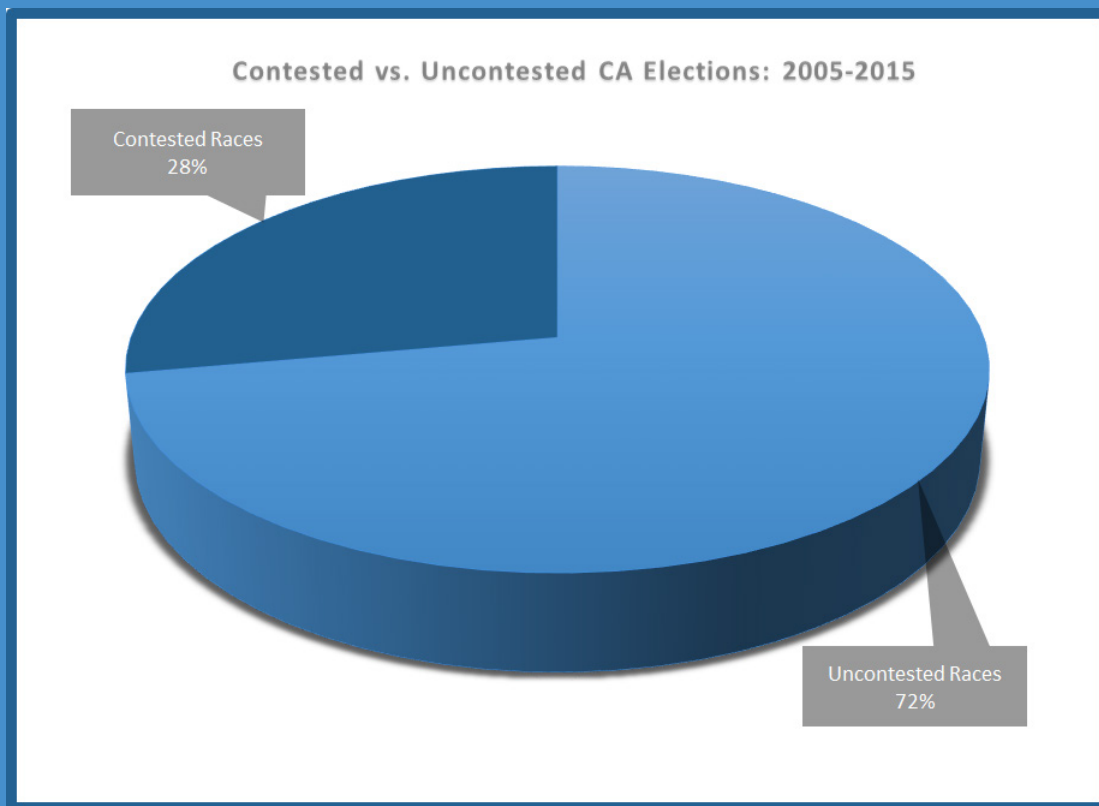
We examined every Commonwealth's attorney election in Virginia over the last decade, from 2005 to 2015. During this period, Virginia held 381 elections for Commonwealth's attorney. Of these 381 elections, 275 of them, or 72 percent, were uncontested. In nearly three-fourths of all elections of Virginia's prosecutors, the election was over before it began.

Contested vs. Uncontested Races: 2005–2015

381 Total Races

275 Uncontested Races (72%)

106 Contested Races (28%)



Another disturbing trend is the number of cities or counties in which there were no contested races. Virginia has 134 localities but elects only 120 CAs, as some counties share a CA with nearby cities (e.g., James City County and Williamsburg). Of the 120 localities that hold CA elections, 48 of them – 40 percent – did not have a contested election between 2005 and 2015. Four of every 10 CAs run for office in a place where there has been no opposition for more than a decade.

Localities with no contested CA races since 2005

1. Accomack	20. Fluvanna	37. Petersburg city
2. Alexandria city	21. Frederick	38. Pittsylvania
3. Amherst	22. Goochland	39. Pulaski
4. Appomattox	23. Greene	40. Rappahannock
5. Bath	24. Greensville/ Emporia city	41. Roanoke
6. Bedford	25. Henry	42. Roanoke city
7. Botetourt	26. Highland	43. Rockingham/ Harrisonburg city
8. Bristol city	27. James City/ Williamsburg city	44. Southampton/ Franklin city
9. Brunswick	28. King & Queen	45. Staunton city
10. Buckingham	29. King George	46. Suffolk city
11. Buena Vista city	30. Lunenburg	47. Warren
12. Campbell	31. Lynchburg city	48. Waynesboro city
13. Carroll	32. Mecklenburg	
14. Charlotte	33. New Kent	
15. Chesterfield	34. Newport News city	
16. Clarke	35. Norfolk city	
17. Craig	36. Northumberland	
18. Cumberland		
19. Fauquier		

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.

Since 2005, only one Commonwealth's attorney candidate who ran unopposed on the ballot has lost. James Monroe lost to Wayne Emery, a write-in candidate, in Richmond County in 2011 – and even then, only by 53 votes.

OFF-OFF-YEAR ELECTIONS

When Americans think of elections, presidential elections come to mind. These elections are held in “on” years – every four years, the same as the Summer Olympics. While congressional elections are held in presidential election years, they are also held two years later. These are often called “off-year” elections, or midterms. Turnout is typically not as high in these off-year federal elections.

Virginia holds elections for state and local officials in “off-off” years. That is, while federal elections take place in even-numbered years, regular elections for Virginia public officials take place in odd-numbered years. As Professor Quentin Kidd of Christopher Newport University explained in a 2009 blog post,¹⁵

Virginia’s “off-off-year” elections have a unique history that dates back to before the Civil War. One undeniable result, however, is that fewer voters choose Virginia’s elected officials than if the elections were held in even-numbered years.

