

## To the Bag

money to furnish a surety bond as a condition of their employment, a practice that I believe has long since fallen out of fashion.

In 1947, Title 6 was enacted into positive law, under the slightly amended heading of “Surety Bonds.” There Title 6 remained until 1982, when Congress enacted Title 31, “Money and Finance,” into positive law. At that time, Congress consolidated the provisions of Title 6 into Title 31, and Title 6 as a separate title was repealed.

In 2002, when Congress adopted legislation creating the Department of Homeland Security in the wake of the September 11 attacks, the compilers of the Code created a new Title 6 to house legislation on the subject of “Domestic Security.” This was a brand-new title of the United States Code, even though it was slotted into the Code with a prosaic designation as Title 6 rather than as an outlier (numerically and alphabetically) in Title 51.

Thus, “National and Commercial Space Programs” can be considered the second, rather than the first, new title of the United States Code since 1926, though it is the first such title enacted into positive law. But not the last, if the House of Representatives’ Office of Law Revision Counsel has its way: positive-law codification projects reportedly being worked on in that office would expand the Code to titles 52, 53, 54 and beyond.

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## IN FOR A DIME, IN FOR 90 MILLION

To the *Bag*:

Connor P. Moore describes the *Bowles v. Russell* criminal case as “probably the most notorious legal math error in memory.” *Big Numbers*, 14 GREEN BAG 2D 246 (Spring 2011). There is a related area of numbers that is dangerous to lawyers, typographical errors.

Probably the most serious such case concerned Prudential Insurance Company’s \$92,885,000 senior lien against eight U.S. Lines merchant vessels. A typist entered the lien amount as \$92,885. General Electric, which had a junior lien, sought to limit Pruden-

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tial's recovery in a subsequent bankruptcy proceeding to the typed-in amount, \$92,885. According to the *Wall Street Journal*, a federal court held that Prudential was entitled to its full claim. However, Prudential had already settled for a lesser amount, about \$12 million. These facts turned into a litigation nightmare for the law firms involved. Milo Geyelin and Amy Stevens, *Typo Causes Problems for Two Law Firms*, WALL ST. J., Dec. 11, 1990, at B4.

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### A TAX OR NOT A TAX, THAT IS THE QUESTION

To the Bag:

In a letter published in the Spring 2011 issue, Jack Metzler said I had argued, in *Prepositions in the Constitution*, 14 GREEN BAG 2D 163 (Winter 2011), “that a capped tax on income is unconstitutional because it is not a tax ‘on’ incomes, as permitted by the Sixteenth Amendment.” If that argument is right, Mr. Metzler added, he “take[s] it [that he] can stop paying Social Security.”

That first quoted passage doesn't get my argument quite right. Yes, a federal tax must be “on incomes,” within the meaning of the Sixteenth Amendment, to be valid – *if* it's a direct tax and hasn't been apportioned among the states on the basis of population. And I'm willing to concede that “a capped tax *on income*,” as Mr. Metzler put it, is a “tax on income” for this purpose. (In Ohio we call that a tautology.) In the unusual situation where a tax's validity depends on the Amendment,<sup>1</sup> however, what the tax is “on” is the question –

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<sup>1</sup> Most federal taxes, although unapportioned, are clearly valid. (No tax has been apportioned since 1861.) Indirect taxes (duties, imposts, excises) are not subject to apportionment to begin with. Direct taxes, however – including, at a minimum, capitation and real-estate taxes – must be apportioned unless they're “taxes on incomes.” The Sixteenth Amendment, ratified in 1913, made the modern income tax possible: in 1895 the Supreme Court had held that the 1894 income tax was direct and, because it hadn't been apportioned, unconstitutional.