Office of the Solicitor General
Washington, D. C.

November 18, 1942

My dear Mr. Justice:

We have been advised by the Department of Agriculture that certain passages in the last paragraph of the Court's opinion in Wickard v. Filburn, No. 59, are not in harmony with the interpretation given the Act by that Department, and are likely to disturb its administration of the wheat program. Inasmuch as the Court's reasoning and the result of the case would not, in our view, be changed by the construction given the Act by the Department, I have taken the liberty of bringing this matter to your attention in the hope that the opinion may be modified.

The paragraph in question (pp. 15-16) declares that under the regulations, and seemingly under the statute itself, the penalties are incurred when the wheat is threshed and not before. The Act, as amended May 26, 1941 (55 Stat. 203, 7 U.S.C. Section 1340(1)) declares that the "farm marketing excess" should be the normal or actual "production", whichever is the less, of the excess acreage. The Department of Agriculture regards wheat as produced when it becomes mature and is used for any purpose after maturity. Although the threshing and harvesting of wheat are frequently simultaneous with the first use at maturity, this is often not true. Some wheat fed to livestock on the farm is bound into sheaves without ever being threshed, or is consumed in the fields.

The regulation cited in the Court's opinion (p. 15, note 38) reads:

> (b) Time when penalties become due. -- The farm marketing excess for any farm shall be regarded as available for marketing and the penalty thereon shall become due at the time any wheat produced on the farm is threshed. [Wheat-507, Sec. 728.251(b), 6 Fed. Reg. 2695, 2701]

This regulation states that the penalty on the entire excess of a farm shall become due, that is, paid over, when any wheat produced on the farm is threshed. The regulation thus sets a time for payment of the penalty, but was not intended to indicate that the Act was inapplicable before the time of threshing. That the regulation might be misconstrued in this respect was subsequently realized, with the result that the regulations for the 1942 crop substituted the word "harvested" for the word "threshed" (Section 728.351(b), 7 Federal Register 3279, 3284). (The paragraphs of the 1941 and 1942 regulations are set forth in full on a separate page.) Wheat was considered as harvested after it reached maturity and was thereafter consumed by grazing, cut for feed or hay, threshed or used in any other manner.

The difference between the time of threshing and the time of maturity of the wheat is not material to the question of retroactivity with which the last paragraph of the Court's opinion is concerned. The record states that appellee's "crop was ready for harvest during the month of July 1941" (R. 18). Thus the harvesting or other consumption of the wheat after its maturity, as well as the threshing, occurred a considerable period after the amendment of May 26, 1941. To construe the Act as applicable to wheat at the time of maturity would accordingly be no more retroactive in this case than to construe it as applicable at the time of threshing. Moreover, it was true both before and after the amendment that a farmer who did not plant more than his acreage allotment would be free from penalty.

I am not, of course, requesting the Court to pass upon the validity of the Department's interpretation of the Act in this case, but only that the opinion not suggest that the Court has decided the question in a manner adverse to the Department's interpretation. As the opinion now stands, I feel that it will be regarded as holding that the time of threshing is decisive. Of particular concern are the passages stating that the penalty is <u>incurred</u> on threshing (p. 15), that only when threshed did the wheat become subject to penalty (p. 16), and that the penalty would not be demanded for wheat reaped and fed "with the head and straw together", i.e., after it had matured (p. 16). The statement that the penalty was due on threshing might be modified so as to indicate that this was based upon the 1941 regulation, and that, in the words of the Regulations, the penalty became due when "any wheat produced on the farm is threshed".

I believe that the passages in the opinion to which I have referred can be modified without affecting either the decision or the Court's reasoning. I have attached a draft of the paragraph in question with changes which we think would avoid the above problems without impairing the reasoning of the opinion.

Sincerely yours,

Charles Fahy,
Solicitor General.

Mr. Justice Jackson,
The Supreme Court.