STATEMENT BY HONORABLE EWIN L. DAVIS, CHAIRMAN, OF FEDERAL TRADE COMMISSION, BEFORE SUB-COMMITTEE OF HOUSE INTERSTATE AND FOREIGN COMMERCE COMMITTEE ON PROPOSED FOOD AND DRUG LEGISLATION.

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE OF THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE.

Saturday, August 10, 1935.

The Subcommittee met at 10:00 o'clock, a.m., Honorable Virgil Chapman, presiding.

Mr. Chapman. We have with us today the distinguished Chairman of the Federal Trade Commission, and also a former distinguished and greatly beloved Member of the House of Representatives, Judge Davis, who will be recognized for an hour. Judge Davis.

STATEMENT OF HONORABLE EWIN L. DAVIS, CHAIRMAN, FEDERAL TRADE COMMISSION.

Mr. Davis. Mr. Chairman, and Members of the Committee present, I am very grateful for the generously kind statement of Chairman Chapman. It was a great pleasure to serve with him and my many other Colleagues in the House. For that reason, I know something of your problems, particularly when you are, as Members of a Committee, dealing with bills that are before you for consideration. Whatever I may say to you will be in the way of an effort to be helpful in laying before you what will be indisputable facts relating to the subject before you.

In the outset, I wish to state that we appreciate the fact that you kindly gave us an invitation and the privilege of presenting our views to you gentlemen and the other Members of Congress. We shall not undertake to discuss any phases of the four bills before you except as they relate to and affect the jurisdiction of the Federal Trade Commission. We want it understood that we are not appearing here as hostile to any bill nor to the purpose of the legislation to strengthen the Food and Drug Laws. The fact of the business is that we are of the opinion that the Food and Drug Laws should be strengthened. So far as we are concerned, we would be very glad to have whatever bill is to be enacted disposed of during the present Session of Congress. For the past two or three years this has been a recurring and controversial matter, which we would like to see disposed of.

Now, in this connection, a statement was made before this Committee by Dr. Campbell, for the Food and Drug Administration, which might be construed, although it is ambiguous, as undertaking to convey the impression that I appeared before the Senate Committee in opposition to the Food and Drug Bill.

I not only did not appear in opposition to the bill, but I specifically stated that I was not doing so, as the printed record shows. I appeared in the last Session of Congress before the full Senate Commerce Committee, upon the invitation of the then Chairman of the Committee, and I confined my remarks to a discussion of the bill as it affected the Federal Trade Commission. Then, during the present Session, I appeared upon the request of the Chairman of the Subcommittee, and, in fact, in response to a request that was repeated that I or some other representative of the Commission appear and state our views. In connection with my appearance there, however, if I may, I wish to quote briefly from the printed record of the Senate hearings some literal statements of what occurred there. When I was first called, among other things, I stated this:

"We assume that it is not expected of this Commission to give any opinions in relation to any feature of the bill as it relates to any other agency, and consequently I shall only discuss it from the standpoint of the jurisdiction of the Federal Trade Commission. As perhaps you are aware, the Federal Trade Commission has jurisdiction over false and fraudulent advertisements. In its organic law it has enjoined upon it the duty of preventing unfair methods of competition in commerce, and the courts have repeatedly and uniformly held that false and fraudulent advertising came within that category."

On page 233 of the Report of those hearings, it appears that Senator Copeland asked me if I was in opposition to the bill, and I replied, "No, I am not."

Now, in view of some discussion as to what is sought to be done and as to what is the purpose of the bill, I desire to quote from the author of the Bill:

"Judge Davis. 'Well, of course, if Congress desires to transfer the jurisdiction, that is a matter for them. I would not undertake to indicate what they should do in that respect.'

"Senator Copeland. 'Well, I would not be in favor of that, Judge, because in these competitive conditions you have a very important part to play in this field, outside of the matter of health itself.'"

Then later he said--

"I would not be willing to take from you any powers that you now have."

That is from the hearings held on March 1, 1934.

Then, on March 8, 1935, when I appeared before the Subcommittee of the Commerce Committee of the Senate, the author of this bill stated, and I quote this because statements have been made before you that the Federal Trade Commission was doing nothing in this field, and many similar statements have been made. I quote from the hearing as follows:

"Senator Copeland. 'I wish to interrupt you to say that I think the Federal Trade Commission has rendered a great public service in what it has done in control of the false advertising and unfair practices, and so far as I am concerned, I concede that at once.'"

And he made similar statements during the course of the hearings.

Now, gentlemen, the issue with respect to advertising is not one of taking jurisdiction from the Food and Drug Administration, or of giving it to the Federal Trade Commission, as a large percentage of the witnesses who have appeared before you have said. A large number of those who have appeared before you showed by their statements that they were wholly uninformed and had no correct conception of the real jurisdiction, functions, and work of the Federal Trade Commission, or of the innumerable court decisions interpreting our Act and our actions. In fact, in some particulars, there was such a significant uniformity of mis-statement that it was doubtless, although honestly stated, inspired by an intensive propaganda which has gone on for the past two or three years. Among other things, statements have been made to the effect that the Federal Trade Commission did not and could not act in the interest of the consumer or the public, but only in the interest of competitors. Those and similar statements have been made.

