

February 25, 2021

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

Dear Senator Warren,

Your proposed wealth tax reform would impose a federal tax of 2% on taxpayers' accumulation of net assets in excess of \$50 million, and a 3% tax on net assets in excess of \$1 billion. The 3% tax would increase to 6% if legislation establishing universal healthcare is in effect.

Article I Section 8 of the Constitution allows Congress to implement your proposed wealth tax reform as an exercise of the congressional taxing power.

Some have suggested that a federal wealth tax would be a "direct tax" subject to the "apportionment rule" in Article I Section 2, which provides that "direct Taxes shall be apportioned among the several States ... according to their respective Numbers."¹ A tax on an individual's net wealth, however, is not a direct tax, and need not be apportioned among the states according to their population.

The apportionment rule is not, and was never intended to be, a major barrier to Congress's taxing power. The apportionment rule occupies a peripheral role in the constitutional structure and resulted from an intentionally ambiguous compromise over representation and slavery. Interpreting the rule too broadly could also prevent Congress from taxing wealth at all, even though the rule was never intended to prevent Congress from imposing any form of tax.

Properly understood, a direct tax would be defined as a "capitation tax" (a tax levied per person) or a tax on land alone, but not as a tax on other activities or bases, such as an individual's total net wealth. This interpretation gives meaning to the provision and more accurately reflects the rule's original understanding and narrow role in the constitutional structure. This interpretation also reflects the view among the Framers and throughout the case law that capitation and land taxes would be direct taxes. A broader interpretation, in contrast, could establish the apportionment rule as a major impediment to Congress's taxing power, which was not intended by the Framers.

This narrow interpretation also conforms to the precedent of the Supreme Court, which has adopted different rationales to distinguish new taxes introduced by Congress from direct taxes, and thereby to limit apportionment's reach. Based on these precedents, the Court could rule that a tax on an individual's total net wealth is qualitatively and constitutionally different from a tax on land alone, or that a tax on large wealth holdings is a tax on the activity of accumulating and maintaining concentrated wealth.

¹ A version of this rule also appears in Article I Section 9.

The important public discussion over the desirability and design of a federal wealth tax should not be short-circuited by reflexive arguments that it would be unconstitutional. Rather, voters and legislators should make these determinations, as the Constitution ultimately requires.

Sincerely yours,²

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² Institutional affiliation is provided for identification purposes only and does not constitute institutional endorsement.