

FOOD AND DRUGS: Food seized by the Bureau of Food and Drugs cannot be held for more than three days without a court order.  
SEIZURE OF FOOD:

May 8, 1950



Honorable Buford G. Hamilton  
Director, Division of Health  
Jefferson City, Missouri

Dear Sir:

I.

This will acknowledge receipt of your request for an official opinion upon the following problem:

"We would like to have your official opinion regarding the length of time which the food and drug commissioner may keep any food, drug, device, or cosmetic under embargo.

"You will note under Section 9861, under Food and Drug Laws, paragraph A, that the commissioner has the authority to embargo any food, drug, device, or cosmetic which he believes is adulterated or misbranded so as to be dangerous or fraudulent within the meaning of this Act. Under this paragraph, there is no mention of a time limit on the embargo.

"Under paragraph D, you will note that when embargoing any meat, seafood, poultry, vegetable, fruit, or other perishable articles which are unsound or contain any filthy, decomposed, or putrid substance, or that may be poisonous or deleterious to health or otherwise unware, the commissioner shall forthwith condemn or destroy the same or render it unsalable as human food, if the person who owns the goods agrees to such action. If the owner refuses, then the commissioner may serve such a person with a written notice directing him to hold or store any such articles for a period of not longer

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Than three days from the date of service of such notice. It further states that the commissioner or his agent, after issuing such notices, shall apply to the judge of the court of common pleas or of the circuit court for an order to condemn or destroy same.

"In a good many cases, it is necessary to run extensive tests, both chemical and bacteriological, on such products to determine their wholesomeness, purity, and safety. It is impossible in three days time to run such tests. For these reasons, therefore, we would like to know if we are limited to a time limit of three days on embargoing such products or if we may hold such products under embargo until such chemical and bacteriological tests are completed."

We will confine this opinion to a consideration of the provisions of Section 9861(d) which section number will be 196.03, R. S. Mo. 1949, because Section 9861(a) and Section 9861(b) relate to detaining or embargoing any food, drug, device or cosmetic which is believed to be adulterated or so misbranded as to be dangerous or fraudulent, while Section 9861(d) relates to the seizure of any meat, seafood, poultry, vegetable, fruit or other perishable articles. If our consideration of the provisions of Section 9861(d) is not sufficient to answer your request then a subsequent request in regard to the provisions of subsections (a) and (b) of Section 9861 may be submitted to us.

Section 9861(d) Reenacted, Laws of 1943, page 559, provides as follows:

"Whenever the state board of health or any of its authorized agents shall find in any room, building, vehicle of transportation or other structure, any meat, seafood, poultry, vegetable, fruit or other perishable articles which are unsound, or contain any filthy, decomposed, or putrid substance, or that may be poisonous or deleterious to health or otherwise unsafe, the state board of health, or its authorized agent, shall forthwith condemn or destroy the same or in any other manner render the same unsalable as human food if the person found in possession of same or claiming possession or ownership or same shall agree to

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such action; provided that if any such person refuse to permit such action by the state board of health or its agent, such agent may serve such person with a written notice directing him to hold or store any such articles for a period not longer than three days from the date of service of such notice. Such notice shall also prohibit any such person from selling or in any manner disposing of such articles of food during the prescribed period. The state board of health or its agent after issuing any such notice shall immediately apply to the judge of the court of common pleas or of the circuit court in whose jurisdiction such articles of food may be found or held for an order to condemn or destroy same. Upon the application for such order the judge of any such court shall, immediately hold a summary hearing and at the conclusion thereof shall order the articles of food in question released to the person claiming ownership or possession thereof. Upon the application for any such order, the judge of any such court may make such orders for the custody, storage, or temporary preservation of any of such articles of food as may under the circumstances be deemed proper. After the hearing prescribed for herein, if the judge of any such court find the complaint to be sustained, he may direct the articles of food to be disposed of as provided for by subsection(c) of this section." (Underscoring ours.)

Section 9862, Reenacted Laws 1943, page 559, provides as follows:

"It shall be the duty of the Prosecuting Attorney in any county or city in the state, when called upon by the State Board of Health, or any of its assistants, to render any legal assistance in its power to execute the laws and to prosecute cases rising under the provision of this article. Before any violation of this Act is reported to any such attorney for the institution of a criminal proceeding, the person against whom such proceeding is contemplated shall be given appropriate notice and an opportunity to present his views before the State

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Board of Health of its designated agent, either orally or in writing, in person, or by attorney, with regard to such contemplated proceeding. The court at any time after seizure up to a reasonable time before trial, shall, by order allow any party to a condemnation proceeding, his attorney or agent, to obtain a representative sample of the article seized, and as regards fresh fruit or vegetables, a true copy of the analysis on which the proceeding is based and the identifying marks or numbers, if any, of the packages from which the samples analyses were obtained."

The provisions for seizure of food in accordance with provisions of said Section 9861(d) cannot be classed as entirely civil nor as entirely criminal in character. The seizure proceedings may be termed quasi-criminal and quasi-civil in nature. It was stated by the court in U.S. v. Eight Packages and Casks of Drugs, 5 Fed.2d. 971, 1.c. 976 and 977 as follows:

"The question in every case of seizure is whether the seizure was justified or not, and the proceeding to ascertain that fact is a civil proceeding, but a seizure of goods is, in effect, a proceeding against the owner \* \* \* and hence criminal in nature. \* \* \*"

You have the right to take samples of any food under suspicion and run the tests before the seizure is made. (See Sections 9875 and 9876, Reenacted Laws 1943, page 559.)

A fair interpretation of said Section 9861(d) means that after the food has been seized by your department that it cannot be held longer than three days from the date of seizure. The law contemplates that during the three day period that you will call upon the prosecuting attorney to file the condemnation suit in the proper court as provided by said section and to request the court for an order concerning the custody, storage or temporary preservation of any such articles of food until the condemnation proceeding is decided. Said section 9861(d) also provides for a summary hearing before the judge of said court upon the condemnation petition. But it would not always be possible for the judge of the court in which the condemnation petition or complaint was filed to hold a hearing upon the questions involved. He would have the power to issue a temporary restraining order for the storage of food while tests were being made of samples of the food seized by your department under the provisions of said Section 9861(d).

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Section 9859, Reenacted Laws 1943, page 559, also gives the circuit court the power to enjoin any person violating any provision of Section 9858, as reenacted by Laws 1943. Section 9858(h) prohibits the removal or disposal of a detained or embargoed article in violation of said Section 9861.

Section 9860, as reenacted, Laws 1943, page 559 provides criminal penalties for violation of any of the provisions of Section 9858 (Laws 1945, p. 559) which is not set forth in full in this opinion, but is part of the Food and Drug Act.

It is in the discretion of the authorities connected with the Bureau of Food and Drugs of the Division of Health to decide which one of the three different judicial proceedings, which have now been mentioned,--injunction proceedings, criminal prosecution or condemnation proceedings--they will pursue against an alleged violator. If they elect to seize the food described in said subsection (d) of Section 9861, then they must be prepared to file the condemnation suit before three days have elapsed.

### III.

#### CONCLUSION

It is, therefore, the opinion of this department that any food seized by the Bureau of Food and Drugs of the Division of Health under the powers granted in Section 9861(d), Reenacted Laws, 1943, page 559, cannot be held for longer than three days without an order from the proper court so to do.

Respectfully submitted,

STEPHEN J. MILLETT  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General