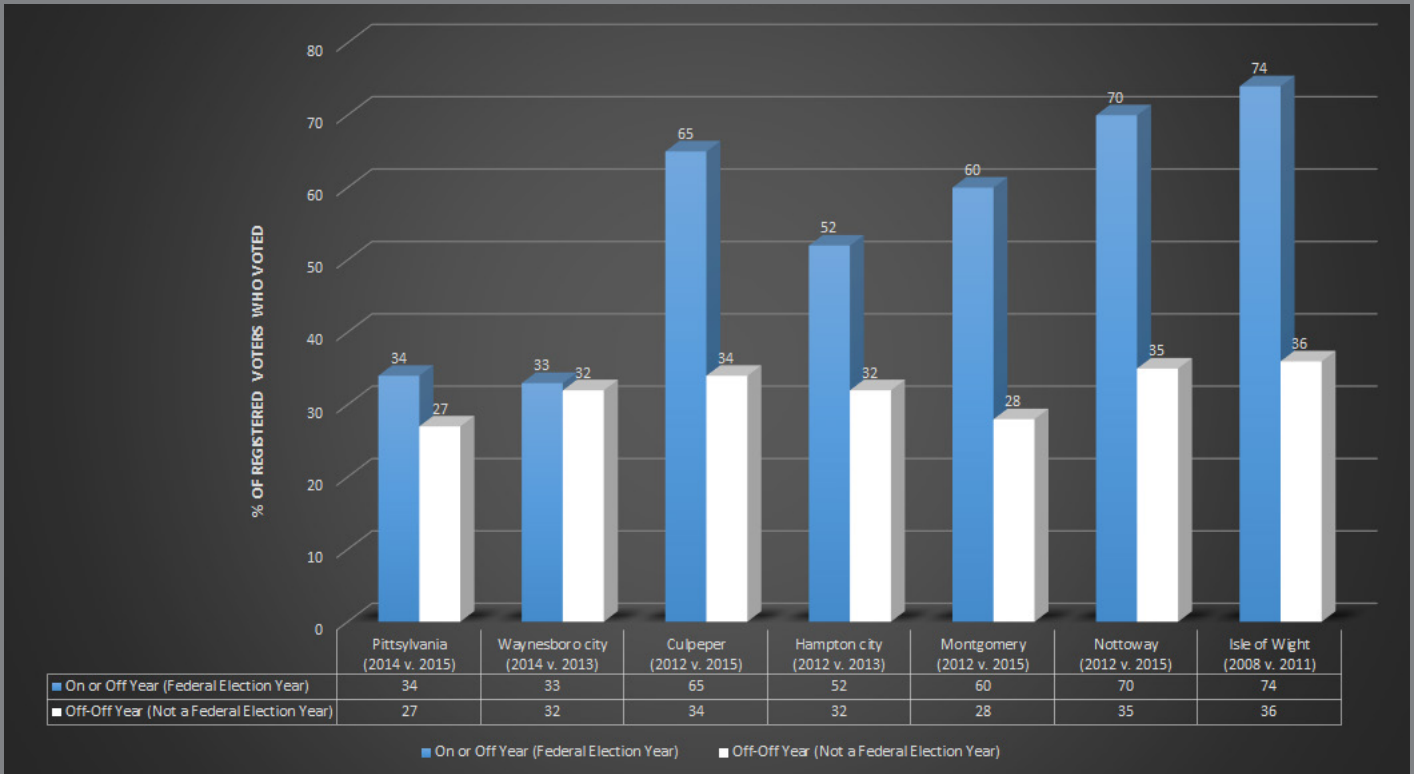
When a CA leaves office for any reason, Virginia law requires that a special election be held promptly for a new CA.¹⁶ Occasionally, this results in special elections that occur in even-numbered years – either at the same time as a presidential election or a federal midterm election.

Since 2005, there have been nine special CA elections held in even-numbered years, due to vacancies. The following chart (see page 11) considers the seven of those nine elections that were held the same day as a federal election, contrasted with an off-off-year election in the same locality. The chart illustrates the dramatic impact that Virginia’s off-off-year elections have on voter turnout in CA elections.

Consider the Culpeper County CA elections in 2012 in 2015. Both races pitted Megan Frederick against Paul Walther. In 2012, Frederick prevailed over Walther – 10,106 to 9,224, with 19,357 total votes cast (65 percent of Culpeper’s 29,766 registered voters that year). In 2015, even with a third candidate in the race, voter turnout declined by nearly 50 percent, to 9,998 (34 percent of Culpeper’s 29,187 registered voters that year). Walther won the 2015 rematch with only 5,127 votes – more than 4,000 fewer than he got in a losing effort three years earlier.

The 2012 and 2013 CA elections in Hampton show a similar trend. After winning the Democratic primary in June, Anton Bell was uncontested in November 2012 when 50,214 votes were cast for CA – 52 percent of Hampton’s 97,418 registered voters. A year later, Bell ran uncontested again but only 30,159, or 32 percent, of registered voters cast votes for CA.

VOTER TURNOUT: “ON/OFF” YEARS VS. “OFF-OFF” YEARS



Virginia’s off-off-year elections depress turnout in Commonwealth’s attorney elections, apparently even when voters have a choice between two or more candidates. In the last 20 years, voter turnout has not exceeded 50 percent of all registered Virginia voters in any odd-numbered year.¹⁷ Comparatively, during the same time span, turnout has averaged more than 70 percent in presidential election years in Virginia.

A strong voter turnout means more citizens are taking part in democracy. In the case of Commonwealth’s attorneys (and the sheriffs who are their colleagues in law enforcement), uncontested and off-off-year elections are bad for democracy, accountability, and the Commonwealth’s justice system.

VIRGINIA'S STAGNANT REFORM CLIMATE AND THE CA'S ROLE

We have examined how the electoral landscape discourages voter involvement in choosing Virginia prosecutors. Public officials who are rarely challenged for reelection and who can be reelected by a small minority of registered voters are unlikely to be accountable to the public in any meaningful way. Because of the unparalleled power that CAs have, this has very real effects on the Commonwealth's criminal justice system.

Prosecutors influence the criminal justice system in two key ways:

- 1. Prosecutorial discretion***
- 2. Lobbying for and against changes to laws***

Earlier we detailed some of the many ways a CA can exercise discretion to affect outcomes in the criminal justice system. This includes critical decisions like whether to proceed with felony charges or misdemeanors, whether to share police reports with the defendant before trial, or whether to offer a plea bargain to a reduced sentence or insist on a trial.