Now, reverting to where the jurisdiction lies, the Federal Trade Commission has since September 26, 1914, had jurisdiction and exclusive jurisdiction over false and misleading advertising. The Food and Drug Administration does not now have such jurisdiction, and never has had it; so that it is not a question of taking anything from the Food and Drug Administration or of giving anything to the Federal Trade Commission, notwithstanding the innumerable statements to the contrary that have been paraded before this Committee.

It is true that the Federal Trade Commission Act does not in specific terms give the Federal Trade Commission jurisdiction over false and misleading advertising. Neither does it in specific terms give it jurisdiction over hundreds of other unfair practices as to which the Commission has rendered corrective action, and which has been sustained by the courts. Knowing that it was impossible to describe all the different devices that would be resorted to to deceive, mislead, and defraud the public, Congress very wisely, as the Supreme Court has several times said, gave general authority to the Federal Trade Commission, subject to review by the courts, to "prevent unfair methods of competition in commerce", to designate and condemn practices which were employed from time to time by the cunning devices of men who were bent upon defrauding their fellow-men, and from the beginning, without exception, the courts have held that false and misleading advertising -- that is, advertising that was calculated by misrepresentation to induce the public to buy goods so advertised, was an unfair method of competition, if it was practiced in interstate commerce.

Now, they play a great deal on the use of the words in Section 5 of our Act under which unfair competition in commerce is declared unlawful, and under which the Federal Trade Commission is authorized and directed to prevent such methods, or unfair methods of competition. Congress used that term at that time following the analogy of the old common law term "unfair competition", which had been sustained by the courts. That was done because Congress wanted to be sure that it was enacting a law that would be sustained by the courts, and the Federal Trade Commission Act has been repeatedly sustained by the courts. Every feature of it has been sustained, and not one single word of it has ever been condemned by the Supreme Court. It is a Constitutional law.

A long line of decisions, and valuable decisions, have resulted from it, and we have the benefit of them and the public has the benefit of them. The subject has been stabilized, although the category of unfair practices and fraudulent practices has been greatly expandod as new pretexts and efforts to defraud have entered into our commercial life.

No Federal agency can regulate or prevent transactions that are not in interstate commerce, or that do not directly affect interstate commerce. In other words, Congress in its effort to protect the public in this respect relied upon the commerce clause. That is all there is to it, and those who speak to the contrary, either do so through lack of information of the law and the decisions interpreting it, or else with a deliberate purpose to mislead this Committee.

Now, if I may, I want to quote from some of the decisions of the Supreme Court. As I said at the outset, I am not going to say anything that is not supported by the records.

According to our Act, we cannot proceed except in the public interest. The very Act itself says that--

"Whenever the Commission shall have reason to believe that any person, partnership, or corporation has been or is using any unfair method of competition in commerce, and it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint", etc.

In other words, it is an absolute requisite without which we do not have the authority. We do not undertake to deal with a mere controversy between competitors. We occasionally come in contact with what we term private controversies, but unless the consuming public is adversely affected, we do not proceed; but, my friends, it is the rarest case in the world, if it ever exists, where the consuming public is adversely affected by false and misleading advertisements that a competitor is not also affected, and, consequently, we would have the requisite showing of competition. In fact, the only instance in which that could not occur would be where there were no competitors.

Now, you have heard a great deal about the Raladam Decision. It has been discussed over the period of the past two or three years as few other decisions have been. It has been used as propaganda against the Federal Trade Commission, and they have made such a show of that because it is the only case in which the Supreme Court has reversed a Decision of this sort by the Federal Trade Commission on the ground of lack of competition. That was seven years ago, and that has been the only case in which the Supreme Court has reversed this Commission on that ground. During the past seven years the Supreme Court has not reversed the Federal Trade Commission in a single solitary case involving Section 5 of the Federal Trade Commission Act. In fact, during that time it has reversed the Commission in only one case, and that was a five to four decision. That was in a Clayton Act case.

Now, I know that a great deal has been said in connection with that Raladam case, to the effect that the court said that you cannot stop one knave

who is in competition with other knaves. Well, the Circuit Court of Appeals said that. The Supreme Court did not say it. The Supreme Court discussed that, but expressly withheld any decision upon it. They reversed the Commission on the ground that there was no evidence, or no substantial evidence, of any competition or any competitor. Now, what has resulted since then? The Commission has always been careful enough to see that competition was expressly proven. The Commission has not been reversed since then, but during the past seven years the Commission has been repeatedly affirmed. It was affirmed in eight cases involving food, drugs and cosmetics within the past two years. It has been repeatedly affirmed. But here they hold out this Raladam Decision as a reason why the Federal Trade Commission should be robbed of its jurisdiction and have it placed in the lap of a farm organization.

