Securities and Exchange Commission Historical Society
Interview with John Fedders
Conducted on August 9, 2006 by Kenneth Durr

KD: This is an interview with John Fedders on August 9, 2006, in Washington, DC, by Kenneth Durr. I want to start with a little bit of background, and talk a little bit about your education and training, how you came to the SEC, and what interested you in taking the position.

JF: Where do you want me to start?

KD: Education.

JF: I was raised in Kentucky. I went to Marquette University in Milwaukee. Then, I came to law school here in Washington, DC at The Catholic University of America. I was fortunate to get a job with the Cadwalader, Wickersham & Taft firm on Wall Street when I left law school. I stayed there for five or six years, and I was provided a business opportunity to become Executive Vice President of a New York Stock Exchange company then called Gulf Life Holding Company. It was an insurance and financial services concern. I stayed there a couple of years. I had an opportunity to join Arnold & Porter in Washington, and I remained there for eight and a half years. When President Reagan was elected, I was approached about several positions between the election through January 20. I interviewed for several. I abandoned the effort and stayed at Arnold & Porter. When Stanley Sporkin resigned as Director of the Division of Enforcement, I received several telephone calls that afternoon, including one from the White House and one from, I believe, Senator D'Amato's office suggesting that maybe this was something I should be interested in. I was flattered and certainly interested. The process didn't last very long; I was interviewed one Friday afternoon by a chap by the name of Irv Schneiderman who was a partner in a major Wall Street law firm. He was doing preliminary interviews for John Shad. I had a bowl of soup with him on a Friday afternoon, and when I arrived home that night there was a telephone call asking me if I would have breakfast with Chairman Shad the next morning. We met in Georgetown, and we had breakfast at a little greasy spoon. We then went to a park nearby and sat down. He had an airplane to catch. Fortunately for me, he kept saying, "Well, I'll catch the next shuttle" and then "I'll catch the next shuttle." We sat in the park from what must have been 8:30 or 9 o'clock until well into the afternoon. We talked about his ideas,

and who I was. There seemed to be some homogenization between the personalities. I liked him. I hoped he liked me. The meeting ended without any note of expectation from him that I would be a finalist or whatever. I was then called the next week and told that I was a finalist. I was told I would have to interview with the other Commissioners. I went to the Commission, and I interviewed with several. I remember the meeting with Commissioner Loomis; we spent a good bit of time together. Sometime later I was called by the Chairman and the job was offered to me. I accepted without hesitation, and in a matter of several weeks rearranged my life to leave Arnold & Porter and to join the SEC staff.

KD: Tell me a little bit about that long conversation in the park. It's hard to imagine not having gotten the idea that you might be seeing him again after having such an extended conversation.

JF: I certainly felt good about it, particularly when he said, "I'll catch the next shuttle." When he said that more than one time, I assumed that I wasn't fish bait; something good was going on. The meeting was very nice. He told me a lot about himself, about his different ideals, and how he had divided his life into three compartments--learning, earning and giving. He said now he was in the giving part of his life: that he had done his learning and his earning. John Shad told me a lot about himself, about his family, his children and his goals at the SEC. That was the first time the topic of insider trading arose. It was by no means the dominant part of the conversation; the dominant part of the conversation was management. Chairman Shad questioned me about my days at Gulf Life Holding Company. I was an Executive Vice President of the company, and did not have legal responsibilities. I think that attracted John Shad. As the afternoon wore on, I do remember we talked about the Foreign Corrupt Practices Act and its accounting provisions. I had some experience with these provisions.

KD: What do you mean you had experience?

JF: I had experience at Arnold & Porter, and was involved in FCPA cases. I had written articles in that area. Obviously if Chairman Shad would go to a topic that I believed I had something to say, I would try to romance the topic. I remember John Shad said that he wanted to really do a lot of exploring of the insider trading area. Either right before my interview or shortly after, and my recollection it probably came after, *Fortune Magazine* ran an article called the

Unwinnable War about insider trading. It's a topic that's interesting because everyone understands lying, cheating, and stealing. While Enron and World Com have received a lot of publicity, all that most people can tell you is that there was wrongdoing in accounting and mischief of that kind that constituted illegalities, whereas as to an insider trading case, most people can explain to you what went on. So it's pretty fundamental; that was attractive to me and so we talked some about insider trading. It was very clear to me that insider trading enforcement was going to be a part of Chairman Shad's program. He told me about a lot of other things that he hoped to do at the Commission, including in the Division of Corporation Finance. I had not started in 1966 as an enforcement lawyer--that became part of my practice at Arnold & Porter in the years I was there -- but when I started with the Cadwalader firm I was a green goods lawyer. I was a deal lawyer. As a young associate, I did registration statements, public offerings, mergers, acquisitions; that might have been attractive to Chairman Shad that I had done more than one thing in my career.