CAs also lobby lawmakers for and against changes to laws establishing crimes and the procedures that govern

their prosecution and setting the punishment for violations. On a wide range of criminal justice issues, the Virginia Association of Commonwealth's Attorneys (VACA)¹⁸ makes its views known to the executive and legislative branches of Virginia's state government. When the General Assembly considers a bill that impacts the criminal justice system, VACA may poll its membership – the 120 elected CAs throughout the Commonwealth – to decide whether to support or oppose the bill. The Association assigns members to monitor the legislature throughout the General Assembly session and individual CAs frequently lobby members of the General Assembly both during the session and between sessions. Legislators are often eager to hear what prosecutors have to say about bills that will affect the criminal justice system. Even when VACA does not take a position on a particular bill, legislators may ask a Commonwealth's attorney to weigh in on it anyway. Because legislators value their opinions, CAs can and do have a significant impact on which criminal justice bills become law.

Given that CAs could play an important role in improving our criminal justice system, here are some key issues in Virginia about which voters ought to ask prosecutors. On each issue, prosecutors can and have had a dramatic impact on criminal justice outcomes by exercising their prosecutorial discretion, lobbying for changes to laws, or both.

CIVIL ASSET FORFEITURE

In Virginia, the police can stop you and seize your money (or property)* if they have reason to believe that you're selling drugs. If a prosecutor can show a court that your money has a substantial connection to the felonious sale of drugs, the Commonwealth can take your money. This is called civil asset forfeiture. In Virginia, the government can take your money even if you're never convicted of a crime. Since July 1991, law enforcement agencies have taken in more than \$106 million through the Commonwealth's asset forfeiture program.¹⁹

This abusive practice offends the basic American notion of innocent until proven guilty. Civil asset forfeiture has received widespread condemnation from groups as diverse as the ACLU, the Tea Party, Americans for Tax Reform, and the Drug Policy Alliance. In other states, legislatures have taken action to curb this practice, such as by requiring a criminal conviction before any forfeiture can occur.

Virginia's CAs have vigorously opposed the conviction requirement for asset forfeitures. While they make several arguments for keeping the status quo, the prosecutors' position on asset forfeiture deserves skepticism, especially when they argue that they "need" to be able to forfeit property as a way to "get" someone for whom they don't have a

case that establishes a criminal violation beyond a reasonable doubt. When the Commonwealth takes money through asset forfeiture in drug cases, CA offices get to keep a chunk of the profits.

Questions to ask your CA:

- ▶▶ Do you support a conviction requirement for asset forfeitures?
- ▶▶ How much money has your office gained through asset forfeitures, and how have you spent that money?

Read more about civil asset forfeiture:

<https://acluva.org/16524/its-simple-asset-forfeitures-should-require-a-criminal-convictions/>

<https://www.aclu.org/issues/criminal-law-reform/reforming-police-practices/asset-forfeiture-abuse>

Rob Poggenklass, *Reform Virginia's Civil Asset Forfeiture Laws to Remove the Profit Incentive and Curtail the Abuse of Power*, 50 U. RICH. L. REV. ONLINE 75 (2016), <http://lawreview.richmond.edu/?p=3953>

* A 2015 report by the Virginia State Crime Commission found that in fiscal year 2014, 95 percent of all asset forfeitures in Virginia involved currency. VA. STATE CRIME COMM'N, ASSET FORFEITURE (SB 684/HB 1287) 80 (Oct. 27, 2015), http://vscc.virginia.gov/Asset%20Forfeiture_FINAL-1.pdf.

THE DEATH PENALTY

CAs have the sole authority to decide whether to seek the death penalty. While an average of more than 20 capital murder cases per year are brought across the Commonwealth, there has not been a death sentence in Virginia since 2011.²⁰ Most capital murder cases no longer go to trial; as one Richmond law professor put it, “Virginia’s death penalty functions primarily as a bargaining chip in a plea negotiation process that resolves most capital litigation with sentences less than death.”²¹ Virginia’s prosecutors rarely obtain a death sentence in capital murder cases, but they still use the death penalty as a tool to bully defendants into pleading guilty in exchange for a sentence of life without parole.

Because Virginia’s death penalty laws fail to protect the innocent, the intellectually disabled, and the mentally ill from being convicted, and because the punishment is arbitrarily applied based on where the crime was committed or who the victim is rather than the seriousness of the offense, and because the method of execution cannot meet constitutional standards, the ACLU advocates for the total abolition of the death penalty. If all of Virginia’s 120 CAs believed that the death penalty was no longer worth its enormous cost to society and decided never to seek capital murder charges, they could end Virginia’s death penalty tomorrow.

Questions to ask your CA:

➤ **How often have you sought the death penalty? Of those cases, how many times was the defendant sentenced to death?**

➤ **Do you support a repeal of the death penalty?**

Read more about the death penalty:

<https://acluva.org/15718/virginias-botched-death-penalty-system/>

<https://www.aclu.org/issues/capital-punishment>

BODY-WORN CAMERAS

Body-worn cameras represent an important development in discovering the truth in police-citizen interactions. Law enforcement agencies have recognized that body cams can benefit police, too, because citizens are less likely to make complaints about an officer if a body cam was used.

One major problem with the implementation of body cams, however, is that unless law enforcement agencies use consistent, well-conceived policies, citizens cannot know what to expect. Our recent report on body cams, “Getting to Win-Win,” showed that Virginia’s law enforcement agencies have vastly different policies on how to use body cams, including when they are turned on and off and whether the person being filmed or the public has access to the videos made.

We believe Virginia should adopt a uniform policy that demands police accountability, while protecting the privacy of individuals and the public’s right to know. This will require changes to state privacy laws and the Virginia Freedom of Information Act. CAs, who are often the ones to view body cam videos, are in a unique position to advocate for a strong, uniform body cam policy throughout the Commonwealth. To date, the VACA and individual CAs have stood in the way of developing uniform statewide policies rather than support their enactment.

Questions to ask your CA:

Do our local law enforcement agencies use body-worn cameras?

If so, do those agencies have policies that protect privacy and the public’s right to know?

Read more about body-worn cameras:

Getting to Win-Win: The Use of Body-Worn Cameras in Virginia Policing,
<https://acluva.org/bodycams/>

<https://www.aclu.org/blog/accountability-vs-privacy-aclus-recommendations-police-body-cameras>

CRIMINAL DISCOVERY

If you're charged with a crime in Virginia, you do not have the right to see any official police reports before your trial. You and your attorney do not have the right to see a list of the witnesses who will testify against you, or what those witnesses have said. This is trial by ambush, because your attorney will not have the proper tools to advise or defend you.