Now, a reading of that decision in the Raladam Case (283 U.S. 643) will show you how unsubstantial is their charge that we are handicapped by having to prove competition. Here is what the court said in that very case:

"It is obvious that the word competition imports the existence of present or potential competitors, and the unfair methods must be such as injuriously affects or tends thus to affect the business of those competitors -- that is to say, the trader whose methods are assailed as unfair must have present or potential rivals in trade whose business will be or is likely to be lessened or otherwise injured."

Then the court goes on to say that it is not even necessary to name the competitors, but that it is just necessary to show that the respondent has competition. It just adds a little more trouble to prove it, but the Commission has not failed to do it since. I think I can show you that it has not failed to do so. That is all there is to this big bugaboo, gentlemen.

I want to show you that according to the Supreme Court, our chief function, as intended by the law -- and I want to tell you, as exercised by the Commission -- is to protect the public interest. For instance, in the noted Winsted Hosiery Company Case, (258 U.S. 483, 494), the Supreme Court in its Decision says:

"As a substantial part of the public was still misled by the use of the labels which the Winsted Company employed, the public had an interest in stopping the practice as wrongful; and since the business of its trade rivals who marked their goods truthfully was necessarily affected by that practice, the Commission was justified in its conclusion that the practice constituted an unfair method of competition; and it was authorized to order that the practice be discontinued."

By the way, Mr. Chairman, I have a number of excerpts from decisions by the Courts, and I would like to have the privilege of placing all of them in the record, simply quoting from a few of them at the present time.

Mr. Chapman. We will be glad to have you do that, Judge.

Mr. Davis. I want to quote a little further:- now from the Royal Baking Powder Case, (Royal Baking Powder Co. v. Federal Trade Commission, 281 Fed. 744, 753):

"The purpose of the Congress in creating the Federal Trade Commission was aimed at just such dishonest practices, and business concerns that resort to dishonest devices of this nature must understand that they cannot add to their revenue or maintain their business standing by methods of competition which the law brands as 'unfair' and therefore unlawful."

The Winstod Hosiery Company Case was one of the leading cases on this subject of false advertising. By the way, in that case, the Court of Appeals reversed the Commission, but the Supreme Court, in turn, reversed the Court of Appeals, and affirmed the Commission. In affirming the order of the Commission in the Royal Baking Powder Case the Circuit Court of Appeals explicitly states:

"The reversal of the case by the Supreme Court (Federal Trade Commission v. Winsted Hosiery Co., supra) has established the principle that advertisements which are false in fact constitute an unfair method of competition, although it was one commonly practiced and not intended to mislead the trade. The labeling of commodities in such a way as to deceive the public is an unfair method of competition. The manufacturer must not brand his goods as 'wool' when they are part wool and part cotton; and it is now made plain that the statute has invested the Commission with jurisdiction to order any one who misrepresents the quality of his goods in his advertising to cease and desist from such unfair methods of competition."

The Circuit Court of Appeals for the 7th Circuit in Consolidated Book Publishers, Inc. v. Federal Trade Commission, (53 Fed. (2d) 942, 945), in affirming an order of the Commission, said:

"The following propositions of law fully support the ruling:

"False and misleading representations resulting in deception of the public are matters of public interest which the Commission has power to prevent."

Then, quoting from the Winsted Hosiery decision --

"The Commission's jurisdiction is not limited to practices which tend to create a monopoly, but embrace false and fraudulent advertising, misbranding, and other practices which result in deceiving the public. Such practices injure competitors who do not use them."

Again, quoting from another case, (Federal Trade Commission v. Gratz, et al, 253 U.S., 421), the Court said:

"Practices opposed to good morals because characterized by deception, bad faith, fraud, and oppression are unfair methods of competition."

I could go on at length quoting from these Decisions.

In a Decision rendered on January 8, 1934, in the case of the Federal Trade Commission v. Algoma Lumber Co. et al, 291 U. S. 67, 78, the Court among other things, said:

"The consumer is prejudiced if, upon giving an order for one thing, he is supplied with something else. * * * In such matters, the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance."

In a case recently decided and reported in Federal Trade Commission v. Keppel & Bros., 291 U. S., 304, 313, it is stated by the Supreme Court:

"It is true that the statute does not authorize regulation which has no purpose other than that of relieving merchants from troublesome competition or of censoring the morals of business men. But here the competitive method is shown to exploit consumers, children, who are unable to protect themselves. It employs a device whereby the amount of the return they receive from the expenditure of money is made to depend upon chance. Such devices have met with condemnation throughout the community."

And so on.

There are many other decisions in which the courts show very clearly what you gentlemen in the light of your experience and observation know is true, that whenever one competitor induces the consuming public to purchase its product and induces them to do so by false and misleading advertising, and induces purchases which would not be made in the absence of such false and misleading advertising, of course it adversely affects his competitors, because to that extent it takes business away from him; and there isn't any difficulty at all on that score.

The Federal Trade Commission of all agencies of this Government has stood out as the protector of the public interest. It is the one agency that originated under its authority the regulation of advertising and the prevention of false and misleading advertising of all commodities, of which a part are food, drugs and cosmetics.

