

February 28, 2023

Dear Members of the AB 3121 Task Force,

I am honored and privileged to share my insights with you.¹ I read the interim Task Force Report² [hereinafter “Report”] when it was first published and then again in early January when I was putting together course material for the advanced administrative law seminar I teach. The Report is—and I cannot stress this strongly enough—a signature achievement. It struck me as such in June 2022, and if anything, strikes me as even more valuable in the instant moment.

But, of course, we’re all here because a report, however magisterial, isn’t sufficient. Not by a longshot, particularly given how difficult it has been for other reparations movements (both in the United States and globally) to gain legislative support. The recommendations and prescriptions included in the Report rightly commend further legislative action. As I understand my role, it is to consider questions of institutional design, implementation and administration—that is, how can the Task Force best translate these new initiatives into durable, legible, legitimate, and readily accessible programs.³ Such questions may seem overly wonky or distracting, especially to audiences understandably focused on what substantive services, programs, and benefits will or won’t be included. But no matter how inspired a substantive reparations package may be, its ultimate success depends critically on careful institutional design and a thoughtful governance strategy.⁴

What follows is an overview of some of the principal design and governance issues that I believe warrant consideration. The ordering of this memorandum is top-down: from a proposed agency’s

¹ I am a [Professor of Law at UCLA School of Law](#), where I write on a range of public law subjects and teach a variety of courses, including ones on administrative law and design. In readying me for this hearing, four UCLA Law students—Ariana Diverio, Tristan Heart-Myers, Omar Jishi, and Sarah Stebbins—rendered invaluable assistance, and colleagues Blake Emerson and Alex Wang provided critical counsel.

² Interim Report, California Task Force to Study and Develop Reparation Proposals for African Americans (Jun. 2022), <https://oag.ca.gov/system/files/media/ab3121-reparations-interim-report-2022.pdf>.

³ Given my charge, I leave to the side discussions of federal and state constitutional questions or possible challenges. Also omitted from my memorandum is any consideration of what specific designs, funding streams, or the like require explicit popular endorsement—*e.g.*, via a ballot initiative or referendum—as opposed to legislative approval.

⁴ One cannot help but recall the late Congressman John Dingell’s infamous line “I’ll let you write the substance... you let me write the procedure, and I’ll screw you every time.” Regulatory Reform Act: Hearings on H.R. 2327 Before the Subcomm. on Admin. Law and Governmental Relations of the H. Comm. on the Judiciary, 98th Cong. 312 (1983).

architecture, to staffing, to public engagement. At the risk of overstepping my charge, I've not shied away from sharing my own reactions, recommendations, and some warnings.

I. Institutional Architecture

The Report proposes the establishment of a cabinet-level secretary position over a California African American/Freedmen Affairs Agency [hereinafter "CFAA"⁵].

I believe that a "brick-and-mortar" agency of the sort the Task Force seemingly contemplates is indeed prudent, especially in light of the myriad divisions, offices, and bureaus prescribed in the Report.

It is of course true that new initiatives need not be carried out through new, freestanding agencies. Responsibilities as rangy as those described in the Report could be divvied up and assigned to legacy agencies, including the state departments of Justice, Health and Human Services, Corrections, Education, Environmental Protection, and the like.⁶ Responsibilities could be outsourced and administered through a web of contractors in keeping with some of the preferred "business-like government" approaches popularized at the end of the twentieth century. Responsibilities could be turned over to a quasi-private foundation or trust. Needless to add, it's just as conceivable, if not even more plausible, that some combination or amalgam of what I've just characterized as discrete and siloed alternatives could take root.

⁵ While I take no strong position on the prudence and propriety of "Freedmen" versus "African American" (and for these purposes leave to the side any reservations I may have regarding the gendering of an otherwise inclusive beneficiary community), I would note that labeling and, dare I say, *branding* matters. Because what you're undertaking will be, in my estimation, a model for the nation and possibly a global template, it may behoove this Task Force to emphasize the "C" regardless whether you recommend the beneficiary population be described as African American or Freedmen. While "FAA" is already widely associated with the Federal Aviation Administration, the CFAA is far more likely to be quickly associated with this particular initiative. (CFAA does make me think of the (federal) Computer Fraud and Abuse Act, but that statute and its acronym surely have very little public resonance, certainly far less than the FAA.) I don't readily associate AAAA with anything in particular; but, again, because I am attracted to stamping the "C" at the front of whatever acronym, I'll just note that CAAAA is quite the mouthful. Needless to underscore, these are all idiosyncratic reactions and ought to be treated as nothing more.

⁶ A potentially sprawling agency is, of course, not without its challenges. See Dara Kay Cohen, Mariano-Florentino Cuellar & Barry Weingast, *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 STAN. L. REV. 673 (2006). The problems associated with the federal Department of Homeland Security [hereinafter DHS] do indeed weigh on my mind. But that's principally because we have so few data points for the creation of new, twenty-first century agencies rather than because there are substantive, structural, or even contextual similarities between DHS and a proposed CFAA. One could just as easily look to the Freedmen's Bureau and note, with Dr. DuBois, that "the comprehensiveness of the Bureau functions as a virtue: only such a multi-institutional approach could hope to address the deep problem of racial subordination, as its roots stretched across the grounds of social life." BLAKE EMERSON, *THE PUBLIC'S LAW* 70-71 (2019) (capturing the essence of DuBois's analysis of the Freedmen's Bureau).

