ACCEPTANCE SPEECH – ALA JAMES MADISON AWARD

March 15, 2010

I am very honored to accept this award on behalf of Citizens for Responsibility and Ethics in Washington (CREW) and to share it with Meredith Fuchs and the National Security Archive. Their expertise and tireless work were pivotal to the successful outcome of our two combined lawsuits. Meredith is someone who, like me, cares passionately about the proper preservation of electronic records and shares the hope that someday soon we can all be assured our nation's history is being properly preserved and are our government truly transparent. I will miss her as she transitions to a new role in Congress.

The story of the many millions of missing Bush-era White House emails begins, as so many of these stories do, with a courageous whistleblower who approached CREW with the truth about what the Bush White House knew, and what it did – or more accurately did not do – with that knowledge. When I got that first phone call I found what the caller told me almost incomprehensible: the White House had no effective way to store its email messages, well over 10 million emails

already had gone missing, and higher ups in the White House, including former White House Counsel Harriet Miers, had ignored recommendations that the missing emails be restored from backup tapes.

Today, what strikes me as even more remarkable is that but for that phone call, we might never have known about the missing email problem. After all, the legacy of the Bush administration is a legacy of secrecy. Nevertheless, the serious and systemic problems with the Bush White House's handling of its electronic records did come to light because someone was troubled enough by what they saw to bring it to our attention.

When we learned the Bush White House was unwilling to deal with the problem of missing White House emails or the underlying problems with its system for preserving electronic records, CREW and the National Security Archive turned to the courts for redress. We filed lawsuits against the Executive Office of the President, and the archivist and the National Archives and Records Administration for their failure to act to bring the White House into compliance with the law. While the

facts underlying our lawsuits seemed clear enough – millions of missing emails, a White House that refused to restore those emails or install an appropriate electronic record keeping system – the lawsuits were not without legal hurdles. Ironically they were able to go forward because of the record keeping failures of the White House.

Let me explain. The presidency of George W. Bush, like all former presidencies, created both presidential and federal records. Proper record keeping requires that the two different kinds of records be stored and preserved separately, as they fall under two separate and distinct legal frameworks: the Federal Records Act for agency records, and the Presidential Records Act for presidential records. The Bush White House had abandoned the system set up by the Clinton White House, which separately stored and preserved federal and presidential records. But, ignoring the advice of its in-house experts, the Bush White House failed to replace the old compliant system with a new system that properly managed the two sets of records. As a result, the Bush administration's presidential and federal records were commingled in

storage files dumped on White House servers.

Apart from being a prime example of how not to manage some of our nation's most valuable historical records, this commingling of records provided us with a legal avenue of redress under the Federal Records Act. Courts have recognized a limited right of private litigants like CREW to sue over the failure of an agency and the archivist to activate the enforcement scheme in the Federal Records Act. That scheme requires the head of an agency to notify the archivist of a record's destruction and, through the archivist, to request that the attorney general initiate an enforcement action. Private litigants like CREW can sue to trigger this enforcement mechanism where an agency or the archivist has done nothing in the face of document destruction.

The Presidential Records Act, however, has no counterpart to this enforcement scheme. Instead, Congress left compliance solely with the president, meaning that private groups like CREW cannot sue to redress a president's failure to preserve records that fall under the Presidential Records Act. Were only presidential records missing here, it is highly

unlikely a court would have recognized our right to sue for relief. But we were able to sue because the missing emails included federal records commingled with presidential records. So we have the Bush administration and its appalling record keeping practices to thank for providing us the ability to sue!

Beyond the irony this situation presents, it points out the serious deficiencies in our current record keeping laws. Fearing to tread on the constitutional prerogatives of the president, Congress has been reluctant to add any enforcement mechanisms to the Presidential Records Act or to give the archivist any direct authority over how the president meets his obligations under the law. But requiring a president to have in place an effective record keeping system that meets basic criteria established by the archivist does not come close to encroaching on any constitutionally protected sphere of the president. The president is, after all, a caretaker of our nation's history.

At a bare minimum, Congress should amend the Presidential Records Act to mandate effective record keeping of presidential records

with a direct oversight role for the archivist to ensure the White House has an appropriate system in place that meets this requirement. Congress should also provide for a private right of action under the Presidential Records Act for groups such as CREW and the National Security Archive that serve as a backstop where the archivist is unable or unwilling to act.