And I liked him--I liked his cut. I liked the way he was casual and relaxed and sitting on a park bench. While I was in a sport coat and a tie at the breakfast, during the we both broke down pretty quickly and coat and tie came off.

KD: Nineteen eighty-one?

JF: Nineteen eighty-one.

KD: Did you get a sense of what was motivating John Shad? He came out of the industry--

JF: Right.

KD: --so he had some experience that was perhaps different than the staffers?

JF: What motivated him was goodness. He was an extraordinarily good person, a really good human being. Never in my years of working for him did I see anything about him I didn't like. He was funny. We went to the racetrack together with other Division Directors on one occasion, and it was an evening of great fun, merry-making and joy. I think his goodness was his overriding quality. He also was into the serving period of his life and that meant something to him -- a third to learn, a third to earn, and then this third of giving. He had

some definite ideas about the administration of the SEC and the administration of justice. He was very loyal to President Reagan. I think he liked politics, and it was something he had never been involved in before. He was hurt by politics at some time. There was a Congressional investigation of his conduct as to how he had put his securities in trust. I think that hurt John Shad personally because he was not a guy who would ever do anything wrong --he was too wealthy to worry about doing something like that. He engaged Joe Califano to assist him in handling the Congressional inquiry. There was pain for John Shad associated with the inquiry. I can remember the pain associated with that for him.

KD: This was while he was on the Commission?

JF: As Chairman, yes; I would say in the early years -- whether it was '81 or early '82 I don't recall, but it came on shortly after I joined the staff in June 1981.

KD: And that came to nothing in the end?

JF: I don't believe it came to anything.

KD: You were caught up in one of those too.

JF: Well I was caught up in a lot of different things. Some thought I was soft on law enforcement. I'm never hesitant to say what I think, and sometimes that practice can bite you in the butt. I issued a number of memoranda that I didn't hesitate to circulate to the entire staff. One in particular ended up in the hands of Congress. I issued an orange book addressing priorities, and I had put as the last page actions under Rule 2E of the Rules of Practice of the Commission -- potential sanctions against lawyers and accountants. I was called to a Congressional hearing. I testified, but for me it never was controversial or adversarial. I enjoy the process. I think it's my sports mentality that I never played in a game where the other team scored zero or where I scored zero, so it's give and take. I remember Congressman Dingell went after me, then Congressman Wirth. Then, there were some questions with regard to my role in an investigation of the Southland Corporation--7-11.

KD: Yes, that's the one I was thinking of.

JF: There were Congressional hearings. In the beginning, I was not permitted to testify because of the attorney-client privilege. Then I became the subject of a Grand Jury and testified. Nothing ever came of it. I was confident about my conduct. Whereas people would say to me, "Oh, isn't it awful, you've got to go testify about this or that and you're embarrassed?" It never struck me that way from a personal point of view because I like that part of life. I like to be tested. As I said, I've never played in a basketball game where I kept the other team scoreless, and I don't mind being elbowed in the gut or somebody scoring over the top of me. It's only going to motivate me at the other end. So I enjoyed the Congressional process.

KD: You understood how adversarial politics can be.

JF: Yes, and I had lived in Washington, DC. I think some serious mistakes were made by the Office of Legislative Affairs when John Shad became Chairman and when I became Director, as far as how the courtship with Congress took place. I was not taken to the Hill and introduced to people in a vetting process. And my own recollection is that Chairman Shad was not--what he told me about what happened. He told me about his vetting process. I'm of the view, without knowing all the facts, that maybe he wasn't vetted adequately. I wasn't vetted at all and that proved to be an enormous mistake by the Office of Legislative Affairs. It was okay because it probably heightened the controversy. They didn't know me and therefore it was easier to dislike me and that was fine.

KD: And these are Democrats?

JF: Yes, they were always Democrats. Senator D'Amato, in the Southland issue, held a special hearing as a Republican and it was clearly to give me a forum to speak. So sure, there's politics but remember I went to law school here. I learned the politics and then certainly during eight and half years at Arnold & Porter, I had seen the way the town operated politically. While I could never see myself as a candidate for public office, I would think that I'd learned enough to know that you don't take a job like I was being offered and accept it without expecting to be wounded over the period of tenure. And then of course, I resigned in February of '85 over difficulties in my marriage that received a lot of publicity. Most of the

things that have occurred in my life that have been adversarial, controversial, or of a painful nature have always redounded to my benefit.

