

January 24, 2019

Senator Elizabeth Warren  
317 Hart Senate Office Building  
Washington, DC 20510

Dear Senator Warren:

Under your proposed wealth tax, an annual levy of 2% would be imposed on American households with a net worth between \$50 million and \$1 billion. This rate would increase to 3% on household wealth exceeding \$1 billion. This new tax would be paid in addition to any other federal tax, and the wealth tax formula would not vary based on the taxpayer's income for that year.

In assessing your proposal, we have consulted both existing case law and the original understanding of the Congress and state legislatures which enacted the Income Tax Amendment in 1913. They make it clear that your initiative is constitutional. It falls within the powers of federal government to "lay and collect Taxes... for the common Defence and general Welfare of the United States." Moreover, it does not qualify as a "Capitation, or other direct, Tax" which, according to the original Constitution, cannot not be imposed on a uniform basis throughout the country, but must be "apportioned among the states."

Turning first to the case law, the key decision is *Knowlton v. Moore*, 178 U.S, 41 (1900), in which the Supreme Court dramatically narrowed the scope of its judgment, in *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895) striking down the income tax. While *Pollock* held that the income tax was a "direct" tax which required "apportionment," *Knowlton* confronted an inheritance tax that directly hit the property itself. Like your proposal, this wealth tax was progressive, increasing the rate from .75% to 3% as inherited property increased in value from \$10,000 to \$1 million. Nevertheless, the Court unanimously held that the tax was "indirect." With only one dissent, it upheld its progressive formula against the claim that its increasing tax on the rich was a violation of the requirement of national "uniformity" imposed by Article one.

*Knowlton* played a key role in the framing of the Sixteenth Amendment – as explained by Bruce Ackerman in the article, "Taxation and the Constitution," 99 *Colum. L. Rev.* 1, 33-39 (1999). While *Pollock* had generated widespread popular opposition, it seemed sufficient to correct the Court's blunder with a narrow amendment focused on the income tax, since the Justices had already sharply cut back on their broad interpretation of "direct" taxation.

Given *Knowlton*'s role in framing the debate surrounding the passage of the Sixteenth Amendment, no thoughtful "originalist" can conclude that *Pollock*'s *dicta*, announcing a broad reading of the "direct" taxation clause, has survived the constitutional decision by the American People to repudiate *Pollock* in 1913.

It follows that your wealth tax proposal is plainly constitutional.

Sincerely yours,<sup>1</sup>

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<sup>1</sup> Institutional affiliation is provided for identification purposes only and does not constitute institutional endorsement.

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Senator Elizabeth Warren  
317 Hart Senate Office Building  
Washington, DC 20510

Dear Senator Warren:

We write regarding your proposal to impose an annual tax of 2% on the net worth above \$50 million of any American household, with an additional annual tax of 1% (for a total of 3%) on the net worth above \$1 billion of any American household. We believe such a law would be a constitutional exercise of Congress' Article I power.

Under the net worth tax you have proposed, American households with a net worth of \$50 million or more would be subject to an annual tax of 2% on their net worth between \$50 million and \$1 billion, and an annual tax of 3% on their net worth above \$1 billion.

For example, a household with a net worth of \$60 million would be subject to a 2% tax on the \$10 million exceeding the \$50 million threshold, producing a tax liability of \$200,000. A household with a net worth of \$4 billion would be subject to a 2% tax on the \$950 million between \$50 million and \$1 billion, and a 3% tax on the remaining \$3 billion, producing a tax liability of \$109 million. This tax would be imposed in addition to any income tax or other tax liability, and the tax rate and base would not vary based on the taxpayer's income for that year.

As laid out in greater detail by Dawn Johnsen and Walter Dellinger in the 2018 *Indiana Law Journal* piece *The Constitutionality of a National Wealth Tax*, such a net worth tax would be constitutional. A federal tax on net worth falls squarely within Congress's broad power under Article I of the Constitution to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." Moreover, a net worth tax would not fall within the category of "direct" tax subject to the additional apportionment requirement of Article I, Section 2, Clause 3 ("direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers") and Article I, Section 9, Clause 4 (apportionment required for "Capitation, or other direct, Tax"). Constitutional text and history demonstrate that "direct" tax is best interpreted as a narrow category that would not include a net worth tax. Because your proposal falls squarely within Congress' broad taxing power and does not require apportionment, we believe it is constitutional.

Sincerely,<sup>1</sup>

Dawn Johnsen  
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