Some of these alternatives are not unattractive—and may have the support of important stakeholders. Compared to a new, freestanding brick-and-mortar agency, these alternatives might well be less expensive, at least at the outset. What’s more, if tasks are delegated to already up-and-running agencies, reparations programs might be put into effect more quickly. If the state were to rely on contractors or on a foundation, there likely would be more flexibility in hiring and firing (and recruiting and retaining) staff; there might also be the perceived advantage of operating pursuant to fewer regulatory requirements (what some might pejoratively label “red tape”⁷). Additionally, there might be less political backlash, if only because the diffusion of responsibilities and the avoidance of explicitly labeling various initiatives as “CFAA programs” could blunt some of the clumsier attacks.⁸

All of these supposed benefits are, however, fleeting, outweighed by countervailing considerations, or not actually salutary in design or operation. Below I list some reasons to be wary of the alternatives.⁹

Constantly pushing initiatives through legacy agencies is, ultimately, incredibly taxing. Whatever upfront benefits may be achieved by leveraging the resources of already operational agencies are likely to be offset over time by the costs associated with having to request, urge, and nudge those agencies to give due attention to reparations projects. Even if those agencies are institutionally capable of supporting reparations work and even if the personnel who staff those agencies are enthusiastic about reparations, leaders and career personnel alike may nonetheless feel compelled to give priority to their agency’s longstanding commitments, defined missions, and already extant beneficiary communities—quite possibly at the expense

⁷ See, e.g., AL GORE, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS i–iv (1993); DAVID OSBORNE AND TED GAEBLER, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR xv–xxii (1992). Those accounts, in my estimation, pay particularly short shrift to socioeconomic and racial power asymmetries and how informality privileges those with the most political, economic, or social capital. They thus undervalue the importance of careful, deliberative, and highly regularized public administration as a special safeguard for those with the least political, economic, or social capital as well as for those from historically disadvantaged or subordinated populations. Cf. Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 20 HARV. C.R.-C.L. L. REV. 401 (1987).

⁸ I use political attacks in the conventional sense—namely, lobbying and advocacy to scale back the Reparations initiatives. But in today’s political climate, one cannot discount the likelihood of political opposition morphing into political violence. See Rachel Kleinfeld, *The Rise of Political Violence in the United States*, 32 J. DEM. 160 (2021), <https://www.journalofdemocracy.org/articles/the-rise-of-political-violence-in-the-united-states/>; Melanie Mason & David Lauter, “*We are a Tinderbox:*” *Political Violence is Ramping Up, Experts Warn*, L.A. TIMES (Oct. 30, 2022), <https://www.latimes.com/politics/story/2022-10-30/paul-pelosi-attack-in-california-political-violence>; *America Can Have Democracy or Political Violence. Not Both*, N.Y. TIMES (Nov. 3, 2022), <https://www.nytimes.com/2022/11/03/opinion/political-violence-extremism.html>.

⁹ Much of my scholarly work over the past fifteen years has centered on how best to design, staff, and fund American administrative agencies. Much of what follows in this section, as well as the others, is informed by JON D. MICHAELS, CONSTITUTIONAL COUP (2017); Jon D. Michaels, *We the Shareholders: Government Market Participation in the Postliberal U.S. Political Economy*, 120 COLUM. L. REV. 465 (2020); Jon D. Michaels, *Running Government as a Business... Then and Now*, 128 HARV. L. REV. 1152 (2015); Jon D. Michaels, *Privatization’s Progeny*, 101 GEO. L.J. 1023 (2013); Jon D. Michaels, *The American Deep State*, 93 NOTRE DAME L. REV. 1653 (2018).

of reparations programs and their intended beneficiaries.¹⁰ What's more, a design structure of this sort demands a different kind of CFAA leader. Were responsibilities farmed out among the agencies, a CFAA "czar" overseeing implementation would be selected based on that individual's dexterity and experience as a savvy, perhaps sharp-elbowed, bureaucratic insider rather than as a public-facing and dynamic messenger of a project that may well serve as a model for the rest of the nation.

Likewise, I would caution against undue reliance on contractors. The late-twentieth century/early twenty-first century bipartisan enthusiasm for businesslike government has never consistently produced the promised cost-savings or efficiencies.¹¹ Overseeing contractor waste, fraud, and abuse is, itself, costly (and requires an investment in in-house expert auditors)¹² and thus begs the question whether capturing some of the market's much ballyhooed élan is worth the candle. Additionally, it is, in my estimation, imperative that the state signals its commitment to reparations by investing in and then nurturing in-house expertise while underscoring that the CFAA's mission is, itself, coextensive with public service.¹³

Last, though I doubt the feasibility of turning over reparations responsibilities to a foundation, agencies are increasingly partnering with private trusts; such a co-governance scheme thus bears some mention.¹⁴ I'll circle back to donors, trusts, and foundations in Part VI of this memorandum.

¹⁰ To take full advantage of that talent within the state bureaucracy, recruiting across agencies and/or creating a rather permissive culture of "seconding" personnel to the CFAA should be encouraged. For what it is worth, a significant number of agents working for the federal Freedmen's Bureau were dual assignees—on loan, as it were, from the War Department. See, e.g., John & LaWanda Cox, *General O.O. Howard and the "Misrepresented Bureau,"* 19 J. S. HIST. 427, 443 (1953).

¹¹ A considerable amount of the ostensible savings has come in the form of labor arbitrage; except when we get to the upper tiers of the labor force, privately employed actors generally received lower wages and fewer benefits than their counterparts in federal or state civil service positions. Michaels, *Progeny*. Though some have treated that form of arbitrage as salutary (insisting government employees are wrongly or inefficiently paid "above market" wages, one cannot help but appreciate that supposed above-market government pay is in many respects a valuable cross-subsidy, one that has enabled many to achieve and maintain middle class status, purchase homes, and pay for children's college. Cf. Thomas Meehan, *Moynihan of the Moynihan Report*, N.Y. TIMES (Jul. 31, 1966), <https://www.nytimes.com/books/98/10/04/specials/moynihan-report.html>.