KD: In the long run you also had a chance to shape the SEC at one of the most plastic moments for the Commission.

JF: Yes.

KD: I want to talk about some of those things, certainly about this huge sea change in how the Commission looked at and treated insider trading. I want to talk about some of the earlier cases that must have been either already in or getting ready to come in when you took office. Was the St. Joe Minerals case in?

JF: I don't remember when St. Joe was filed. Let me put it in perspective how it all came about. I believe Santa Fe had been filed, which was an offshore case as I would refer to it, and I'll explain that later. St. Joe either came before I got to the Commission or a couple of days after. I certainly was not responsible for nurturing either of the cases in the investigative stages. That was Stanley Sporkin, and in New York there was a terrific attorney by the name of Bob Blackburn, who was in charge of St. Joe. But here is what happened with regard to insider trading.

When I went to the Commission, I had the benefit of individuals who might have had my job and who certainly as securities lawyers were premier lawyers. Rather than exhibiting any jealousy, they exhibited teamsmanship, and consequently I was the beneficiary of an awful lot of good ideas and scholarship that played well.

As far as insider trading, the aggregation of all the ideas was three-fold. Three things were happening in the market place that had never happened before, that permitted this proliferation of insider trading as we saw it. Number one, there was access by traders to offshore accounts in countries that, because of their secrecy laws, were likely to prevent a government regulator like the SEC from identifying who the particular trader was. So step number one -- there was some secrecy; you might be able to hide your conduct. Number two, we were in a period where very large premiums were being paid by insurgents in tender offers for the securities of target companies. As I recall there were some situations where a

stock might be selling at 39 and almost a 20-point premium was being offered. So therefore, if you were going to play the game of insider trading--number one you had secrecy and two, if you were lucky, you were going to hit a lot because the premium being paid lets say on a $39 stock was 20-points. It's the third thing that really made it a worthwhile effort -- that was the options market. That's what some of those early cases were about. You could go to the Pacific Stock Exchange and you could buy options by putting very little capital at risk. If the tender offer occurred and the stock went from $39 to $59, your opportunity for a reward was enormous. Indeed, I forget whether it was Santa Fe or St. Joe, but one of those early cases shut down some of the specialists at the Pacific Stock Exchange because the premium was so large and they were on the losing end of the trades. There was no way that the Commission could move fast enough to recoup the money.

So you put those three things together, they're easily understood. Every citizen understood them. The newspapers understood them and wrote about them. The business magazines understood them and wrote about them. Very early on there was support for the SEC's insider trading program. You had people like Professor Henry Manne, who said that insider trading should be legalized. I debated him, and he had some very good points. But if his philosophy would be adopted, you'd have to revolutionize many things the Commission does. It's not that he had bad ideas; it's that some of the consequences of his ideas would have had to be taken into other areas.

So what happens? It's June when I was sworn in as Director. I'd say by September 1, I'm receiving calls from the United States Ambassador in Switzerland, I'm being called by the Swiss Bankers Association, I'm then being called by high government officials in Switzerland about what we were doing. We had frozen the bank accounts in the United States of customers of Swiss banks who were doing business here. That attracted attention. Now you had another dynamic that came into the picture that made this an attractive subject--Congress wasn't going to restrain us. The White House wasn't going to restrain us. No one from any executive or legislative area was going to be saying we were wasting resources. One of the themes of Congressman Wirth was that I was soft on business. And he did shoot at me one time suggesting that insider trading was a buzz word that the SEC would be soft on business generally. But that's politics; that's not truth.

The cases began to develop and the personalities of the people – lawyers from Wall Street, noted individuals -- who were engaged in the misconduct made the stories very interesting. The newspapers had a new dynamic beyond the basic three reasons that I told you about; now they had a foreign country where they could go and interview somebody like John Zwahlen in Switzerland. Here I am--I'm nothing but a Director of Enforcement and I'm being invited to Switzerland to negotiate with its government, to talk with the Swiss Bankers Association, and talk about what eventually resulted in the Memorandum of Understanding. But you must not focus on me and these situations; look at the various levels of personalities that were involved. First of all, you had Ed Greene as head of Corporation Finance and then as General Counsel. You had Lee Spencer and John Huber. You had Rick Ketchum; you had Dan Goelzer in the General Counsel's Office and then you look at our own Division. At the senior level you had Ted Levine and then soon after that, Gary Lynch. And then at the next level you had Bill McLucas. Lynch and McLucas became Directors of Enforcement. Then we brought in Alexia Morrison, an Assistant United States Attorney, to head up the litigation team in the Division. So the individuals that I was working with weren't individuals of whom I was superior. I might have had a title but it was the homogenization of people who were willing to work together as a team that made this thing work. No one is going to tell you that John Fedders brought great scholarship or anything like that to the SEC. I was the Director; I'm proud of what I did but it was not John Fedders who did any of this. I never argued a single case. I may have taken a couple of depositions. I was taking people's ideas and trying to have an impact as a leader; I think it worked well.