I haven't the time, of course, to answer the innumerable things that have been said before you during the past two or more weeks. I shall only deal in general terms with some of them. For instance, with regard to statements that the Commission has not done anything much, I wish to file with you gentlemen those six volumes. I will not be so bold as to ask you to read all these thick volumes, but I tender them to you and only wish that you and all other interested parties could read them all. These volumes contain nothing except official complaints issued by the Federal Trade Commission, stipulations to cease and desist and not to resume, and orders to cease and desist. These volumes contain only such official documents and orders issued during the past two years and relating alone to food, drugs and cosmetics.

Mr. Chapman. We will be glad to have them filed.

Mr. Davis. We offer these as an answer in part to some of the wild, reckless, unjust and unfair statements which have been made before this honorable committee.

Furthermore I wish to hand you or call your attention to a summary of those cases. During the past two years the Commission has received 2,998 applications for complaint, of which 706 related to food, drugs and cosmetics, and during this period the Commission has approved 329 stipulations to cease and desist with respect to false and misleading advertising on foods, drugs and cosmetics, and during the same period has issued 107 complaints with regard to the same commodities and has issued in addition 61 cease and desist orders against foods, drugs and cosmetics.

In addition to these I wish to call your attention to the fact that during the past 12 months the Federal Trade Commission has received and has reviewed 405,174 radio advertisements and that 40,275 of those were laid aside for further consideration, the others passing without objection, and that of those corrective action has been taken or is being taken in 445 drug cases, 133 cosmetics and 183 foods and beverages, and so on.

And yet they say we are not doing anything. I defy anybody to point to any agency of the Government in which a larger amount of work is done per man than is done in the Federal Trade Commission.

Do you realize that during the present fiscal year the appropriation for the Food and Drug Administration is approximately $400,000 more for the administration of their jurisdiction over food and drugs alone, than the appropriation for the Federal Trade Commission for all purposes, for handling not only unfair methods of competition and false and misleading advertising of food, drugs and cosmetics, but every other commodity, and also for its jurisdiction over the Clayton act and the Webb-Pomerane act and our investigations which we are constantly carrying on under the direction of Congress or the President. Our total appropriation for all these purposes is several hundred thousand dollars less than that given to the Food and Drug Administration. And yet if you give them jurisdiction over advertising, and they have to duplicate the field force that the Federal Trade Commission has on that, and all other commodities, I don't know how much more appropriation you will have to give them. That is betwoen you and them.

Another criticism that I desire to reply to is the alleged slowness of the Federal Trade Commission. One Charles Wesley Dunn has been very active before Congressional committees, a gentleman from New York who has had some business before the Federal Trade Commission, and he seems to have taken a great deal of delight in advising the committees and the public, and in any statement he can get inserted in the public press, that he delayed a case for ten years before the Federal Trade Commission, and that he just got a decision in it recently.

Well, now, Mr. Dunn rather left the impression that he got a decision in his favor, but he, gentlemen, should have told you that the Court of Appeals unanimously decided against him, unequivocally, absolutely on every issue; and he should have also told you that in rendering that decision the court cited the Beach-Nut case, another important case which Mr. Dunn had before the Commission, and in which the cease and desist order was entered against his clients, and from which he appealed to the Court of Appeals and on to the Supreme Court, and in which the Commission was affirmed.

But, in the first place, I leave it with you gentlemen to determine how much credit you will give to the opinion of a gentleman who boasts of having had his case continued and continued and continued, and then comes in and criticizes the tribunal for doing it.

Let me tell you, he did, by various devices, wanting to go to Europe and other places, get numerous continuances and the case was unduly delayed. But I want to tell you, my friends, that I am not endorsing that delay. I criticize the Commission myself. I say that that is one case where the Commission was entirely too lenient. But that is an exceptional case and like the Raladam case --- that and the Raladam case have been the twins that the enemies of the Federal Trade Commission have paraded from one end of this country to the other --- and I want to tell you that neither Mr. Dunn nor any other lawyer is, under present conditions, getting unmerited continuances or fighting off any cases of that kind in that way. The Commission is proceeding with greater expedition than ever, because under the court decisions, the rights of the Commission have been established, its work has been stabilized, its force has become trained and efficient and the Commission itself and its personnel is 100 per cent in favor of expediting these cases and, gentlemen, in the vast majority of cases they are disposed of within a few months.

At least 85 per cent of our cases, after preliminary investigation and some without any field investigation, are disposed of by the respondent and the Commission signing a stipulation in which the respondent concedes that he has done thus and so, and agrees to cease and desist from the practices and not to resume any more.

You might say, "Well, that is just an agreement." Yes, that is an agreement, but do you know that our stipulations have been observed to a remarkable extent?

Our chief trial examiner ---

Mr. Kenney. Well, that stipulation is an admission on the part of the respondent that it has been doing certain things, set out in the stipulation, is that so?

Mr. Davis. Oh, yes. They are required, in effect, to plead guilty. In other words, they admit in writing that they have done things which constitute a violation of the law, and it is set out in detail.

