Warren’s Wealth Tax: Possibly Unconstitutional; Difficult to Administer

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Democratic presidential hopeful Elizabeth Warren's wide-ranging progressive platform is dependent in part on an "Ultra-Millionaire" wealth tax on the richest people in the United States, but questions about its efficacy and constitutionality make it a risky wager on which to stake her political future.

The *Washington Free Beacon* analyzed Warren's wealth tax by speaking with experts about the difficulties of implementing such a plan in the United States, including whether it would pass constitutional muster. Even if passed by Congress, its implementation could all hinge on which assets Warren's government would target for those households under the tax's umbrella.

What’s in Warren’s Wealth Tax And What Would It Pay For?

A wealth tax is a direct tax on a person’s assets. This is distinct from an income tax, which is levied on the amount of income a person makes in a year; a sales tax, a tax on the value of a transaction; and a capital gains tax, a tax on the profit of the sale of certain assets. Each of these taxes is applied when money changes hands. A wealth tax, however, is levied on the amount of wealth a person has, or at least the amount they report to a taxing authority.

Under Warren's proposal, all assets in excess of $50 million would be taxed at two percent annually, while assets in excess of $1 billion would be taxed at three percent annually. This means that in the first year of Warren’s tax plan, Jeff Bezos—net worth $148.5 billion—would pay about $4 billion in taxes on his wealth.

The two UC Berkeley economists who designed the plan, Emmanuel Saez and Gabriel Zucman, estimate the tax would raise about $2.75 trillion over 10 years while affecting just 75,000 families—less than 0.1 percent of households. Compliance would be enforced through expanded funding for the IRS, mandatory audits for a share of wealth-tax targets each year, and a one-time tax penalty for any person who tries to renounce his citizenship to get out of paying the tax.

Saez and Zucman are well-known leftist economists and frequent collaborators of Thomas Piketty, author of the controversial blockbuster *Capital in the Twenty-First Century*. The trio collaborated on a landmark 2016 study of inequality, arguing that growth has stagnated for the bottom half of earners since 1980. Subsequent work, however, has challenged this finding; the debate is ongoing.

Warren often asks her audiences if they own homes, before telling them they already pay a wealth tax in the form of property taxes. In a populist line her crowds love, she says this tax is the same thing but for just the tippy top of the 0.1 percent and will include "their Rembrandts and their diamonds."

"I'm calling it the 'Ultra-Millionaire Tax,' and we can use the significant revenue it creates to start rebuilding our middle class," Warren wrote in January.

With this tax, Warren says, the U.S. could cancel student-loan debt for 95 percent of Americans in the red, make public two- and four-year college tuition free, provide universal child care for "every one of our babies age 0 to 5," and universal pre-kindergarten for three- and four-year olds. All that, she claims, with a trillion dollars left over.

Four of Warren's major proposals alone cost nearly $4.5 trillion: a green manufacturing investment over the next 10 years ($2 trillion), fighting opioids ($100 billion), canceling student debt and offering free public college ($1.25 to $1.565 trillion), and offering universal child care ($700 billion). During the campaign, she's put her name behind the Green New Deal and Medicare for All, which by some estimates would constitute a whopping $126.6 trillion in government spending over the next 10 years.

What Do We Know About the Effects of Wealth Taxes?

Although the United States has never had one, wealth taxes used to be fairly popular: As of 1996, fourteen nations in the OECD—an organization of "economically developed" nations—levied them. However, they have fallen out of favor. As of 2018, just three currently levy a wealth tax: Switzerland, Norway, and Spain. Spain temporarily cancelled its wealth tax in in 2008, then reintroduced it following the Great Recession.

Even in these three countries, wealth taxes are small contributors to total tax revenue. Switzerland collects 3.7 percent of total revenue from wealth taxes, Norway collects 1.1 percent, and Spain collects 0.5 percent. This is a persistent trend, according to an OECD report. Over the past 40 years, European wealth taxes usually were responsible for less than one percent of overall revenue.

A lack of revenue is one reason other economically developed countries have moved away from wealth taxes; another is to draw in foreign investment. This was the justification of French finance minister Bruno le Maire in announcing his nation's repeal of its wealth tax in 2018.

The Tax Foundation, a right-leaning tax-policy think tank, outlined a number of other reasons wealth taxes might not be all they're cracked up to be. They can be difficult to administer, because many assets held by the super-wealthy, such as constantly fluctuating stocks, are hard to value.

Further, a wealth tax is effectively a tax levied on the expected returns of whatever assets the taxpayer holds, meaning that he will invest less in those assets. The effects of that reduced investment are felt not just by the taxpayer but throughout the economy, as the wealthy invest less in the capital used to employ others. As economist Tyler Cowen put it, a wealth tax would "lower investments in human capital and the creation of new businesses."

Veronique de Rugy, a senior research fellow at the Mercatus Center at George Mason University, told the *Free Beacon* Warren's idea wasn't new but it was "terrible."