The deficiencies in the Federal Records Act call for even more statutory changes. Under the current law, when agency records are destroyed or go missing the public typically has no effective recourse, and must wait for the agency head or archivist to decide whether to act. But if those individuals elect not to act, the public may not even learn of the problem until it is too late to fix it. Just as troubling, under the current law such agencies would suffer no legal consequences for their inaction, which may place the missing records beyond our reach forever.

This is certainly true in the case of the missing White House emails. We reached a settlement of our lawsuits with the Obama administration under which the White House agreed to restore many of

the missing emails from existing backup tapes. But those tapes are incomplete, because the Bush administration followed a practice of recycling backup tapes. In addition, the Obama White House has limited funds for this project, as the Bush White House spent most of the allotted money trying to prove there was no problem in the first place. So at this point in time, there appears to be no effective way to restore all of the missing emails, and we must settle for a less than complete record.

In another matter, we learned recently the Department of Justice has no emails for former Office of Legal Counsel Assistant Attorney General John Yoo, author of the highly contested torture memos. Also missing are emails from the relevant time period for another former high-ranking OLC official, Patrick Philbin. The Department of Justice acknowledged in a recently released report that the loss of these emails hampered its investigation into whether these individuals violated their ethical obligations as attorneys. Unfortunately, learning of this document destruction years after the fact makes a full recovery of the missing emails highly unlikely.

Clearly there is something wrong with a law that says we, the public, must sit by idly while agency heads – including the attorney general – refuse to act when informed important agency records have been destroyed or mysteriously have gone missing. While the agency head suffers no adverse consequences from his or her inaction, the public suffers irreparable harm from the loss of important historical records.

So what should Congress do to remedy this situation? First, Congress must add teeth to the Federal Records Act, building in penalties for non-compliance that will work. Second, Congress should expressly expand the ability of private litigants like CREW to sue where there is evidence of systemic or purposeful destruction of agency records. Third, Congress must expand the kind of relief private litigants can seek beyond merely triggering the administrative enforcement scheme. This is especially critical where – as in the case of the missing Bush White House emails – the attorney general or archivist already have demonstrated an unwillingness to act. Congress should also

require all agencies in the federal government to have in place effective electronic record keeping systems within two years, with fiscal consequences for those agencies not meeting this requirement. Unless we act now, we will continue to lose important documents.

In our White House email litigation we were able to get relief even without these statutory changes because the incoming Obama administration was willing to commit to restoring as many missing emails as possible with the limited funds left to it by the previous administration. This commitment followed years of hard fought litigation, during which the Department of Justice argued repeatedly and insistently we had no right to even be in court, much less to relief that would restore to the public its rightful heritage. Thankfully that view did not prevail either with the court or the Obama White House. Otherwise I have no doubt we would still be litigating our right to be in court and the Department of Justice would still be attempting to sweep away the years of inaction during the Bush administration as issues not suitable for litigation.

Yet even with this settlement, we likely will never know why those emails went missing in the first place, and can only speculate why high-ranking White House officials refused to act when told of the missing email problem. Still, in the end, a more complete story of the Bush presidency will now be available to future generations.

I recall engaging in a vigorous internal debate nearly 20 years ago, while an attorney at the Department of Justice, over whether email was even a record that had to be preserved with all of its metadata. Today this issue is long settled, but we face new issues from emerging methods of communication – such as twitter and facebook posts – that pose new and greater challenges for record keeping. All of this is happening at a time when agencies cannot keep pace with older forms of electronic communication, such as emails. So while we are thankful that because of the combined efforts of CREW and the National Security Archive the gap in the records of the Bush presidency will not be as great, we must continue to be vigilant.

Sunshine Week affords us an opportunity to reflect on the past year

and events that have helped and hindered our goal of a more transparent and accountable government. I am honored our work in the White House email case has been recognized as advancing this goal. And I pledge to you that CREW will continue to speak out about the impediments to openness we see, no matter their source, and to breathe life into Shakespeare's words, engraved on the exterior of the National Archives and Records Administration building in Washington, D.C., "What's past is prologue." Together we can all ensure our past will be available for future generations to study and learn from.

Thank you.