Mr. Kenney. And if they do resume, it would be a very easy matter to stop them.

Mr. Davis. Absolutely.

Our chief trial examiner called our attention to the fact recently that since he had been chief trial examiner his division had handled the negotiation of about 1800 stipulations to cease and desist, - he only had a part of them, the special board having a portion, - and that in only one case has the Commission received a complaint of non-compliance or of violation that appeared to be worthy of action.

Now, I think that is a remarkable record.

We get a very small per cent of violations of our formal orders, based upon evidence, formally taken, but wherever there is a violation, you understand we have the power to enforce our orders by going to the Circuit Court of Appeals, presenting the record to them, and asking that they proceed against the violator for contempt, and every respondent knows that can be done and will be done if he violates the orders.

Now, some of the good ladies who appeared said that they did not want the Federal Trade Commission to have this jurisdiction because of its technical procedure. These cases that are stipulated by negotiation and by agreement are as informal and as speedy as it is possible to have them. But suppose that the Commission believes that a certain company, or individual, is violating the law in a certain respect, that he is misrepresenting the value or the quality or the character or the effect of a commodity, and we call his hand, and he says, "No; what I say about my commodity is true, and I can prove it. I am not going to sign any stipulation. I want to fight it out under the Federal Trade Commission Act, enacted by Congress," and recognizing that, whenever we take forceful action against the rights of our citizens we should do it according to due process of law, according to the specific terms of the statute itself, we proceed. In other words, the respondent is entitled to his day in court, and what happens?

Our chief counsel's staff prepares a formal complaint in which he sets out specifically the charges that are made against this alleged violation, and it is served upon him, and he has 20 days in which to answer, and then it is referred to the chief trial examiner, who up to date has had nothing to do with the case. He sits in an impartial capacity, and an attorney of the chief counsel's staff of the Commission presents the evidence in behalf of the contentions made on behalf of the Commission, and the other side has the right

of cross examination. Then the other side takes their proof. Then both sides file briefs, and if it is requested the full Commission hears them orally on the case. Then the Commission decides the matter, and, if it finds that the charges are sustained by a preponderance of the evidence it issued a cease and desist order and that ends it unless the respondent is still dissatisfied. If so, he has the right of appeal to the United States Circuit Court of Appeals of the circuit in which he resides.

Mr. Chapman. Judge, the Federal Trade Commission is what we call a quasi-judicial body, is it not?

Mr. Davis. That is it, Mr. Chairman. In other words, with respect to investigations that are conducted under the direction of the Congress, we will say, or the President, or the Attorney General, and the statute says we shall conduct investigations at the request of any of those, we are acting in an administrative capacity. Our force is acting in an administrative capacity in investigating a complaint. But when it comes to a trial, when it gets to a decision, the Commission is acting in a judicial capacity and passes upon it according to the law and the evidence, and then if the respondent is still dissatisfied, he has the right of appeal.

And, by the way, talking about the question of speed, the Federal Trade Commission Act provides that upon appeals from our Commission or upon presentation of cases for enforcement by our Commission under contempt procedure that our cases shall be given priority, and that is an important matter, too.

Mr. Chapman. Judge, how many members of the Commission are lawyers?

Mr. Davis. All of them.

Mr. Chapman. Is there anything in the act creating the Federal Trade Commission requiring them to be lawyers?

Mr. Davis. No, there isn't anything in the act requiring that, but out of a recognition of the fact that they do act in a legal capacity and have to pass upon matters involving the interpretation of the statute and the laws of the land, and of the rights of citizens under the law, it is recognized that they should be lawyers and there have been very few and rare instances where others than lawyers were appointed.

Mr. Chapman. The very nature of the duties they perform you might say almost requires that they be lawyers?

Mr. Davis. It is very important, I think, Mr. Chairman, that they should be lawyers.

Mr. Kenney. Judge Davis, do you agree with me that lawyers very often pick up a vast knowledge of other things outside the law?

Mr. Davis. I think that is undoubtedly true. I think lawyers more than any other profession, unless perhaps it is journalism, come in contact with

every phase of life and every side of human nature and public relations and all that. I think that is all important in determining questions of this kind.

Mr. Kenney. We have lawyers who specialize in food matters, other lawyers who specialize in drug matters, others who specialize in railroad matters and that sort of thing, isn't that so?

Mr. Davis. Why, sure. I think the Federal Trade Commission has some of the greatest specialists in the Government or anywhere else. We have on our legal staff men who are specialists in different industries and different kinds of law. We have economists, we have accountants, we have statisticians.

Much has been made of the fact by some of the witnesses that the Federal Trade Commission does not have a medical staff. Now, in the first place, the Federal Trade Commission could set up a medical staff if it was so disposed and had the funds to do it. It has the right to employ, as the act says, such special experts as are required to aid it in the administration of the laws. But we haven't done so. Why? We have employed other agencies of the Government in assisting us in that respect. My friend, Dr. Campbell, stated that his Administration refers to us nearly all the advertising cases that we get on food, drugs and cosmetics. While they have all along referred to the Commission many such advertisements which have come to their knowledge, for which we are grateful and which we always handle to the best of our ability, at the same time Dr. Campbell deceives himself when he thinks that he sends us anything like most of them or more than a small percentage of those that come to us.