¹² Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717, 729-30 n. 44 (2010) (cataloging reports of traditional service contractor waste, fraud, and abuse).

¹³ Cf. EMERSON, THE PUBLIC'S LAW 115 (understanding the administration of the Freedmen's Bureau as "providing the background conditions... for the active political engagement of all members of the democratic public").

¹⁴ Cf. Margaret H. Lemos & Guy-Uriel Charles, *Patriotic Philanthropy? Financing the State with Gifts to Government*, 106 CAL. L. REV. 1129 (2018); Michaels, *Shareholders* at 498, 518, 529, 533.

II. Personnel—Senior Level

Assuming the Task Force adheres to its tentative recommendation in favor of a freestanding agency, the next consideration would be whether to make the agency head a political appointee or one directly elected like our Attorney General, Secretary of State, etc. It strikes me as imprudent to in any way suggest the CFAA is led by a partisan politician; thus having CFAA heads stand for statewide election (perhaps as a stepping stone to higher office) would therefore send highly problematic signals about an agency that'll likely be heavily scrutinized from the moment of its inception. There are other prudential reasons for steering clear of an elected head. Given how complicated Californian ballots have become and how burdensome it has become to scrutinize a slew of ballot initiatives and evaluate dozens of judicial candidates, it may be best to avoid asking voters to research and select among candidates for yet another highly consequential state office.¹⁵

The question that follows, then, is whether there would be any particular or compelling reason to deviate from the standard appointments and removal processes—that is, selection of the CFAA head by the governor and continuing service of that CFAA head at the governor's "pleasure." For instance, is there a fear that future governors may try to weaken or undermine the work of the CFAA? If so, there might be reason to require, prior to removal, that the governor make a "for cause" determination, attesting to the fact that the CFAA head acted dilatory or derelict in their duties.¹⁶

Whether the Task Force recommends that the governor retain summary removal power, it would be my further recommendation that the CFAA head have appointment and summary removal power over the heads of each of the divisions, offices, or bureaus *except for the reparations tribunal*.

With respect to the aforementioned proposed reparations tribunal, depending on what roles and responsibilities are likely to be assigned to that body, there may be benefits in insulating that office from the rest of the CFAA, including its leadership. The chief reason for doing so turns on questions and perceptions of fundamental fairness. In short, and assuming I'm properly appreciating the general purpose and aims of the proposed tribunal, the Task Force ought to underscore that there will be no policy-based or politically motivated interference with the adjudication of specific claims made against the state, its cities or counties, and/or private institutions. Initial appointments—and perhaps even long-term appointments—to this

¹⁵ There is, of course, the possibility that appointed CFAA head, without their own political base and electoral mandate, would be viewed as less formidable when the CFAA needs to partner with (or compete against) the likes of the Attorney General or Secretary of State—or needs to challenge or confront the governor. But I don't think those risks, however real, outweighs the downsides of putting yet another statewide office holder up for election and outside of the Governor's ambit.

¹⁶ One could go further and draw upon, say, the corporate-like leadership structure of the United States Postal Service, route appointments and removal through, say, a majority vote of the statewide elected officeholders, or assign appointments or removal to some other appointed multimember commission. Absent overriding fears centering on the relationship between the governor and head of the CFAA, though, it doesn't strike me as necessary or proper to get overly cute and experiment with anything too complex or convoluted, particularly as each of those alternative approaches is not without its drawbacks.

tribunal—could be vested in the state Justice Department or any other state entity that is capable of evaluating merit and competence and that functions autonomously from the CFAA.¹⁷

III. Personnel—Staff/Career Level

My recommendation here is, again, fairly straightforward—recruit and hire personnel in a manner consonant with the extant state civil service, albeit with some modest tweaks to the conventional framework.

For starters, in this current political environment, perhaps we cannot assume that a new, freestanding agency would necessarily be staffed by career civil servants. There is a trend, initially pushed by the businesslike government crowd¹⁸ but now additionally championed by those most animated by suspicions of so-called “deep state,”¹⁹ to remove civil service protections for government employees.²⁰ Allegations of civil servant disloyalty are entirely without foundation and seem motivated largely by overt partisanship²¹ or deep-seated antipathy to government.²²

¹⁷ To the extent the Task Force believes the state court system would, for any number of reasons, be unlikely to vindicate just claims, there may be reason to ensure decisions of the tribunal are deemed final. *Cf.* EMERSON, THE PUBLIC’S LAW 69 (noting, with respect to the Freedmen’s Bureau that “Congress provided for the use of federal administrative tribunals to adjudicate employment contract disputes, where ordinary courts had failed to recognize the entitlements of Black workers”).

¹⁸ *See generally* Michaels, CONSTITUTIONAL COUP.

¹⁹ *See generally* PAUL R. VERKUIL, VALUING BUREAUCRACY (2017); Michaels, *American Deep State*.

²⁰ Donald P. Moynihan, *Public Management for Populists: Trump’s Schedule F Executive Order and the Future of the Civil Service*, 82 PUB. ADMIN. REV. 174 (2022); Donald F. Kettl, *Is Government Better When Anyone Can Be Fired Anytime?*, GOVERNING (Aug. 12, 2021), <https://www.governing.com/work/is-government-better-when-anyone-can-be-fired-anytime/>; Erich Wagner, *Trump Has Endorsed a Plan to Purge the Civil Service of “Rogue Bureaucrats,”* GOV. EXEC. (Jul. 27, 2022), <https://www.govexec.com/workforce/2022/07/trump-endorsed-plan-purge-civil-service-rogue-bureaucrats/375028/>. Likely 2024 presidential candidate Ron DeSantis seemingly shares Trump’s views. *See Fox News Interview*, clip available at <https://twitter.com/RonFilipkowski/status/1630543550008946692?s=20>.