Virginia's restrictive criminal discovery rules created the system of trial by ambush by allowing CAs to withhold critical information from the defense. Recent exonerations of innocent defendants who spent decades in prison show, however, that justice is better served when more information is shared, not less. Some CAs recognize this important principle and share as much information as they can. The result, however, is that whether a person has access to basic information about a criminal case depends on where he or she is being prosecuted.

For years, many CAs have resisted efforts to reform Virginia's criminal discovery rules. Virginia's longest-serving prosecutor, Paul Ebert, once testified in federal court that he intentionally does not share information because he's afraid defendants will use it to "fabricate" a defense.²² Meanwhile, Texas and North Carolina improved their discovery rules only after several high-profile wrongful convictions.²³ Rather than wait for more of these cases, CAs should take the lead in reforming Virginia's criminal

discovery rules. Unfortunately, however, despite the participation of CA representatives on a task force that recommended some changes in the rules, VACA and individual CAs actively lobbied the Virginia Supreme Court not to adopt the recommended changes in the discovery rules that would have given all defendants a fairer opportunity to view the evidence against them before trial.

Questions to ask your CA:

- **Do you share police reports, witness lists, and witness statements with defense attorneys before trial?**
- **If not, aren't you afraid that this could lead to wrongful convictions?**
- **If not, aren't you afraid that this could lead to wrongful convictions?**

Read more about criminal discovery:

<https://acluva.org/17355/change-criminal-discovery-rules-to-end-trial-by-ambush-in-the-commonwealth/>

<https://www.aclu.org/blog/brady-reform-new-legislation-win-justice>

MARIJUANA LAWS

Since 2012, four states and the District of Columbia have legalized the possession of marijuana.²⁴ Fifteen other states have decriminalized marijuana, which takes the possession of the drug out of the criminal justice system by making it a civil infraction – like a parking ticket.

As state marijuana laws go, Virginia's are among the harshest. A first offense of marijuana possession can result in 30 days behind bars and a \$500 fine.²⁵ A second offense is a Class 1 misdemeanor, punishable by up to 12 months in jail and a \$2,500 fine.²⁶ Possession of more than half an ounce of marijuana with the intent to sell or distribute it is a Class 5 felony, punishable by up to 10 years in prison.²⁷

Marijuana laws disproportionately impact black people, even though blacks and whites use marijuana at roughly the same rate. In Virginia, for example, blacks are 3.3 times more likely to be arrested for marijuana possession than white people.²⁸

In the last two years, several legislators have introduced bills to decriminalize marijuana possession in the Commonwealth. If prosecutors supported these bills, they would have a much better chance of passing the General Assembly.

Questions to ask your CA:

- **How many people has your office prosecuted for marijuana possession in the last year? What percentage of those defendants were black?**
- **Does prosecuting people for marijuana possession make our community safer, or would time and resources be better spent on more serious crimes?**
- **Will you support the decriminalization of marijuana when you meet with other prosecutors and at the next General Assembly session?**

Read more about marijuana laws:

<https://acluva.org/16507/why-virginia-should-decriminalize-marijuana/>

<https://www.aclu.org/feature/war-marijuana-black-and-white>

GRAND LARCENY THRESHOLD

In Virginia, theft of property valued at more than \$200 is a felony, punishable by up to 20 years in prison.²⁹ This \$200 amount, known as the grand larceny threshold, is the lowest in the nation (tied with New Jersey), and has not changed since 1980.³⁰ CAs have the sole discretion whether to seek a felony or a misdemeanor conviction for theft.

A felony conviction is permanent, and the consequences are significant. Upon conviction, a person with a felony loses the right to vote, the right to serve on a jury, and the right to seek public office. A felony conviction can mean the end of federal benefits, such as public housing or student loans. A person with a felony conviction also faces serious barriers to employment, such as the ability to seek certain business licenses. According to an American Bar Association website,³¹ a grand larceny conviction in Virginia carries 74 of these collateral consequences.

Other states have raised their larceny thresholds without any measurable effect on theft rates.³² An increase in the larceny threshold is good for public safety because it helps keep nonviolent offenders out of the state prison system, allows for community-based responses that are more likely to prevent

recidivism, and prevents the imposition of legal and political disabilities associated with a felony conviction. Such disabilities make us all less safe by giving the person convicted fewer real opportunities to get a job and reengage with the community a positive way.

Questions to ask your CA:

➤ **Do you seek felony convictions for all people who steal more than \$200 worth of property? If you do for some and not others, what distinctions do you draw that allow different treatment of people accused of similar crimes?**

➤ **Do you support raising the grand larceny threshold? Will you support raising the grand larceny threshold when you meet with other prosecutors and at the next General Assembly session?**

Read more about grand larceny threshold:

<https://acluva.org/16674/virginias-felony-larceny-threshold-is-stuck-in-1980/>

Other questions to ask your CA:

- »» Do you support bringing back parole as an incentive for prisoners to rehabilitate themselves?**
- »» At what age do you believe it's appropriate to try a juvenile as an adult? Why, and for which offenses?**
- »» Have you ever recommended that a juvenile defendant be sentenced to life without parole?**
- »» Do you support the use of mandatory minimum sentences?ⁱ If so, when and how often do you use them?**
- »» Do you allow offenders to use drug court?ⁱⁱ Does it work?**
- »» Do you support the creation of diversion programsⁱⁱⁱ that would allow defendants with substance abuse problems to get treatment instead of being charged with a crime?**
- »» Do 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?**
- »» Would you prosecute a police officer who shot an unarmed person?**

ⁱ For more information on mandatory minimum sentences, visit <http://famm.org/mandatory-minimums/>.

ⁱⁱ For more information on drug courts, visit <http://www.nij.gov/topics/courts/drug-courts/pages/welcome.aspx>. For more information on drug courts in Virginia, visit <http://www.courts.state.va.us/court-admin/aoc/djs/programs/dtc/home.html>.

ⁱⁱⁱ For more information on substance abuse and mental health diversion programs, visit http://www2.centerforhealthandjustice.org/sites/www2.centerforhealthandjustice.org/files/publications/CHJ%20Diverison%20Report_web.pdf.