KD: Tell me a little bit about freezing those assets, because it is a very interesting situation.

JF: Yes.

KD: Where the Swiss are coming to you for a change instead of the other way around.

JF: Right.

KD: Did you make the decision to freeze those assets? Was that an SEC decision?

JF: You don't make the decision to freeze them; you make the decision to go to a Federal District Court Judge and ask him or her to freeze them. Now some of those assets had been

frozen when I came on board. I do remember going to the Southern District of New York on one occasion. We were trying to freeze some assets, and we were sent by the Court to the apartment of a U.S. Federal District Court Judge and he was already in his night-clothes and we made a pitch.

The process works this way: you identify that there was some unusual trading before the announcement of the merger or tender offer. Let's suppose that today X makes a tender offer for Y; Y is selling at $29; the tender offer is at $59. That would send the staff in the market surveillance unit to surveil the market in X and Y's stock for several weeks before the announcement. You would find maybe these option trades or some large unusual trades. You'd then engage in blue-sheeting, which is simply a term for a sheet that was sent to brokers to find out who the persons were on the sides of the transaction. You'd find out that it was maybe a Swiss bank, who was acting on behalf of a customer. You'd contact them and then they could not tell you the identity. Then you would gather the facts, largely circumstantial evidence, but compelling circumstantial evidence, and you'd draft a complaint and you'd go to the Federal District Court Judge and you would present this ex parte and you would say, "Look these are the facts that we've been able to garner. We know that the money is at this bank. We would like you to freeze that money in the United States until we have a time to go forward." If the evidence is compelling, the judge -- fortunately for the SEC -- would issue a freeze order.

KD: And you cited unknown persons?

JF: Yes. You would cite unknown persons because you didn't know who the individual traders were. The complaint would explain that they were customers of the XYZ Bank or the ABC Bank. Again, to the public, this is very attractive; it's sexy news. It would attract the media and make television, things that you don't expect about a routine kind of case. All of a sudden, we're getting a lot of support for insider trading. And then you have the talent of guys like Ted Levine and Gary Lynch and Bill McLucas and others to lead these cases--guys who were extraordinarily careful, were not hip-shooters, went to court with great professionalism, knew how to train young people -- so that when they were part of the team it all went well. Fortunately we didn't make any glaring mistakes in the early days, so the insider trading program created some momentum.

KD: Were there cases in which you or somebody else said "we don't have enough here. I don't want to jeopardize what we're doing over here by taking on this one."

JF: There are always investigations which you close down. In one investigation, there were two young staff lawyers who had the matter and they did not believe that they had any information. They went to Gary Lynch and myself and made a presentation of the investigation. And we excused them, and Gary and I talked and we then went back to the two young attorneys and said "keep going." I think that maybe that was a good thing that I did in some cases. I would say to close cases or that I don't think there's enough there. You have to be a manager and keep in mind that there's no way that any agency in the civil context can police all of the insider trading. Somebody once asked me what percentage of it do you think you got? Well it's not like murder where if there's a dead body you count it as one. Okay; it's unsolved. So you don't know, you do your best, you hope it's a deterrent to others. You want to create an atmosphere of a government agency that the public believes the cop's on the beat. That's the first objective and then you go forward.

KD: I do want to get into the Paul Thayer case, but before we do that I want to pick up the thread that you left with Switzerland. I assume you needed the help of the State Department to get over there and negotiate?

JF: We needed a lot of help. I remember the phone calls saying that it would be appropriate to go. Nobody is going to suggest that John Fedders is a diplomat, so Ed Greene -- I believe he was General Counsel—and I spent some time thinking about putting a team together. We went with a gentleman from the State Department who was willing to take a backseat in the negotiation; he never chose to be the dominant speaker. We went with Roger Olsen from the Department of Justice; he chose not to be a centerpiece, so he was permitting the SEC to be the centerpiece of these negotiations. Ed and I decided that we had to take somebody with us, and it was an incredible stroke of good fortune who we selected. There was a young man at the Commission, who I saw as a rising superstar, by the name of Michael Mann, and we took him to Switzerland with us and his career was meteoric after that. The Division of Enforcement had an international section for a while. When the Commission created an Office for International Affairs, Michael Mann was appointed Director of that Office, and is today one of the pre-eminent lawyers in international law enforcement. The U.S. Ambassador over there, Ambassador Whittlesey, met with us and we began a series of