²¹ *See* Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 583-87 (2015).

²² *See* Joe Davidson, *GOP Attacks Go Beyond FBI and Elections to Delegitimize Government*, WASH. POST (Aug. 24, 2022), <https://www.washingtonpost.com/politics/2022/08/24/gop-attacks-fbi-doj-government-trump/>; Jon D. Michaels, *The War on Federal Employees*, AM. PROSPECT (Dec. 11, 2017), <https://prospect.org/power/war-federal-employees/>; Philip Rucker & Robert Costa, *Bannon Vows a Daily Fight for “Deconstruction of the Administrative State,”* WASH. POST (Feb. 23, 2017), https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643_story.html.

That’s not to say government service is free from personnel who invite genuine doubts as to their capacity to faithfully serve the public. But it is notable that such concerns have been raised and documented in contexts outside

What's more, civil service safeguards are a signature, if not defining, feature marking the modern era of professional, competent public administration and helping cement the political and legal legitimation of the modern administrative state.²³ In practical terms, civil service safeguards reward those who invest in their jobs and professional development (something not necessarily prudent for employees to do were they expecting to be cycled quickly through, replaced each time a new political administration is installed); it permits (and indeed creates space for) respectful resistance if and when political bosses or powerful special interests issue orders or make demands outside the scope of the agency's statutory mission or in clear tension with professional norms and expert assessments; and it strengthens the institutional culture and stability of an agency as the staff remain in place no matter how much political turmoil exists in the arena of electoral politics.²⁴

But I would go further. Simply defaulting to reliance on the civil service may not be enough. For years, public service has been increasingly maligned. Even before Donald Trump and his closest allies went on a sustained campaign of delegitimizing government work and government workers,²⁵ disparagement and—consequentially—demoralization was pervasive.²⁶ It is therefore incumbent on any new agency to build a solid foundation of respect and support.²⁷ Some of that can be achieved through internal guidelines and practices, but a lot of it needs to be done informally. I mention this simply to encourage future agency leaders, this Task Force, legislative sponsors, and partnering institutions (public and private) to be mindful

of those governed by traditional civil service laws and protections. *See, e.g.,* Michael German, *Hidden in Plain Sight: Racism, White Supremacy, and Far-Right Militancy in Law Enforcement*, BRENNAN CTR. (Aug. 27, 2020), <https://www.brennancenter.org/our-work/research-reports/hidden-plain-sight-racism-white-supremacy-and-far-right-militancy-law>; Karen Yourish, Larry Buchanan & Denise Lu, *The 147 Republicans Who Voted to Overturn Election Results*, N.Y. TIMES (Jan. 7, 2021), <https://www.nytimes.com/interactive/2021/01/07/us/elections/electoral-college-biden-objectors.html>.

²³ MICHAELS CONSTITUTIONAL COUP.

²⁴ *See, e.g.,* Michaels, *Running Government*.

²⁵ Matthew Daly, *Interior Secretary Criticized for Saying 30% of Department is Disloyal*, BLOOMBERG (Sept. 26, 2017), <https://www.bloomberg.com/news/articles/2017-09-26/interior-chief-says-third-of-employees-not-loyal-to-trump?leadSource=verify%20wall>; Michaels, *War on Government Employees*; Peter Stone, *Trump's Increasing Tirade Against FBI and DOJ Endangering Lives of Officials*, GUARDIAN (Sept. 11, 2022), <https://www.theguardian.com/us-news/2022/sep/11/trump-mar-a-lago-witch-hunt-fbi-doj-safety>.

²⁶ I and others had been studying this phenomenon well before the Trump presidency and underscored the bipartisan tendency for politicians to disparage government work and government workers. *See* MICHAELS, CONSTITUTIONAL COUP; VERKUIL, VALUING BUREAUCRACY.

²⁷ It may be of some note that the overall demographics of the California civil service are such that Black or African Americans represent 9.3% of the state civil service, as compared to 5.2% of the overall state labor force (and 5.5% of the state population). *See* REPORT TO THE GOVERNOR AND LEGISLATURE, 2020 ANNUAL CENSUS OF EMPLOYEES IN STATE CIVIL SERVICE (Sept. 2022), at 10, <https://www.calhr.ca.gov/Documents/ocr-census-of-employees-2020.pdf>.

of agency morale and its importance, especially at the moment of an agency's inception and with, quite likely, the eyes of the nation on it.

Last, though hardly least, we need to be crystal clear about the tumultuous times in which we live.²⁸ Dr. Anthony Fauci's family has regularly needed an armed security detail.²⁹ Republican officials (and their families) in Arizona were harassed, threatened, and demonized for not being sufficiently partisan in the administration of the 2020 election.³⁰ Election officials in Fulton County were brutally harassed.³¹ (Gabriel Sterling, a Republican election official in Georgia, went so far as to plead with Donald Trump and his allies to cease the attacks: "Stop inspiring people to commit potential acts of violence. Someone is going to get hurt, someone is going to get shot, someone is going to get killed."³²) Those in Detroit, Phoenix, and Las Vegas were greeted by angry armed protesters as they entered and left their worksites.³³ County public health

²⁸ My current research, with Professor David Noll of Rutgers Law, is on the rise of state-sanctioned or state-condoned vigilantism, which at times is manifested through violence. See, e.g., Jon D. Michaels & David L. Noll, *Vigilante Federalism*, 108 CORNELL L. REV. — (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3915944; JON D. MICHAELS AND DAVID L. NOLL, *VIGILANTE DEMOCRACY* (forthcoming 2024).