Furthermore, we receive complaints, applications for complaints, from various sources, from various other Government Departments, from consumers, from better business bureaus, from competitors and from numerous sources. We are glad to receive them from any source, and we always undertake to give them proper attention.

Another thing, much is made of the fact, as I started off to say, that we do not have a medical staff. Why? We frequently call upon the Food and Drug Administration to make analyses and reports of drugs for us, and they have always very kindly and courteously complied. They have been very helpful to us and we appreciate that, as we have many times said, and in that respect I want to say this -- that aside from this little question of jurisdiction the relations between the Federal Trade Commission and the Food and Drug Administration, the official relations, have been entirely cordial. There has been no conflict. We have been getting along fine together. They have pursued their jurisdiction, and when they were handling the cases which they could handle we have not interfered, we have let them go ahead with it.

Mr. Kenney. But if we pass the bill in its present form, there would be conflict, wouldn't there?

Mr. Davis. Without a doubt, and I want to state this, gentlemen; I am not taking the position I am taking, by inference, I will say, because of any jealousy of jurisdiction -- although I do think there is no basis whatever for changing, that there ought to be the strongest sort of a reason before

jurisdiction that has been exercised and developed for 20 years by one department of the Government, is transferred to another department of the Government.

We are busy. We have plenty to do. It does not mean any more salaries to us whether we have more or less work, but I want to state that in my opinion it is better to continue as in the past jurisdiction over advertising, from the consumer and public interest standpoint.

There has not been any conflict in principle or in practice between the two agencies, so far as I am aware. We certainly have had no feeling of that kind, and if the Food and Drug Administration has such feeling we are not aware of it. We were not made aware of it.

Without jurisdiction to regulate advertising, the Food and Drug Administration can act effectively with respect to any food or drug or cosmetic that is dangerous to health, that is impure or dangerous to health. They can seize it. They can destroy it. They can suppress the sale of it. And is that not sufficient? Is there going to be any more occasion for advertising a product that is destroyed or suppressed? Of course not. It cannot be sold any more. But in the vast majority of the cases, that is not involved. In most of our false and misleading advertising cases relating to foods, drugs and cosmetics, there is not involved a question of something that is dangerous to the health, but it is a question of over-exaggeration of claims, of transcending the realm of puffing, and making false and misleading advertisements, and statements calculated to mislead the consuming public and cause them to buy the article under the belief that it would cure this disease or that disease or the other disease, or that it will make them beautiful, or something else, when it will not.

In other words, it is not a question involving public health in the vast majority of cases. It is a question of filching the public out of some of their earnings by inducing them to buy something that, while not dangerous, is worthless or partially so.

That is purely a commercial matter. So far as the protection of public health is concerned, the Food and Drug Administration does not need jurisdiction over advertising, because it can stop it under even its present authority, although, as I have said before, I would like to see their act strengthened, such as in the wisdom of the Congress may be deemed advisable, after long years of trial. But remember this, that we have jurisdiction over advertising of all commodities. We have a trained force, we have branch offices which are investigating various charges.

Mr. Chapman. Judge, may I ask here, how many men are in that force who devote their time to the food and drugs and cosmetics branch of the work?

Mr. Davis. Congressman, we do not divide our force up as to commodities. An investigator will start out in the field, we will say that he is going down into Texas --

Mr. Chapman. Yes.

Mr. Davis. He will take with him several complaints that have come in for investigation relating to whatever commodities they may happen to be. In other words, we have jurisdiction over all unfair trade practices and including all false and misleading advertisements relating to all commodities.

Mr. Chapman. I see.

Mr. Davis. We just handle them as they come.

Mr. Chapman. In otherwords, they do not specialize on any one type of commodity, but the same investigator would investigate unfair trade practices affecting foods, drugs or any other thing.

Mr. Davis. Yes, and that is the reason why the duplication would be uneconomic from the Government's standpoint.

I will undertake to quote figures which I saw a while ago to the effect that about 70 per cent of our cases under section 5 are false and misleading advertising cases and about 25 per cent of that relates to food, drugs and cosmetics. In other words, we would have to cut out all our work on these particular commodities.

And, by the way, it is perhaps interesting to note that a great many years ago the Federal Trade Commission, under the direction of Congress, conducted a vigorous investigation of packers and made a report, as a result of which there was introduced in both branches of the Congress, bills to regulate the packers, and it passed the House and gave the Federal Trade Commission, as it passed the House, jurisdiction to do the regulating. That was reported out in that form to the Senate Committee, but, as a result of the fight being made by the packers, who did not want the Federal Trade Commission to regulate them, the Department of Agriculture was substituted for the Federal Trade Commission. They were thus given jurisdiction over packer meat products.

Now, if you give them jurisdiction over food, drugs and cosmetics, they will still further increase their function in that respect, and of course deprive the Federal Trade Commission of jurisdiction, or else have dual jurisdictions, which would make for confusion in the Government, confusion to industry and confusion to the public.