RECOMMENDATIONS AND STEPS YOU CAN TAKE

Commonwealth's attorneys have unparalleled power over Virginia's criminal justice system. They exercise this power through prosecutorial discretion and by lobbying lawmakers in Richmond. Because of uncontested and off-off-year elections, most CAs are not held accountable by the public they serve.

To fix Virginia's criminal justice system, this broken arrangement must change. Here are three recommendations to make it happen, along with concrete actions you can take.

RECOMMENDATION #1 – A NEW CULTURE OF ENGAGEMENT BETWEEN VOTERS AND CAs.

Once they learn how much power CAs have, voters should engage these public officials in conversations about how to improve Virginia's criminal justice system. The ACLU of Virginia will help by sponsoring and co-sponsoring forums to bring voters and CAs together to talk about criminal justice issues. The media can play an important role through the coverage of such events, as well as CA elections.

STEPS YOU CAN TAKE:

- Find out who your local Commonwealth's attorney is.
- Get to know your CA. Find a group of voters interested in criminal justice reform and invite your CA to come talk with you.
- Ask your CA to support positive changes that will reduce incarceration rates, and make communities safer.

RECOMMENDATION #2 – CULTIVATION OF CA CANDIDATES WHO SUPPORT CRIMINAL JUSTICE REFORMS.

One powerful solution to the problem of uncontested elections is the cultivation of reform-minded candidates who will run for office. Lawyers with a strong interest in public service and changing the system should consider challenging CAs who have become obstacles to reform.

STEPS YOU CAN TAKE:

- Talk to attorneys who live in your city or county about criminal justice reform.
- If you're not satisfied with the CA you have, make sure the CA knows that you will not support his or her reelection unless the CA supports reforms you support. Seek out and support candidates to run for CA who do support criminal justice reform.

RECOMMENDATION #3 – INCREASE VOTER TURNOUT.

STEPS YOU CAN TAKE:

- Talk to your friends, colleagues and business associates about the importance of voting in state and local elections, including, especially, elections of Commonwealth's attorneys.

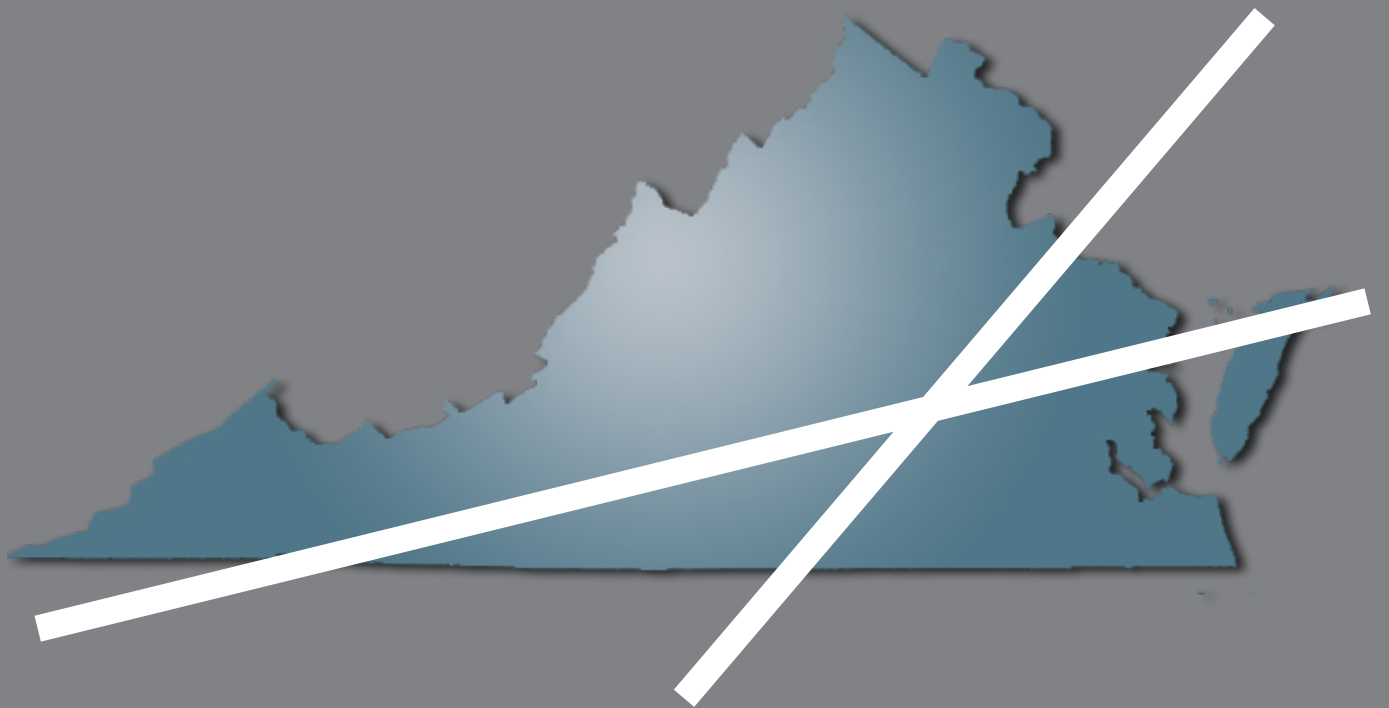
CONCLUSION

The United States leads the world in incarcerating its own people. The 40-year-old War on Drugs is a massive failure that continues to wreak havoc on communities of color. Numerous killings of unarmed citizens by police officers have sown distrust between law enforcement and the public. Our jails and prisons remain hell-bent on punishment, rather than rehabilitation.

In the last few years, the criminal justice system has finally started to get the attention it deserves. Folks across the political spectrum have called for much-needed reforms. The public is largely supportive of sweeping changes to move the system in a new direction.

With unparalleled power, Commonwealth's attorneys should advocate for reforms to Virginia's broken criminal justice system. Voters should engage their elected officials, including CAs, in discussions about criminal justice policy. Advocacy groups and the media can play an important role by bringing CAs and voters together and spreading the word to the public at large.

The interactions between CAs and the voters who put them in office may decide whether Virginia enacts meaningful criminal justice reforms. By engaging with CAs, cultivating reform-minded candidates, and showing up to the polls, voters can reclaim the power and change a broken criminal justice system.