²⁹ Dan Diamond, *Fauci Gets Security Detail after Receiving Threats*, POLITICO (Apr. 4, 2020), <https://www.politico.com/news/2020/04/01/fauci-coronavirus-security-160901>. Cf. Sravasti Dasgupta, *Steve Bannon Threatens Dr. Fauci and his Family Will be "Hunted" after Midterms*, YAHOO! (Oct. 25, 2022), <https://finance.yahoo.com/news/steve-bannon-threatens-whole-fauci-061411492.html>.

³⁰ Maggie Haberman, "I took an Oath," *Rusty Bowers the Arizona House Speaker, Says of Rejecting Efforts to Overturn the Election*, N.Y. TIMES (Jun. 21, 2022), <https://www.nytimes.com/2022/06/21/us/rusty-bowers-testimony-hearing-jan-6.html>. To the extent there might have been some hope that Bowers' testimony might have stirred voters to fear the abuse of officials had gone too far, the Arizona Republican Party censured Bowers, and Bowers was primaries and routed by a Trump-backed candidate. Allan Smith, *Rusty Bowers, a Jan. 6 Committee Star Witness, Loses GOP Primary in Arizona*, NBC NEWS (Aug. 3, 2022), <https://www.nbcnews.com/politics/2022-election/rusty-bowers-jan-6-committee-star-witness-loses-gop-primary-arizona-rcna40647>.

³¹ Farnoush Amiri, "Nowhere I feel Safe:" *Election Officials Recount Threats*, ASSOC. PRESS (Jun. 22, 2022), <https://apnews.com/article/capitol-siege-2022-midterm-elections-georgia-election-recounts-5cffe294a372eb32dc68588784202314>.

³² Richard Fausset, "It Has to Stop:" *Georgia Election Official Lashes Trump*, N.Y. TIMES (Dec. 1, 2020), <https://www.nytimes.com/2020/12/01/us/politics/georgia-election-trump.html>.

³³ Tim Sullivan & Adam Geller, *Increasingly Normal: Guns Seen Outside Vote-Counting Centers*, ASSOC. PRESS (Nov. 7, 2020), <https://apnews.com/article/protests-vote-count-safety-concerns-653dc8f0787c9258524078548d518992>.

officials³⁴ and school board members³⁵ around the country are likewise subject to abuse.³⁶ As was illuminated during the January 6 Commission proceedings (and substantiated elsewhere), officials who suffered (*and were largely unprotected*) are not likely to stay in their positions.³⁷ Even worse, some of these officials felt unsupported by local law enforcement officials whom they feared were unsympathetic to the dangers they labored under.³⁸

The U.S. Attorney General has promised to provide some support for, among others, the increasingly beleaguered school board officials,³⁹ perhaps seizing the opportunity to reestablish norms of democratic deliberation and overall respect, civility, and safety. But the pushback Merrick Garland has received has been withering,⁴⁰ and it is unclear what tangible steps have been taken. While I sincerely hope I am wrong, I fear that the CFAA—whose work will surely span education, health, and voting—may be a particularly attractive target of political ire, harassment, and even violence. For that reason, I would urge the Task Force to consider specially investing in security arrangements—and to favor arrangements that are more formalized and institutionalized rather than ad hoc and reactive.⁴¹ Assurances of an investment of that

³⁴ Danielle Ivory & Mike Baker, *Public Health Officials in the U.S. Need Federal Protection from Abuse and Threats*, a *National Group Says*, N.Y. TIMES (Oct. 19, 2021), <https://www.nytimes.com/2021/10/19/us/public-health-threats-abuse.html>.

³⁵ Hannah Natanson, *Death Threats, Online Abuse, Police Protection: School Board Members Face Dark New Reality*, WASH. POST (Nov. 9, 2021), https://www.washingtonpost.com/local/education/death-threats-online-abuse-police-protection-school-board-members-face-dark-new-reality/2021/11/09/db007706-37fe-11ec-9bc4-86107e7b0ab1_story.html.

³⁶ Zack Beauchamp, “*We are Going to Make you Beg for Mercy:*” *America’s Public Servants Face a Wave of Threats*, VOX (Nov. 18, 2021), <https://www.vox.com/22774745/death-threats-election-workers-public-health-school>.

³⁷ Jess Bidgood, *America’s Election Workers Are Leaving in Droves*, BOS. GLOBE (Oct. 23, 2022), <https://apps.bostonglobe.com/nation/politics/2022/10/democracy-under-siege/election-workers-leaving-in-droves/>; Fredreka Schouten, *Alarm Grows as More Election Workers Leave their Posts Ahead of Election Day*, CNN (Sept. 1, 2022), <https://www.cnn.com/2022/09/01/politics/election-workers-officials-harassment-kentucky-texas/index.html>.

³⁸ See, e.g., Linda So & Jason Szep, *Special Report: Terrorized U.S. Election Workers Get Little Help from Law Enforcement*, REUTERS (Sept. 8, 2021), <https://www.reuters.com/legal/government/terrorized-us-election-workers-get-little-help-law-enforcement-2021-09-08/>; Alexandra Berzon & Nick Corasaniti, *2020 Election Deniers Seek Out Powerful Allies: County Sheriffs*, N.Y. TIMES (Jul. 25, 2022), <https://www.nytimes.com/2022/07/25/us/politics/election-sheriffs-voting-trump.html>.