I believe that I have spoken as long a time as I indicated I would like to have.

Mr. Chapman. We will be glad to hear you further.

Mr. Davis. Thank you, Mr. Chairman. There are many things which might be said on this subject. I know the committee has been very indulgent, and you have been exceedingly patient.

Mr. Chapman. We want you to complete your statement.

Mr. Davis. But, gentlemen, our commission has been discussed before you for two or three weeks in a rather voluminous record, and I am going to ask you if you will hear Mr. James A. Horton, our Chief Examiner, at least briefly, on what he may desire to say, and probably introduce some figures and so forth, if you will be kind enough.

Mr. Chapman. We will be glad to do that, Judge. We have enjoyed hearing you very much, and thank you for coming and making this valuable contribution to the hearings.

Mr. Davis. I want to state that I appreciate that, and I appreciate the privilege, as I stated in the outset, of appearing. Of course, whatever Congress does we will abide by. We are peculiarly an agency of Congress, and we make our reports to Congress, and we are subject to the will of Congress and the Executive, and we want to do what both of you want done, and whatever you do is all right.

But whatever I have said was said in all sincerity and in the light of the real facts and the real law relating to this subject.

Mr. Chapman: Judge, I know you are an excellent lawyer and I would like to ask you if you think the proviso in line 18, on page 44 -- that is subsection (a) of section 717 of this bill -- if that proviso that nothing in this Act shall impair or be construed to impair or diminish the powers of the Federal Trade Commission under existing law -- I would like to ask if you think that would protect the jurisdiction of the Federal Trade Commission in the performance of the functions that it performs now, and has performed so well in the past?

Mr. Davis: In reply to your question, I would state that the commission and its legal staff have given consideration to that very question, and we regard it as extremely doubtful as to whether it would protect the present jurisdiction of the Federal Trade Commission, although Senator Copeland stated positively and unequivocably and repeatedly that he did not want to take anything from the Commission that it had or to interfere with its present jurisdiction.

However, when this becomes a law, if it does, it will be the law, and it specifically deals with this subject in various ways. It will be the latest enactment on the subject, and there is very grave danger, in our opinion, if it should be passed in this form, of its being so construed as, by implication, repealing the jurisdiction of the commission in any respect where it was in conflict with this Act, or perhaps concurrent.

There is another feature: Aside from that, Mr. Chairman, the question of jurisdiction being duplicated, we think, is a serious situation, and as I said before it is not a question of giving something to the Federal Trade Commission or taking something away from the Department of Agriculture. Just the reverse obtains, and we think that it would be unfortunate in many respects

for a concurrent jurisdiction with relation to advertising to grow out of this legislation, especially, as I said before, in our viewpoint this is not required before the Food & Drug Administration can act effectively, - certainly not under the terms of this bill or of any of the pending bills with respect to anything that is dangerous to health.

Why should they expressly be given jurisdiction to enter a field entirely separate and apart from that?

Then, another thing; in actual practice when authority is given to the Secretary of Agriculture to either in effect prosecute in the district courts or to give a warning or notice, - of course, the only warning to be given is that if they don't do so and so, they will be presented to the Federal grand jury.

We don't proceed in a punitive manner except in case of violation of our orders and the court itself does it through contempt proceedings. We think that anybody who has observed the situation during the past 15 or 20 years, and especially during the last 5 or 10 years, knows that there has been a tremendous improvement in the character of advertising, and only a year ago we took in hand a definite, vigorous handling of radio advertising.

Mr. Chapman: Judge, do you think it possible that the law could be enacted strengthening the law as it now exists so as to provide more restrictive and more stringent measures for the protection of the public?

Mr. Davis: You mean of the food and drug laws?

Mr. Chapman: Yes, sir, more stringent provisions for the protection of the consumer.

Mr. Davis: Which law then do you refer to, Mr. Chairman?

Mr. Chapman: We have got just one law now. I mean the present food and drug laws. Should we strengthen them considerably, with more restrictive measures provided and measures that would enable the Government to give quicker and more active protection to the users of food and drugs and users of cosmetics and devices, or do you think the present law is sufficient?

Mr. Davis: Well, as I have stated, I am of the opinion that the food and drug laws should be strengthened in certain particulars, although I have not given it any detailed study, except the feature of it that relates to our jurisdiction, because I have been too busy with our own official business. But I think that it should be strengthened, reasonably, in every respect that may be necessary to carry into effect the intent. In that connection I want to say, Mr. Chairman, that after nearly 21 years administration, without amendment, we think that certain simple and clarifying amendments of the Federal Trade Commission Act should be enacted, and they would be very helpful and make for expedition and efficiency and economy, particularly.

We expect that that will be done, and when that is done, it will absolutely remove all of the arguments that have been paraded here relating to us having to prove competition.

Mr. Chapman: Judge, the members of the committee have the greatest respect for your judgment as well as your legal attainments, and we would really appreciate it if you would leave with the committee or send to the committee any suggested amendments for the consideration of the committee, when it comes to consider this bill in executive session.