BACKGROUND AND METHODOLOGY

Virginia has 120 Commonwealth's attorneys. Twenty-five cities have CAs that serve only one city. Eighty-three counties have CAs that serve only one county. Twelve counties have CAs that serve one county, plus one or more cities. Each of the 120 Commonwealth's attorneys are elected to four-year terms. There are no limits on the number of terms a CA may serve.

Elections for CAs are staggered. Like elections for other Virginia public officials, CA elections occur in odd-numbered years. The 83 CAs who exclusively serve a county and the 12 CAs who serve a county and one or more cities are elected the same year as the House of Delegates and Virginia Senate.³³ These elections were held in 2007, 2011, and 2015, and the next one will occur in 2019. The 25 CAs who exclusively serve a city are elected the same year as the governor, lieutenant governor, attorney general, and the House of Delegates. These elections were held in 2005, 2009, and 2013, and the next one will occur in 2017.

When a CA leaves office for any reason (other than military service), the locality must hold a prompt special election to fill the vacancy.³⁴ The highest-ranking assistant CA assumes the office until the special election is held.

CA elections can be partisan, though independents comprise nearly half of all current CAs (see List of Current CAs on pages 24-26). Between 2005 and 2015, there were only 11 CA primaries held in nine jurisdictions; six were Republican and five were Democratic. No jurisdiction held both a Democratic and a Republican primary for Commonwealth's attorney between 2005 and 2015.

We wanted to learn how often Commonwealth's attorneys run for office uncontested. We also wanted to learn the impact of Virginia's off-off-year elections on voter turnout in CA elections. We examined CA elections from 2005–2015, which includes three complete election cycles.

Most of the data was obtained from the Virginia Department of Elections (VDE) website, <http://historical.elections.virginia.gov/>, which provides detailed information about historical CA elections. Although the site lists elections dating back to 1924, the information is less complete for elections before 2007. For the relatively few elections that the VDE website did not provide complete information, we supplemented with information from the websites of local voter registrars, such as the City of Virginia Beach. When party information about a candidate or interim CA was not clear from the VDE website or a registrar's website, we consulted news articles.

While the VDE website provides a wealth of valuable information, the layout does not lend itself to a comparative analysis. For this reason, we transferred the data into spreadsheets that allowed us to analyze the data. Using these spreadsheets, we counted the total number of elections and determined the number of contested and uncontested elections.

To count the total number of elections, we defined “election” to mean the process by which a CA is chosen for a particular locality in a given year. Thus, when a locality held a primary and a general election in the same year, we counted one election, because the winner of a primary election does not assume the office of CA unless that person also wins the general election.

We considered an election to be uncontested if only one person’s name appeared on the ballot and that person received more than 75 percent of the votes cast in the election. For example, in the Dinwiddie County CA election of 2015, Ann C. Baskervill was the only candidate on the ballot but she encountered a significant write-in challenge and won only 55.9 percent of the vote. We considered this a contested election.

If a locality held a contested primary and an uncontested general election in the same cycle, we nonetheless counted the election as contested. For example, the 2006 Richmond CA election included both a June Democratic primary, in which Michael Herring defeated two opponents, and a November general election, in which Herring ran unopposed and won. The 2006 Richmond CA election was contested, because Herring faced two primary opponents. When both the primary and the general election were contested, such as in Stafford County in 2011 and 2015, we of course counted the election as contested. The 2011 Stafford County primary and general election counted as one contested election, as did the 2015 Stafford County primary and general election.

The chart that shows the 48 localities that have not had a contested CA election since 2005 does not necessarily mean that those localities have had the same Commonwealth’s attorney since 2005. For instance, William Petty won an uncontested election for Lynchburg CA in 2005. When he took a seat on the Virginia Court of Appeals in 2006, a special election was called. Mike Doucette won that uncontested special election, and has since won two more uncontested elections, in 2009 and 2013. Thus, Lynchburg is one of the 48 localities included in the chart.

We compiled the List of Current CAs along with the year that each CA was first elected because no such list was readily available. We obtained this information from a variety of sources: official CA websites and Facebook pages, voter registrars, staff at the Commonwealth’s Attorney’s Services Council, online news articles, and from the *Richmond Times-Dispatch* on microfilm at the Library of Virginia. In a few situations, when the information was particularly elusive, we spoke directly with the Commonwealth’s attorneys themselves.

LIST OF CURRENT CAs (June 2016), by Jurisdiction

JURISDICTION	CA	PARTY	FIRST ELECTED/ TOOK OFFICE	YEARS IN OFFICE
Accomack	Gary Agar	D	1987	29
Albemarle	Robert Tracci	R	2015	1
Alleghany/Covington city	Ed Stein	I	2003	13
Amelia	Lee Harrison	I	2000	16
Amherst	Lyle Carver	I	2015	1
Appomattox	Darrel Puckett	I	1999	17
Arlington/Falls Church city	Theo Stamos	D	2011	5
Augusta	Tim Martin	R	2015	1
Bath	John "Chris" Singleton	I	1975 ^a	32
Bedford	Wes Nance ^b	R	2016	0
Bland	Patrick White	R	2015	1
Botetourt	Joel Branscom	R	1996	20
Brunswick	Lezlie Green	I	1995	21
Buchanan	Gerald D. Arrington	D	2011	5
Buckingham	E.M. Wright Jr.	I	1976	40
Campbell	Paul McAndrews	I	2011	5
Caroline	John Mahoney	I	2015	1
Carroll	Nathan H. Lyons	R	2011	5
Charles City	Robert H. Tyler	I	2007	9
Charlotte	William E. Green Jr.	I	1999	17
Chesterfield	Billy Davenport	R	1987	29
Clarke	Suzanne Mackall	D	1998	18
Craig	Thaddeus Cox	I	1984	32
Culpeper	Paul R. Walther	R	2015	1
Cumberland	Patricia Scales	D	1995	21
Dickenson	Seth Baker	D	2015	1
Dinwiddie	Ann Cabell Baskervill	I	2015	1
Essex	Vince Donoghue	R	2011	5
Fairfax/Fairfax city	Ray Morrogh	D	2007	9
Fauquier	James P. Fisher	R	2011	5
Floyd	Eric Branscom	R	2015	1
Fluvanna	Jeffrey W. Haislip	I	2000	16
Franklin	A.J. Dudley Jr.	I	2015	1
Frederick	Ross P. Spicer	R	2013	3
Giles	Robert M. Lilly Jr.	I	2011	5
Gloucester	Holly Smith	R	2011	5
Goochland	Claiborne H. Stokes ^c	R	2004	12
Grayson/Galax city	Douglas Vaught	I	2011	5
Greene	Ron Morris	I	2000	16
Greensville/Emporia city	Patricia T. Watson	I	2000	16
Halifax	Tracy Quackenbush Martin	I	2015	1

^aSingleton served as CA from 1975-83, and again from 1992-present.