³⁹ Gary Fields, *Garland Says Authorities Will Target School Board Threats*, ASSOC. PRESS (Oct. 5, 2021), <https://apnews.com/article/merrick-garland-school-boards-violence-daaff3f659981354b7a9a536db5cf2e2>.

⁴⁰ Evan Perez & Tierney Sneed, *Attorney General Garland Faces Relentless GOP Pressure after Issuing Memo on School Board Threats*, CNN (Oct. 26, 2021), <https://www.cnn.com/2021/10/25/politics/garland-school-board-senate-house-hearings/index.html>.

sort would help with recruitment and retention. They would also serve as a strong deterrent against those who, in the current political environment, feel emboldened to express disagreement through campaigns of harassment and abuse.

IV. Public Engagement and Accessibility

For many of us, government is known or knowable based on our interpersonal points of contact. We “know” government not from watching *Meet the Press* or perusing the *Federal Register*. And most of us likewise don’t even “know” government as we largely take for granted that the air we breathe is clean, the drinking water is uncontaminated, the foods we consume are true to their labels, and the workplaces we enter are accessible and safe. Instead, we tend to know government based on our direct interactions—*e.g.*, DMV appointments, police stops, Postal Service deliveries, TSA pat downs, jury duty voir dire, and, perhaps, small talk with beach lifeguards or park rangers. Those contacts may be rewarding, enriching, confusing, frustrating, dispiriting, or, likely, a mixed bag.

I am hazarding a guess that there will be much curiosity, and no doubt lots of apprehensiveness and even distrust, about the new CFAA. If the Task Force shares my thinking, time and energy ought to be invested in ensuring that the CFAA’s work seems (and, of course, *is*) accessible, legible, and democratic. Below I offer some simple, modest approaches that may have some salutary effects. As with practically everything else, the downsides are obvious: agency costs and, in some instances, administrative delays.⁴²

- Host open houses⁴³ and listening sessions at agency offices⁴³ and engage in social-media outreach; set up booths at town festivals, county fairs, farmers markets, carnivals, popular parks (on such holidays as Memorial Day, Juneteenth, and July 4), and in mass transit hubs; hold meetings in libraries, school cafeterias, and the like; pass out business cards with an actual point of contact.⁴⁴

⁴¹ California’s new election workers’ privacy bill (SB 1131) represents a modest step in the right direction.

⁴² One other likely downside will be further or intensified accusations that, given the beneficiary population and given the type of services provided, the CFAA is a crude, partisan instrument. Such accusations plagued the Freedman’s Bureau, as unreconstructed southerners claimed the Bureau was an instrument of the Republican Party. Cox & Cox, *Misrepresented Bureau*,” at 429. General Howard, charged with leading the Bureau was not unaware of that accusation and directed agents to support and promote voting rights while “avoid[ing] partisan discussion. *Id.* at 445. Surely, accusations notwithstanding, there is no reason to believe the CFAA won’t likewise promote voting rights while refraining from opining on “partisan discussion.”

⁴³ *Cf.* Michael Sant’Ambrogio & Glen Staszewski, *Public Engagement with Agency Rulemaking*, ADMIN. CONF. OF THE U.S. (Nov. 19, 2018), <https://www.acus.gov/sites/default/files/documents/Public%20Engagement%20in%20Rulemaking%20Final%20Report.pdf>.

⁴⁴ *See, e.g.*, HOLLIE RUSSON GILMAN & K. SABEEL RAHMAN, BUILDING CIVIC CAPACITY IN AN ERA OF DEMOCRATIC CRISIS 13 (2017) (describing New York City’s Public Engagement Unit). Though it has faded from contemporary public discourse and has been widely criticized, the concept of maximum feasible participation still has its champions and may be of particular relevance to an outfit like the CFAA.

- Consider employing one or more deliberative-democracy schemes to broaden and deepen the public’s formal engagement with the CFAA—*e.g.*, deliberative polling⁴⁵ or some sort of empaneled cohort of citizens capable of investing substantial time and effort to consider and weigh in on particular policy questions more fully.⁴⁶
- Create visitors’ lounges in agency offices. I know that space, money, labor, and security are all at a premium, but these lounges need not be elaborate or special—just a place to sit, to collect one’s thoughts or paperwork (*as interactions with government officials may, based on past experiences, be unsettling or intimidating*) and to ask questions of a live human being who could be one of the outreach liaisons mentioned above. Government offices can be imposing and cold. No one says things have to be that way and, again, I’m talking about tiny amounts of square footage and a couple of dozen FTEs spread across a state population nearing forty million people with an economy that our governor boasts is, at worst, the fifth largest in the world.⁴⁷
- Commission artwork from among the population of beneficiaries. Here I would encourage the Task Force to borrow from the lessons of the New Deal.⁴⁸ There is no money or time for commissioning grand buildings—and perhaps that’s for the best. But hallway murals, monographs that can be posted online and shared with libraries and schools, and music that can be played in the aforementioned visitors’ lounges? All of that is feasible. And, again, light touches can go a long way.
- Advertise. Yes, advertise. Most federal agencies are expressly prohibited from drumming up public support for their programs, campaigns, or initiatives. Some members of Congress deem this “propaganda,” and the Government Accounting Office has sanctioned agencies for engaging in certain forms of public outreach. Meanwhile, the United States military has an *annual advertising budget* of approximately \$667 million. That’s larger than the entire operating budget of the federal

⁴⁵ See JAMES S. FISHKIN, *WHEN THE PEOPLE SPEAK: DELIBERATIVE DEMOCRACY AND PUBLIC CONSULTATION* (2011). Stanford University, where Professor Fishkin teaches, has a dedicated Deliberative Democracy Lab, which is “devoted to research about democracy and public opinion obtained through Deliberative Polling,” <https://deliberation.stanford.edu/>.