Mr. Davis: Thank you. I shall be very glad to do that. However, we have refrained all the way through, Mr. Chairman, from expressing any opinion on any of the numerous bills that have been introduced from time to time except as they related to us. We have had a delicacy ---

Mr. Chapman: In response to that, Judge, I will suggest this; in as much as you and your legal staff express doubt as to whether or not your present jurisdiction would be sufficiently guarded and protected by that provision, lines 18 to 21 on page 44, we would appreciate it if, before the committee acts on this subject, you would suggest some language to be written in that you think might furnish full and complete protection of the existing jurisdiction of the Federal Trade Commission.

Mr. Davis: Thank you very much, Mr. Chairman; I shall be glad to present to you, not later than Monday, amendments which we suggest to preserve the present jurisdiction of the commission.

I thank you very much.

Mr. Kenney: Judge, I would like to clear up one thing in my mind. I want to protect the consumer just as much as we can. On the other hand, I don't want to subject the honest manufacturer to a dual control. First, let me ask you whether you know of any other departments of the Government exercising dual control over any industry for the regulation of any industry or any other activity?

Mr. Davis: I do not for the moment. Of course, the Post Office Department has jurisdiction over fraudulent mail, you know.

Mr. Kenney: Yes, I know.

Mr. Davis: The fraud cases.

Mr. Kenney: But that has to do with the mails.

Mr. Davis: Oh, yes, that has to do with the mails.

Mr. Kenney: Now, you have to do with false advertising at the present time.

Mr. Davis: Undoubtedly.

Mr. Kenney: Under the terms of this bill, the Food and Drug Administration virtually would have control also over false advertising.

Mr. Davis: Undoubtedly.

Mr. Kenney: Such an arrangement as that would subject a manufacturer to that dual control. He might be investigated by you and at the same time by the Food and Drug Administration and also be subjected to two different kinds of prosecution.

Mr. Davis: Certainly, that is undoubtedly true, Mr. Congressman.

I wish to make this observation, if I may. I have not any sympathy whatever with any effort to protect anybody in any manner who is selling something that is calculated to impair the public health, in other words, making misrepresentations or selling a product under conditions which are dangerous to the public health. I think they ought to be severely dealt with. But it has been the universal custom, from the dawn of civilization up to the present day, for men in business in an effort to sell their wares to go all the way from what the courts hold as "puffing" to make what are fraudulent representations. I do not condone that. Lying is reprehensible, misleading statements are reprehensible, but overexaggeration, in an effort to make a sale, unfortunately is so universal that the question is, in the first place, "Do you want to make that a criminal offense, and, in the second place, do you believe that you could enforce it before the juries of the country, because some man has simply overexaggerated what the particular drug or cosmetic would do?"

Mr. Chapman: Overstatement and overclaiming, Judge, is pretty prevalent, is it not, in the sale of foods, drugs, and cosmetics?

Mr. Davis: I say undoubtedly so and unfortunately it is so universally prevalent that many reputable business men are vying with one another in crying their wares, and they make their statements as alluring as they can, and frequently overstep the bounds.

Now, then, their hands should be called when they do that, but isn't it better to simply say "stop" than it is to indict all of these reputable businessmen in a criminal court and undertake to convict them for an overstatement, a misleading statement with respect to an article that is harmless and not dangerous? It is simply a question of inducing a sale.

I am of the opinion that to undertake to go into a court on all these matters would be not as effective as the course which we have pursued and are pursuing, and which has proven more effective than anything else that has been done. Of course, it is not all stopped, but I will say that if our law itself should be amended in a few simple particulars, -- nothing comparable to the proposed changes in the food and drugs law, and if we are given enough funds to have a wholly adequate force at all times, we could proceed as expeditiously, and I believe as efficiently, as any organization in the Government could.

I don't say that because I happen, for the time being, to be a member of that organization. As you gentlemen know, I was up here on the Hill for 14

years, and I came in contact with the different departments of the Government as you do now. I think I know something of that, as well as something of your responsibilities and difficulties and problems.

Mr. Chapman: We know you were one of the most valuable men in the Congress, and are universally so recognized.

Mr. Davis: That is certainly extremely kind of you to say that, even though I don't deserve it.

I will not bother you any further unless there are some further questions you gentlemen desire to ask me.

Mr. Chapman: We thank you so much.

Mr. Davis: But I will appreciate it if you will hear Mr. Horton briefly.

Mr. Chapman: Judge, there is another representative from another department of the Government here who has to leave and he can not be here this afternoon, and if Mr. Horton will permit, I will let him have a few minutes first.

Mr. Davis: That is perfectly all right, Mr. Chairman.

Mr. Chapman: We appreciate your coming, Judge.

Mr. Davis: Thank you but I want to state that some time ago when I was invited and asked to indicate how much time would be required, that was at the beginning of your hearings and I did not realize so much would be said in the meantime that would require some attention, and that is why I suggested an hour would be ample, and I certainly thought it would.

Thank you very much.

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