^bInterim CA; Randy Krantz (R) was named a General District Court judge in March 2016.

^cWas named a General District Court judge in March; term starts July 1, 2016.

LIST OF CURRENT CAs (June 2016), by Jurisdiction

JURISDICTION	CA	PARTY	FIRST ELECTED/ TOOK OFFICE	YEARS IN OFFICE
Hanover	R.E. "Trip" Chalkley III	R	2007	9
Henrico	Shannon Taylor	D	2011	5
Henry	M. Andrew Nester	I	2015	1
Highland	Melissa Ann Dowd	I	2007	9
Isle of Wight	Georgette Phillips	I	2014	2
James City/Williamsburg city	Nate Green	R	2007	9
King & Queen	Charles Adkins	I	1999	17
King George	Keri Gusmann	I	2012	4
King William	Matthew R. Kite	I	2011	5
Lancaster	Jan Smith	I	2015	1
Lee	H. Fuller Cridlin	D	2015	1
Loudoun	Jim E. Plowman	R	2003	13
Louisa	Rusty McGuire	R	2011	5
Lunenburg	Robert Clement	I	1981	35
Madison	Clarissa T. Berry	I	2015	1
Mathews	Tom Bowen III	I	2011	5
Mecklenburg	Nora J. Miller ^d	I	2004	12
Middlesex	Michael T. Hurd	I	2007	9
Montgomery	Mary Pettitt	R	2012	4
Nelson	Jerry Gress ^e	D	2016	0
New Kent	Linwood Gregory	I	1993	23
Northampton	Bruce Jones	I	1991	25
Northumberland	Jane B. Wrightson	I	2009	7
Nottoway	Theresa J. Royall	I	2012	4
Orange	Diana Wheeler	I	2003	13
Page	Kenneth L. Alger II	R	2011	5
Patrick	Stephanie Brinegar-Vipperman	I	2011	5
Pittsylvania	Robert "Bryan" Haskins	R	2014	2
Powhatan	Richard "Dickie" Cox	I	2015	1
Prince Edward	Megan Clark	D	2015	1
Prince George	Susan M. O'Prandy Fierro	R	2015	1
Prince William/Manassas city/ Manassas Park city	Paul B. Ebert	D	1968	48
Pulaski	K. Mike Fleenor Jr.	D	1999	17
Rappahannock	Arthur Goff	I	2011	5
Richmond	Elizabeth A. "Libby" Tribble	I	2015	1
Roanoke	Edwin R. "Randy" Leach	R	2003	13
Rockbridge/Lexington city	Chris Billias	R	2015	1
Rockingham/Harrisonburg city	Marsha Garst	R	1999	17

^dWas named a Juvenile and Domestic Relations Court judge in March 2016; term starts July 1, 2016. R. Allen Nash will become interim CA when Miller resigns to assume her judgeship.

^eInterim CA; Anthony Martin (D) resigned in January 2016.

LIST OF CURRENT CAs (June 2016), by Jurisdiction

JURISDICTION	CA	PARTY	FIRST ELECTED/ TOOK OFFICE	YEARS IN OFFICE
Russell	Brian Patton	D	2009	7
Scott	Marcus McClung	R	2003	13
Shenandoah	Amanda McDonald Wiseley	I	2011	5
Smyth	Roy F. Evans Jr.	D	1987	29
Southampton/Franklin City	Eric Cooke	D	2003	13
Spotsylvania	Travis Bird	R	2015	1
Stafford	Eric L. Olsen	R	2011	5
Surry	Derek A. Davis	I	2015	1
Sussex	Lyndia Person Ramsey	I	2003	13
Tazewell	Mike Dennis	D	2015	1
Warren	Brian Madden	R	2003	13
Washington	Josh Cumbow	D	2015	1
Westmoreland	Julia Hutt Sichol	I	2011	5
Wise/Norton city	Chuck Slempp	R	2015	1
Wythe	Jerry Mabe	R	2005	11
York/Poquoson city	Ben Hahn	R	2011	5
Alexandria city	Bryan Porter	D	2013	3
Bristol city	Jerry Wolfe	R	2005	11
Buena Vista city	Christopher Russell	I	2004	12
Charlottesville city	Dave Chapman	D	1993	23
Chesapeake city	Nancy Parr	R	2005	11
Colonial Heights city	William "Bill" Bray	I	2005	11
Danville city	Michael J. Newman	I	2009	7
Fredericksburg city	La Bravia Jenkins	I	2008	8
Hampton city	Anton Bell	D	2012	4
Hopewell city	Rick Newman	I	2009	7
Lynchburg city	Michael Doucette	I	2006	10
Martinsville city	H. Clay Gravely IV	I	2013	3
Newport News city	Howard Gwynn	D	1990	26
Norfolk city	Greg Underwood	D	2009	7
Petersburg city	Cassandra S. Conover	D	1991	25
Portsmouth city	Stephanie Morales	I	2015	1
Radford city	Chris Rehak	D	2004	12
Richmond city	Michael Herring	D	2006	10
Roanoke city	Don Caldwell	D	1979	37
Salem city	Tom Bowers	I	2005	11
Staunton city	Raymond Robertson	D	1971	45
Suffolk city	C. Phillips "Phil" Ferguson	I	1978	38
Virginia Beach city	Colin Stolle	R	2013	3
Waynesboro city	David Ledbetter	I	2014	2
Winchester city	Marc Abrams	I	2015	1