breakfast meetings, meetings with government officials and meetings with the Bankers Association. I gave speeches when I was over there; that's something that I enjoyed doing so being in the spotlight was not hard. They liked what we said. I think if Ed Greene was here and he was trying to put a patina on how we acted, I think he would say we were pretty conservative. I think we minded our manners. You'll see up on the mantle there a cartoon of a United States animal eating a Swiss animal. The United States animal has a flag around its nose and that cartoon appeared in the *Neue Zurich Zeitung*, and the caption states, "we are the most aggressive law enforcement agency." So that was the media's turn on it. We returned to the United States and we received calls to come back.

And so we made a second trip and then we began to develop what was called the Memorandum of Understanding or MOU. It was signed in a ceremony by Chairman Shad and John Zwahlen on behalf of the Swiss. Ambassador Whittlesey came home for the ceremony.

KD: They want their assets unfrozen; you want the names of people who own bank accounts. Was it essentially figuring out a good way to do that?

JF: Yes it was a means to do that. We want the names if we're going to unfreeze the assets. There was a very thoughtful MOU system about how we would go to the Swiss. We would identify certain information. There were checks and balances in the process. I think some of the genius of Mike Mann began to get in there as a very young lawyer at an early time. Ed Greene is clearly one of the most skilled lawyers I've ever met and a wonderful creative guy. The only thing that I can say in retrospect is that we operated slowly and we never pushed. We went over there and showed great respect, talked about the system, talked about why liquidity in our markets and integrity in our markets was important to the Swiss--that they invested an enormous amount of capital in our market. They would want it to be fair; they would want it to be liquid; they wanted it to be swift. If we weren't able to police our own markets because of impediments in jurisdictions of secrecy, the markets would not have this liquidity, speed, integrity. They bought our arguments.

KD: It made sense.

JF: Yes, it made sense. I would take a little credit for the fact that we were gentlemen. The ideas came from a lot of different people at the SEC.

KD: And that's diplomacy.

JF: Yes and I'm not a diplomat. I don't have that skill.

KD: Switzerland of course because the Santa Fe case was done through Swiss banks.

JF: Santa Fe and St. Joe Mineral both, yes.

KD: Did this transfer over to other companies—you've got the Bahamian problem--

JF: Slowly. My successors developed that. Mike Mann, under his directorship and the Chairmanship of Chairmen other than John Shad, entered into a lot more MOUs. I'm not sure during my Directorship if there were any other MOUs. I remember going to three or four other countries after that and it wasn't the way I wanted to spend my time as Director. That isn't where I belonged, but that's what I was asked to do.

KD: What countries?

JF: I remember going to England. I remember going to France. I remember going to Germany. I have a sense there was another country, but I could be wrong.

KD: Back in the states, one thing we haven't talked about that we should is the context of this insider trading prosecution.

JF: The context is easy; it never became the dominant program. If you look at the number of cases that we brought and compare that to the overall program the main thrust of the program remained disclosure issues--accounting fraud, broker dealer misconduct, all of those type of violations. That was good for us because we had something to ring the bell with in insider trading to attract attention, but we had all these other programs that were going quite well and never were pushed aside. All the young lawyers as I recall wanted to have one insider trading case among the cases that they were investigating, and I don't know if that was possible or

not. The insider trading program rang the bell. But the other cases kept going, and we did our share of accounting cases. We didn't have enormous frauds like Enron or World Com or Tyco. But we had our cases. Glenn Perry came in from Peat Marwick. In the Division of Enforcement was the position of Chief Accountant, and Glenn Perry came and did it and then Bob Sack came in after Glenn went back to Peat, and Sack was very, very good as well. They were two guys who really had the ability to homogenize themselves with the staff, and they were fun to work with. They had a lot of ideas and they were good teachers, because you were dealing with so many young lawyers who wanted to learn. They're looking for the day they get enough chevrons on their sleeve that maybe they might leave. Perry and Sack were extraordinary teachers.

KD: The legal background to all of this: you had the Chiarella decision in '80?

JF: No. It was after that because I came in '81 and Chiarella came after I was there.

KD: So it was in '81.

JF: Dirks, Chiarella and then Carpenter--there were a number of them and the Courts supported what we were doing, although Dirks was adverse to the Commission. That case was argued before the Supreme Court by David Bonderman of Arnold & Porter, one of my former partners. Dirks didn't hurt the Commission.

KD: No?