⁴⁶ *E.g.*, David J. Arkush, *Direct Republicanism in the Administrative Process*, 81 *GEO. WASH. L. REV.* 1460 (2013); Mariano-Florentino Cuellar, *Rethinking Regulatory Democracy*, 57 *ADMIN. L. REV.* 411 (2005).

⁴⁷ *ICYMI: California Poised to Become World’s 4th Biggest Economy*, OFFICE OF GOV. (CA) (Oct. 24, 2022), <https://www.gov.ca.gov/2022/10/24/icymi-california-poised-to-become-worlds-4th-biggest-economy/>.

⁴⁸ See, *e.g.*, *The Works Progress Administration*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/surviving-the-dust-bowl-works-progress-administration-wpa/>.

Occupational Safety and Health Administration (OSHA), twice as large as the total budget for the U.S. Department of Labor's Wage and Hour Division, and four times larger than what Congress annually appropriates in total to the National Highway Traffic Safety Administration.⁴⁹ And whereas the federal EPA was sanctioned for attempting to generate public enthusiasm (and invite broader public comment) for a proposed regulation of some significance, the military spends its money cross-marketing military service with action heroes in films, in video games, and comic books. The military also helps orchestrate what (by design) appears to be organic demonstrations of public support and gratitude for the troops, of the sort regularly on display in high-profile sporting events. As the late Senator John McCain documented, the Pentagon spends millions of dollars to underwrite highly staged patriotic displays at pro and college sporting events.⁵⁰ With apologies for this lengthy aside, I want to be clear that there certainly can be a happy medium between an allergy to public promotion (of the sort we see with congressional restrictions imposed on domestic regulatory agencies) and a voracious appetite for it. And given the public's longstanding skepticism of government, and lack of understanding of the contributions government makes, it is imperative on government to put some effort into countering those narratives, demystifying the work government does, and touting its successes.⁵¹

V. Partnerships

At various times, I've referred to outreach and alluded to engaging allies and complementary institutions. Identifying and then working closely with such partners are critical to any organizational initiative. But I want to underscore that multiple levels of engagement seem vitally important here, again because of the CFAA's newness, the skepticism with which it'll likely be greeted in some, perhaps many, corridors, and the likelihood that other states and localities will be watching closely to see if the CFAA succeeds or fails. There will surely be no shortage of opportunities to team up with large corporations, foundations, and service organizations. There will be no shortage of invites to talk up editors at the *New York Times* or meet with pundits and philanthropists at, say, the Aspen Ideas Festival or Renaissance Weekend. But none of that should come at the expense of identifying (and prizing) grass-roots partners: church leaders, teachers, youth sports coaches, and small business owners who run delis, style/cut hair, or

⁴⁹ These numbers are admittedly several years old, see MICHAELS, CONSTITUTIONAL COUP 215-16; but I have no reason to believe much has substantially changed.

⁵⁰ Les Carpenter, *Report Highlights the Obscene Price of NFL's Paid Patriotism*, GUARDIAN (Nov. 5, 2015), <https://www.theguardian.com/sport/blog/2015/nov/05/report-highlights-the-obscene-price-of-nfls-paid-patriotism>.

⁵¹ One of the canonical bases justifying government regulatory interventions is what economists and political scientists refer to as information asymmetries. When the market doesn't have adequate incentives to level those asymmetries, the government may intervene to do that work. See STEPHEN BREYER, REGULATION AND ITS REFORM 26-28 (1982). It stands to reason that government interventions to correct misunderstandings are important not only when it comes to external disinformation regarding, say, consumer product safety or a societal health risk but also about its own responsibilities and functions. This ought to be especially the case when certain market actors benefit immensely from perpetuating and amplifying disinformation about the government.

prepare tax returns. And, to be sure, as widespread distrust in elites and elite institutions continues apace,⁵² as surely seems to be the case, reliance on community intermediaries will only become more important to the success of the CFAA.⁵³

Additionally, there are few things more challenging than internecine fighting among groups who each have just and pressing claims against the state. Such fighting, as you surely know, is music to the ears of those who don't believe in any remediation. Rather than chop down the ideas of, say, Black reparations on their merits (which may not only be difficult on the merits but also, at least in some spaces, impolitic), it may be advantageous for those opponents to stoke dissent and protest in other minority communities, particularly those harboring genuine grievances against the state.⁵⁴ I claim no expertise in political organizing

⁵² See March Hetherington & Jonathan M. Ladd, *Destroying Trust in the Media, Science, and Government Has Left America Vulnerable to Disaster*, BROOKINGS (May 1, 2020), <https://www.brookings.edu/blog/fixgov/2020/05/01/destroying-trust-in-the-media-science-and-government-has-left-america-vulnerable-to-disaster/>; David Klepper, *Choose Your Reality: Trust Wanes, Conspiracy Theories Rise*, ASSOC. PRESS (Jul. 9, 2022), <https://apnews.com/article/covid-technology-health-government-and-politics-new-york-cfb56a95aec23dddbabcf3ebbe839f05>; Sarah McCammon & Liz Baker, *Disinformation Fuels Distrust and Even Violence at all Levels of Government*, NPR (Mar. 1, 2021), <https://www.npr.org/2021/03/01/971436680/from-the-u-s-capitol-to-local-governments-disinformation-disrupts>.

⁵³ EMERSON, THE PUBLIC'S LAW 169-70 (noting one of the challenges to the Freedmen Bureau's durability was "unable to carry out its transformative egalitarian mission because national and local public opinion was not engaged to sustain it.")