Independents: 57

| Republicans: 35

| Democrats: 28

LIST OF CURRENT CAs (June 2016), by Tenure

CA	Jurisdiction	PARTY	YEARS IN OFFICE
Paul B. Ebert	Prince William/Manassas city/ Manassas Park city	D	48
Raymond Robertson	Staunton city	D	45
E.M. Wright Jr.	Buckingham	I	40
C. Phillips "Phil" Ferguson	Suffolk city	I	38
Don Caldwell	Roanoke city	D	37
Robert Clement	Lunenburg	I	35
John "Chris" Singleton	Bath	I	32
Thaddeus Cox	Craig	I	32
Gary Agar	Accomack	D	29
Billy Davenport	Chesterfield	R	29
Roy F. Evans Jr.	Smyth	D	29
Howard Gwynn	Newport News city	D	26
Bruce Jones	Northampton	I	25
Cassandra S. Conover	Petersburg city	D	25
Linwood Gregory	New Kent	I	23
Dave Chapman	Charlottesville city	D	23
Lezlie Green	Brunswick	I	21
Patricia Scales	Cumberland	D	21
Joel Branscom	Botetourt	R	20
Suzanne Mackall	Clarke	D	18
Darrel Puckett	Appomattox	I	17
William E. Green Jr.	Charlotte	I	17
Charles Adkins	King & Queen	I	17
K. Mike Fleenor Jr.	Pulaski	D	17
Marsha Garst	Rockingham/Harrisonburg city	R	17
Lee Harrison	Amelia	I	16
Jeffrey W. Haislip	Fluvanna	I	16
Ron Morris	Greene	I	16
Patricia T. Watson	Greensville/Emporia city	I	16
Ed Stein	Alleghany/Covington city	I	13
Jim E. Plowman	Loudoun	R	13
Diana Wheeler	Orange	I	13
Edwin R. "Randy" Leach	Roanoke	R	13
Marcus McClung	Scott	R	13
Eric Cooke	Southampton/Franklin City	D	13
Lyndia Person Ramsey	Sussex	I	13
Brian Madden	Warren	R	13
Claiborne H. Stokes	Goochland	R	12
Nora J. Miller	Mecklenburg	I	12
Christopher Russell	Buena Vista city	I	12
Chris Rehak	Radford city	D	12
Jerry Mabe	Wythe	R	11

LIST OF CURRENT CAs (June 2016), by Tenure

CA	Jurisdiction	PARTY	YEARS IN OFFICE
Jerry Wolfe	Bristol city	R	11
Nancy Parr	Chesapeake city	R	11
William "Bill" Bray	Colonial Heights city	I	11
Tom Bowers	Salem city	I	11
Michael Doucette	Lynchburg city	I	10
Michael Herring	Richmond city	D	10
Robert H. Tyler	Charles City	I	9
Ray Morrogh	Fairfax/Fairfax city	D	9
R.E. "Trip" Chalkley III	Hanover	R	9
Melissa Ann Dowd	Highland	I	9
Nate Green	James City/Williamsburg city	R	9
Michael T. Hurd	Middlesex	I	9
La Bravia Jenkins	Fredericksburg city	I	8
Jane B. Wrightson	Northumberland	I	7
Brian Patton	Russell	D	7
Michael J. Newman	Danville city	I	7
Rick Newman	Hopewell city	I	7
Greg Underwood	Norfolk city	D	7
Theo Stamos	Arlington/Falls Church city	D	5
Gerald D. Arrington	Buchanan	D	5
Paul McAndrews	Campbell	I	5
Nathan H. Lyons	Carroll	R	5
Vince Donoghue	Essex	R	5
James P. Fisher	Fauquier	R	5
Robert M. Lilly Jr.	Giles	I	5
Holly Smith	Gloucester	R	5
Douglas Vaught	Grayson/Galax city	I	5
Shannon Taylor	Henrico	D	5
Matthew R. Kite	King William	I	5
Rusty McGuire	Louisa	R	5
Tom Bowen III	Mathews	I	5
Kenneth L. Alger II	Page	R	5
Stephanie Brinegar-Vipperman	Patrick	I	5
Arthur Goff	Rappahannock	I	5
Amanda McDonald Wiseley	Shenandoah	I	5
Eric L. Olsen	Stafford	R	5
Julia Hutt Sichol	Westmoreland	I	5
Ben Hahn	York/Poquoson city	R	5
Mary Pettitt	Montgomery	R	4
Theresa J. Royall	Nottoway	I	4
Keri Gusmann	King George	I	4
Anton Bell	Hampton city	D	4
Ross P. Spicer	Frederick	R	3
Bryan Porter	Alexandria city	D	3
H. Clay Gravely IV	Martinsville city	I	3

LIST OF CURRENT CAs (June 2016), by Tenure

CA	Jurisdiction	PARTY	YEARS IN OFFICE
Colin Stolle	Virginia Beach city	R	3
Georgette Phillips	Isle of Wight	I	2
Robert "Bryan" Haskins	Pittsylvania	R	2
David Ledbetter	Waynesboro city	I	2
Robert Tracci	Albemarle	R	1
Lyle Carver	Amherst	I	1
Tim Martin	Augusta	R	1
Patrick White	Bland	R	1
John Mahoney	Caroline	I	1
Paul R. Walther	Culpeper	R	1
Seth Baker	Dickenson	D	1
Ann Cabell Baskervill	Dinwiddie	I	1
Eric Branscom	Floyd	R	1
A.J. Dudley Jr.	Franklin	I	1
Tracy Quackenbush Martin	Halifax	I	1
M. Andrew Nester	Henry	I	1
Jan Smith	Lancaster	I	1
H. Fuller Cridlin	Lee	D	1
Clarissa T. Berry	Madison	I	1
Richard "Dickie" Cox	Powhatan	I	1
Megan Clark	Prince Edward	D	1
Susan M. O'Prandy Fierro	Prince George	R	1
Elizabeth A. "Libby" Tribble	Richmond	I	1
Chris Billias	Rockbridge/Lexington city	R	1
Travis Bird	Spotsylvania	R	1
Derek A. Davis	Surry	I	1
Mike Dennis	Tazewell	D	1
Josh Cumbow	Washington	D	1
Chuck Slemp	Wise/Norton city	R	1
Stephanie Morales	Portsmouth city	I	1
Marc Abrams	Winchester city	I	1
Wes Nance	Bedford	R	0
Jerry Gress	Nelson	D	0

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NOTES

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¹² VA. CODE ANN. § 15.2-1627.

¹³ Rule 3.8, Virginia Rules of Professional Conduct, <http://www.vsb.org/pro-guidelines/index.php/rules/advocate/rule3-8/>.

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