JF: No. I always feel that if you get a case and it gives you direction on how to plead your cases in the future, you might not win the first case like Dirks, but you gain a lot. All these cases that came along, whether Dirks or Chiarella or Carpenter, they gave the SEC staff some sense of moving forward. The 2nd Circuit had decisions in insider trading cases and they sharpened the SEC's pleadings. You had more confidence when you would plead the next time. From an institutional point of view, no government agency likes to lose a case. It isn't part of human nature; you like to win all the time, but it's not the way it works. You've got to take the good things that come out of these cases and the good thing is that you can have more confidence as you go forward. I think that that happened during my tenure.

KD: So did that change the way you approached some of the cases?

JF: I don't think the way you approached it; you knew what you had to have and you knew how it had to be pled. I recall the decision being made very quickly to close down a case or two. I do remember a couple of instances of that, but the impact on the program of closing a couple of cases is de minimus. The private bar certainly likes the fact that the SEC loses because it gives them something to champion and gives them new arguments, but that's part of the adversarial process. I don't ever recall any case coming down during my tenure where we had to go into great depression over the loss. You learn from it and there's good scholarship in all of those cases.

KD: John Shad very publicly put a lot of his stock in insider trading.

JF: He sure did--hobnailed boots.

KD: Did he ever come to you and say "I stuck my neck out there. How are you doing on that insider trading stuff?"

JF: No. He never said it that way, but he would meet with all the Division Directors fairly frequently. So I met with Chairman Shad often enough. I don't think he ever asked the question. I was always telling him what we were doing. The people who worked for me were very good in giving me periodic reports. We had a Monday morning staff meeting of the senior staff, both Associate Directors and Assistant Directors, so that I could tell Chairman Shad what we were doing and where we were. I don't think the Chairman ever suggested that we do one thing as opposed to another. He liked ideas; he liked different things.

Our Division kept Chairman Shad very well advised where we were. I know that the other Division Directors did too. The one thing when you're in an institution like the SEC and particularly with a leader like John Shad--no surprises. That would be the worst thing you could do--to create a surprise.

KD: Because he's got people ringing his bell—John Dingell, William Proxmire --folks like that?

JF: They were certainly watching him. I don't think they ever attacked Chairman Shad as a program-oriented Chairman in saying that his programs were no good. He took some personal shots over his wealth and whether it was sufficiently entrusted. But John Shad was a smart cookie. When we would go for Congressional hearings there might be some questions that were probative and it might be put in a tone that it was adversarial, but he was smart enough -- and I think all the Division Directors were smart enough -- to know this is part of the deal. If you go up there to the Hill and you're testifying, there are Senators and Congressmen to the left and there's some to the right and some of them are of your political party and some are not and you've just got to accept that.

KD: Somebody is going to disagree with whatever you say?

JF: Yes. We could say that it's a beautiful cool day after all the heat we've had in Washington, and somebody would say it's not cool enough. I don't think Chairman Shad ever got upset. He prepared himself well when he went up there for Congressional hearings.

KD: Did you participate in those?

JF: Somebody recently was telling me that I testified 20 times before Congress while I was at the SEC. I remember going up and testifying before both the House and the Senate on the Insider Trading Sanctions Act which was new at that time and I sat with Chairman Shad and I think Ed Greene. I testified about Southland. I testified about our Enforcement program.

KD: You touched on something that's next on my list, which is the Insider Trading Sanctions Act.

JF: Right.

KD: How much of that was the result of initiatives by the SEC?

JF: A very large part. I'd give a lot of credit to Ed Greene and the people in the General Counsel's Office. I'd give a lot of credit to the people who worked for me. I certainly read and was a participant in a lot of discussions as to whether there ought to be a definition of insider trading. At one time, internally, I suggested that I thought it was a good idea. I've always been one who believed that the tendency of the law should narrow the field of

uncertainty, and that maybe by definition you'd make the scope of illegality more certain. But the overwhelming majority was "no, keep it broad." Rule10b-5 itself is broad; it's flexible; it permits you to attack new kinds of fraud. I think that's part of the Commission mentality. I think it goes all the way back to the staff who began in '34. They had this broad mandate--protect the institution and its ability to be flexible. I remember talking to Chairman Shad when we were in the park. He asked me about some of my philosophies, and he ticked off a number of ideas. I remember saying to him I thought that the tendency of the law should always narrow the field of uncertainty, and that's something I recall saying at the meetings when we were talking about a definition of insider trading. But yes, I think the SEC itself was largely responsible for ITSA. If John Shad and Ed Greene and the Commissioners hadn't pushed for the Insider Trading Sanctions Act, I don't think it would have occurred.

