6470.

SOCIAL SECURITY ACT—OHIO STATE UNIVERSITY NOT SUBJECT TO PROVISIONS OF SOCIAL SECURITY ACT.

SYLLABUS:

The Ohio State University is not amenable to the excise tax imposed upon employers of eight or more individuals under Title IX of the Social Security Act of Congress of August 14, 1935.

COLUMBUS, OHIO, December 4, 1936.

HON. GEORGE W. RIGHTMIRE, *President, The Ohio State University, Columbus, Ohio.*

DEAR DR. RIGHTMIRE: Your letter of recent date is as follows:

"We have received here, addressed to the Ohio State Lantern, a form which employers are required to fill out for the calender year 1936 under the provisions of the Social Security Act of the United States. We are uncertain as to whether the University activities and agencies are affected by the provisions of this Act.

You know the Ohio State Lantern is the daily paper of the University, used as a laboratory by the School of Journalism and sold to students and faculty members and others, and is the product of the activities and organization of the School of Journalism. The subscription price is affixed to help make up a rotary fund to bear the expense so far as possible. The paper is managed entirely under the auspices of the University as an educational device.

Also the Dean of the College of Law received a copy of the Social Security Act and he at once raised the question as to whether the College of Law is covered by the terms of this Act. I can see on the fact of it no relation between the Federal Social Security Act and the operations of the College of Law inside a State University.

The general question then becomes whether the educational agencies of the State University, which may or may not incidentally result in revolving funds, are included under the Social Security Act of the United States. I am addressing the Attorney General for such advice and counsel as he may find it legally possible to give to the University with reference to this matter. If there is further information desired before proceeding with the study of the legal situation, kindly advise me."

It is observed at the outset that a serious constitutional question would arise as to the power of the federal government to impose a tax on The Ohio State University under the early, well-known decisions of the Supreme Court of the United States as rendered in the cases of McCulloch v. Maryland, 4 Wheat. 315, and Collector v. Day, 11 Wall. 113, establishing the principle that the states may not tax the federal government and that the federal government may not tax the states. This serious constitutional question would remain notwithstanding the recent decisions of the Supreme Court of the United States in the cases of Ohio v. Helvering, 292 U. S. 360, and Helvering v. Powers, 293 U. S. 214, in which that court held that this immunity from taxation extended only to essential governmental functions. It is not believed that it could be successfully contended that the state was engaged in other than an essential governmental function in maintaining and operating a state university. It is not, however, necessary to further consider the underlying constitutional question suggested in view of the express provisions of the Social Security Act and the regulations adopted pursuant thereto.

The Act of Congress in question of August 14, 1935, 49 State 620, USCA, Title 42, Sections 301, et seq., defines the terms used therein pertinent to your inquiry. Section 1107, Title 42, USCA, defines the terms as used in Sections 1101 to 1110 of the pertinent chapter of this act. There is in such section expressly excepted from the definition of the term "employment", among others the following:

> "(6) Service performed in the employ of a state, a political subdivision thereof, or an instrumentality of one or more states or political subdivisions;"

There would appear to be little doubt but that The Ohio State University is at least an instrumentality of the state and that accordingly services performed for that university would not constitute "employment" within the meaning of the Act and that the same would be excepted from its provisions. Section 1108 of such title however authorizes the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to make and publish rules and regulations for the enforcement of certain sections of the act, including the definitive Section 1107 hereinabove referred to. Presumably under that authority, Form 940, containing instructions for the annual return of excise tax on employers of eight or more individuals under the Social Security Act, sets forth under the heading "Excepted Service" the following:

> "(5) Government employees. Services performed by Federal and State employees are excepted. The exception extends to every

service performed by an individual in the employ of the United States, the several States, the District of Columbia, or the Territory of Alaska or Hawaii, or any political subdivision or instrumentality thereof, including every unit or agency of government without distinction between those exercising functions of a governmental nature and those exercising functions of a proprietary nature."

Even if the operation of the Ohio State Lantern by the University were to be said to constitute the exercise of a proprietary rather than a governmental function, a position which I do not believe tenable, services performed for such newspaper would under the foregoing regulations be expressly exempt.

In view of the foregoing, it is my opinion that The Ohio State University is not amenable to the excise tax imposed upon employers of eight or more individuals under Title IX of the Social Security Act of Congress of August 14, 1935.

Respectfully,

JOHN W. BRICKER.

Attorney General.

6471.

APPROVAL—PETITION CONTAINING PROPOSED CONSTITUTIONAL AMENDMENT AND SUMMARY OF THE SAME.

COLUMBUS, OHIO, December 3, 1936.

KINGSLEY A. TAFT, ESQ., *Attorney at Law, Terminal Tower, Cleveland, Ohio.*

DEAR SIR: You have submitted for my examination a written petition signed by one hundred qualified electors of this state, containing a proposed constitutional amendment and a summary of the same under Section 4785-175, General Code. It is proposed to adopt Section 2a of Article V to read as follows:

"The names of all candidates for an office shall be arranged in a group under the title of that office, and shall be so alternated that each name shall appear (insofar as may be reasonably possible) substantially an equal number of times at the beginning, at the end, and in each intermediate place, if any, of the group in which such name belongs. Except at a party primary or in a non-