⁵⁴ One need look no further than the attacks on affirmative action in higher education currently being waged in the courts of law and public opinion. White critics have been fighting affirmative action for decades, with only mixed success. Increasingly, however, they are framing the injuries not in terms of a zero-sum game between Black/Brown candidates and White candidates but rather one that pits Black/Brown candidates against other minority groups, principally Asian Americans. See, e.g., Dennis Saffran, *Affirmative Action is Racist—Against Asians*, NEWSWEEK (Oct. 24, 2022), <https://www.newsweek.com/affirmative-action-racist-against-asians-its-time-scotus-overturn-it-opinion-1753623>; Natasha Warikoo, *How Conservative Activists are Using Asian Americans to Argue Against Affirmative Action*, PBS NEWSHOUR (Oct. 3, 2017), <https://www.pbs.org/newshour/education/column-conservative-activists-using-asian-americans-argue-affirmative-action>. Without getting into the myriad problems with that formulation, I will note only that the strategy may well prove effective, see Alexander Nieves, *California Voters Reject Affirmative Action Measure Despite Summer of Activism*, POLITICO (Nov. 4, 2020), <https://www.politico.com/states/california/story/2020/11/04/california-voters-reject-affirmative-action-measure-despite-summer-of-activism-9424555>; Adam Liptak, *Supreme Court Seems Ready to Throw Out Race-Based College Admissions*, N.Y. TIMES (Oct. 31, 2022), <https://www.nytimes.com/2022/10/31/us/supreme-court-harvard-unc-affirmative-action.html>. There is, for sure, plenty of pushback and resistance to the framing of affirmative action as a contest between Black/Brown Americans and Asian Americans. See, e.g., Benjamin Chang, *I'm an Asian American Harvard Student. The anti-affirmative-action case does not speak for me*, WASH. POST (Feb. 4, 2022), <https://www.washingtonpost.com/opinions/2022/02/04/harvard-asian-american-student-believes-in-affirmative-action/>; AALDEF Files Amicus Brief in Supreme Court on Behalf of 121 Asian American Groups and Educators in Support of Race-Conscious Admissions at Harvard (Aug. 1, 2022), <https://www.aaldef.org/press-release/aaldef-files-amicus-brief-in>

or coalition building; still, it strikes me that concerted efforts to understand how different communities in various civil rights struggles partnered and supported each other and embraced broad conceptions of communal self-interest *notwithstanding evident and understandable frustration that one—and only one—ally secured particularly valuable benefits*—will be absolutely critical to maintaining and strengthening relations with California’s Latinx, Indigenous Peoples, and Asian American communities all of whom may, again, credibly make claims of their own on Sacramento’s lawmakers.

VI. Funding

I don’t answer to voters concerned about rising costs and thus understandably wary of tax increases; nor is it my responsibility to worry about slippery slopes given the issues of intergroup equities mentioned immediately above. I understand that those are real and valid constraints, just as I understand the legislature has no shortage of other programs to fund. All of this is to say that I appreciate that there are difficult political and value propositions to consider. I nonetheless feel compelled to weigh in on one particular—and in some respects particularly attractive—funding stream: a donor class.

My concerns here are three-fold. First, one has to be highly careful about signaling that reparations ought to be treated as a form of charity or noblesse oblige, apart from rather than constitutive of the collective, public responsibility to provide recompense for the systemic racism that Californians endorsed, condoned, or unwittingly but inescapably benefited from. Already too many indirect beneficiaries of systemic racism insist that they have received no such benefits directly. To signal that corporate charitable trusts will foot the bill only furthers that misapprehension that only the very rich, or only those who have deep historical roots to antebellum times, were advantaged by generations of racist public policy.⁵⁵

Second, with donors comes strings. Donors may have particular, and quite possibly idiosyncratic or self-serving, priorities that will inescapably become CFAA priorities. Credible reports indicate that big donors tried (and to varying extents succeeded) in shaping and influencing policy with respect to such outfits as Newark’s public schools, the National Park Service, and the Center for Disease Control.⁵⁶

Third, there is the danger that California is setting a bad or at least unsustainable precedent. Because California is the first mover or because there is considerable corporate and personal in-state wealth, a CFAA

[supreme-court-on-behalf-of-121-asian-american-groups-and-educators-in-support-of-race-conscious-admissions-at-harvard/](#).

⁵⁵ Likewise, albeit for slightly different reasons, I worry about the creation of a new tax, especially any kind of “sin” tax to underwrite the reparations initiative—as if, again, reparations aren’t otherwise worth appropriations drawn from the general fisc. Compare C126-R-19, City of Evanston (IL) (Nov. 14, 2019), <https://www.cityofevanston.org/home/showpublisheddocument/62672/637511530122430000> (funding city reparations program through the imposition of a cannabis tax) with Providence (RI) Reparations, <https://aaagpvd.com/providence-reparations/> (drawing upon federal funds expressly targeting harms associated with public health and economic displacement).

⁵⁶ See Michaels, *Shareholders*, at 537-38 (2020); see also DALE RUSSAKOFF, *THE PRIZE: WHO’S IN CHARGE OF AMERICA’S SCHOOLS* 27-29 (2015).

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could soak up much, if not most, of the available charitable money—leaving little left for those jurisdictions which might follow Sacramento’s lead. Setting certain expectations that reparations will be privately raised, rather than publicly financed, will make it much harder for those other communities to embark on reparations projects, let alone provide similar levels of support.

* * *

Again, thank you for this opportunity to share my insights. I hope they are of some value to you and to the members of your staff.