KD: How much of the provisions came from consultation with folks at the SEC?

JF: That I don't know. I couldn't give you a percentage or even an estimate of it. In hindsight I would think that an awful lot of it came from Ed Greene and his folks in the Office of the General Counsel. I'm sure there was consultation with the Hill, and I'm sure some of the committee reports were written by staff at the SEC.

KD: Did it seem to make a big difference?

JF: No. It created a new penalty; it gave lawyers something to negotiate about. But I don't think that you could say that once ITSA was passed that insider trading went away or became de minimus. Of course nobody has any statistics, and nobody has any ability to create statistics. One thing that Chairman Shad provided me was an opportunity to do is meet people on the Street to talk about what was going on and what are we missing in the Division of Enforcement. He brought Warren Buffett to the Commission at one time; I remember spending a good couple of hours with him in my office and asking him about what did he think the Commission was missing and did it make a difference? ITSA certainly gave the legal community something new to talk about, something new to negotiate, and were we going to hit people with three times penalties. The trade-off became the one-time one. If your ill-gained profits that you had to disgorge were 100,000, then you had to pay another 100,000 under ITSA as a penalty.

KD: I had heard it said that people can ignore penalties; it's throwing people in jail.

JF: The criminal aspect of the enforcement of the federal securities laws has certainly had a big impact since 1980. I remember Gary Lynch went with me and we met with Rudy Giuliani in the Southern District. I met with the U.S. Attorney in Boston. I remember going to the U.S. Attorney's Offices in Chicago and San Francisco and a few other places and trying to interest them in our program. If I have a client today who had done wrong things and the government is investigating, he might say look, I understand that I might have to take an injunction and pay a fine but I'm here because I don't want my liberties to be taken from me. If we've got to take an injunction, if I've got to pay a fine where I lose a lot of money, I can live with that. But I can't live with going to jail and that would disrupt my family life and it would be an embarrassment too great to take. An awful lot of times you face a client today and that's the litany you hear.

KD: You're talking about going around to Boston, Chicago, New York--are you talking about the hypothetical "we may want to work together on prosecuting insider trading if it should happen" or were you talking about specific cases?

JF: Both. I don't think it was just insider trading. We were trying to drum up business in other areas as well. Certainly, in going to meet Rudy Giuliani and some of his colleagues, I think there were some particular cases that were already in the pipeline that we were specifically talking about. When we went to Boston to the U.S. Attorney I think the Boston Regional Director went with me, and in Chicago the Regional Director there, so the visit was diplomatic. It was trying to interest them in our program. I say this irreverently that most U.S. Attorneys have political ambitions and if they can bring some popular cases in the insider trading or other securities areas it might enhance their eventual run for Governor. I think I was blunt enough to say that to some of them.

KD: I'm sure they're seeing a lot of that.

JF: Yes. We would laugh about it, but I knew that there was more truth in it than humor.

KD: You had bookends of government cases too, and you referred to the Thayer case.

JF: Yes.

KD: That was Tom Reed.

JF: Right, I remember Reed well.

KD: Were there any significant implications to those cases other than the fact that here's some guys with a lot of money?

JF: No, no one at any time ever tried to restrain us. No one in the Administration knew that the cases were in the pipeline until the very end. I remember the Thayer case much more clearly. When that case was approved at the Commission table, either Chairman Shad or somebody else said, "Don't you think it would be advisable to advise the White House," and the Commissioners unanimously said yes. When the meeting was over I called Fred Fielding, who was Counsel to President Reagan. I wasn't about to go over there by myself. Gary Lynch and I went and we reported to him what was going to happen within the next few days and went back to our offices. Within an hour, I got a call from Mr. Fielding saying he would like me to brief Secretary Casper Weinberger at the Defense Department. I grabbed Gary Lynch and we went to Defense and briefed the Secretary and his General Counsel.

KD: Why didn't you want to go over by yourself?

JF: I'm visible by my height. I am a conservative Republican. You don't want anyone to suggest that something untoward happened at a meeting and to have to articulate it yourself. I don't know Gary Lynch's politics today; didn't know then, but he was a most trusted advisor and a man whom I had great faith in and would help make the presentation. I remember that the only question asked at both meetings at the White House and at the Department of Defense was -- you should do what you believe is right and are you sure. In both cases we were; we were confident that we were. It was good experience; it's the kind of thing that people were interested in – oh, you went to the White House; you went to the State Department -- but they weren't significant events in my overall tenure. Nobody was going to suggest to us that we not do this; that never even crossed my mind. It was a matter of doing the right thing so

that an Administration was not embarrassed and could put its ducks in a row to understand that this publicity was coming.

KD: You weren't reaching for any new legal theories to prosecute insider trading?

JF: No, neither--no, no.

KD: One where perhaps you were would have been the Foster Winans case, which came toward the end of your time in Enforcement.

JF: Right.

KD: Now I understand you were recused from that case because of Arnold & Porter?

JF: Yes. I think there was a gentleman named Clark that was involved in that case and he retained Arnold & Porter at some time. The case was well along as far as an investigation, and then I had to step aside from the case.

KD: So you put Gary Lynch in there?

JF: I didn't put Gary Lynch in there; Gary Lynch was in there. That's one of the things you've got to understand about this is that while I was Director and I'd like to give myself a miniscule of credit for leadership, these were extraordinarily talented people. Look at what Gary did as Director. Ted Levine should have or could have--however you want to say it--been Director when I was appointed, a man who has pre-eminent knowledge of the federal securities laws. These were extraordinary people I was working with. There wasn't anybody I had to go over there and teach the federal securities laws. I didn't put Gary Lynch in charge; he was in charge and he did the right thing and moved the case along--yes.

KD: He took a lot of heat for this idea that the SEC was going to bring action against a journalist.

JF: I was still part of the case when the three chief editors of *The Wall Street Journal* came down and when we told them what we believed had occurred. I don't think the publicity was adverse. There were people who protect the fourth estate who had an interest in doing that.

But it's like cases that are popular today, without mentioning names, where if somebody has done something wrong you can't hide behind the fact that you're a Congressman or a reporter or whatever. Wrongdoing is wrongdoing and I think when people analyze the case-- what eventually Gary and the staff and the Commission concluded I never considered it to be negative. It might have been-- every day you get a bad story about something but you can't live your life nor can a governmental agency or a prosecutor particularly live their life by worrying about negativity. You want to do it right; you want to consider yourself to be operating within the scope of the law. I certainly wouldn't want to be out beyond the outer edges of the law, because I don't think that that's necessary to run an effective law enforcement program.

KD: I'd like to start to wrap up by getting to maybe one larger question.

JF: Okay.

KD: During these four or five years you're in Enforcement, did you see things change significantly in the way that the job is done, the way that the Division functioned?

JF: People tell me things, and I like to believe that some of it is true. But any time you embark upon a conversation like that some people could infer that I'm being critical of my predecessor. I'm very different than Stanley Sporkin, in appearance, in attitude, in all kinds of things, so sure; I brought what John Fedders could bring. Some people have said to me that there was a heightened degree of professionalism, much more attention to detail. Some people say some people were afraid of me when I first went there. If it was a healthy respect, I'm happy. If it was a fear. I'm sad. Sure it changed; it should be changed because of the personalities. Ted Levine left and that was an enormous loss, and then Gary moved up and Bill McLucas and other people moved up and their personalities changed the Division.

KD: What about priorities?

JF: I'm sure I shifted priorities because I went there with the intention of doing that, because that was part of the conversation in the park with Chairman Shad. I have written articles about the whole questionable payment era, and my view on that is pretty well noted. I had certain views with regard to the anti-bribery provisions of the Foreign Corrupt Practices Act. I made a

negative statement to an Assistant Director once that became big newspaper publicity about what I said about a FCPA case that the Division was investigating. There were areas that I didn't think that we needed to be in or to have a kind of prominence that historically had been in, but I would only be critical of myself if the program was less active and it didn't bring cases in core areas and didn't make an impact in what we were doing. So there are one or two cases that I'm not free to mention that I look back upon--two in particular that I have great regrets about how they were handled. And I know that mistakes were made, and I'm prepared to take the responsibility for that. But that's only really two cases out of five years of work and if I didn't effect a change then something is wrong because then I didn't exercise my personality or the human qualities that I brought to the SEC. People either found me attractive where they would want to cooperate and be a part of the team or they found me unattractive and they would rebel against those notions. And my own sense is that there was little, if any, rebellion during my tenure. I think it was a team. I think that it was a good period and I feel good. I don't want to ever take the credit for it. I've been really, really lucky with the people that I worked with. I would say that at the SEC I had been at a great law firm and I've worked with some extraordinary lawyers at every place I've worked. And I like to think that my tenure at the Commission and the Division of Enforcement we had an extraordinary law firm and that if somebody would confirm that, that would be enough for me. I don't need to hear anything more. But I know in my heart that we were an extraordinarily good law firm in the Division.

KD: Well that's sounds like a great place to wrap it up.

JF: Good.

KD: Thank you very much.

JF: Thank you.