"The definition of insanity, they say, is to do the same thing over and over again but expect different results," she said. "The definition of arrogant is to observe country after country dropping their wealth tax because it failed to achieve its goal but believe that you can do better than they did. Those two statements fit the Warren plan perfectly. Back in 1990, 12 OECD countries had a wealth tax—now only four do. There is no secret as to why they dropped it. It is also a very difficult tax to administer, it doesn't raise much revenue, and it is economically counterproductive. In the U.S there is the added question about whether it is even constitutional. The bottom line is this is not a new idea but it is a terrible idea."

Is It Constitutional?

There is a separate issue with a wealth tax, beyond its effects: the Constitution. Article I, Section 9 lays down limitations on what sorts of laws Congress can make. One of its limitations is that "No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken" — in other words, "direct" taxes can only be levied on a per-person basis. The Sixteenth Amendment created a special carve-out for the income tax, which is in proportion to income. But there is no such carve-out for a wealth tax.

"I'd argue that the term 'direct tax' is a proxy for incidence, as there's solid evidence from the Founders that's what they were getting at by using the term," the Tax Foundation's Joseph Bishop-Henchman wrote in January. "Based on that and the precedents, my inclination is that Warren's proposal would be found unconstitutional. But it's not a slam-dunk case, as the precedents go both ways, and it's not an area the Court has opined on for a long time."

The question of whether Warren's wealth tax is constitutional turns on what the word "direct" means, and specifically what distinguishes a direct from an indirect tax. According to the Heritage Foundation, there is great disagreement over what exactly the Founders may have meant when writing "direct," although it is generally agreed that their goal was to constrain the taxing power that they viewed as a major threat to liberty.

In 1796, the Supreme Court seemed to constrain direct taxes to mean only per-person levies and land taxes. On this basis, a number of federal taxes that would appear unproportional passed Supreme Court scrutiny. But in 1895, the Court expanded the definition in order to reject an unapportioned income tax implemented the previous year.

Since then, the estate tax and corporate income taxes have been upheld on the basis that they were not taxes on persons but on transactions and on the privilege of doing business as a corporation, respectively. A general principle appears to be that, as *New York Magazine* business writer Josh Barro put it, "a direct tax is a tax that applies to a state of being, while an indirect tax applies to an action."

On that basis, it seems like a wealth tax would be clearly direct—and therefore unconstitutional. But the Supreme Court has never seen fit to pronounce on the issue one way or another, and there are voices on either side of the issue. As such, whether the tax is constitutional would, in the unlikely event of a Warren presidency with a sympathetic Congress, come down to the Supreme Court. What they would have to say can only be guessed at.

Ilya Shapiro, director of the Robert A. Levy Center for Constitutional Studies at the Cato Institute, told the *Free Beacon* it could depend on how the tax is structured.

"A straight-up tax on wealth would fail because direct taxes have to be apportioned among the states on the basis of population," he wrote. "Indirect taxes (or excises) merely have to be uniform across the country, but they apply to transactions as opposed to people. … So, what and how will Warren be taxing? The constitutional devil will be in those details."

The wealth tax has other detractors. The *Washington Post* editorial board cautioned against it in January, warning of enforcement issues and the "authoritarian odor" of punishing any of those renouncing their citizenship.

"Problems of implementation abound, starting with pricing non-publicly traded assets such as land or rare antiques," the board wrote. "The tax would create a huge incentive for tax avoidance among a segment of society well able to afford accountants and lawyers. The authors of the proposed wealth tax would bolster enforcement by charging people worth more than $50 million to renounce their citizenship, which conveys a certain authoritarian odor. This country has prided itself as a destination for immigrants with great ideas for creating wealth, not as a place that bars the exits to anyone, rich or poor."

Warren is aware of the possible issues. When she released the proposal in January, she included letters from legal academics arguing it was constitutional.

Warren Resurgent

Warren has established herself as a force in the 2020 race after a blundering start over her past claims of Native American heritage, for which she has apologized. She has made significant investment in campaign staff and infrastructure, and a new Iowa poll shows her in third place and closing in on frontrunner Joe Biden, whose advantage has closed to single digits over her and Sen. Bernie Sanders (I., Vt.).

Propelled by her "I've got a plan for that" motto, Warren has improved as a retail politician since her first successful U.S. Senate bid in 2012. Proposals like the wealth tax, to go along with her drumbeat of ideas on issues on issues like canceling student debt and breaking up big tech companies, have flipped the media narrative on her presidential campaign. Here is just a short list of recent headlines:

Washington Post: Warren's nonstop ideas reshape the Democratic presidential race — and give her new momentum
New York Times: Elizabeth Warren Gains Ground in 2020 Field, One Plan at a Time
The Guardian: Elizabeth Warren gains momentum in the 2020 race plan by plan
Bloomberg: Elizabeth Warren Rises in 2020 Race as Policy Focus Catches Fire
CNN: Elizabeth Warren Breaks Through Crowded 2020 Field — With A Plan
Politico: How 'I got a plan' became a thing: Warren nerds out and the crowds go crazy

Media members and liberal pundits have touted her as having a "plan for everything."

Washington Post reporter Michael Scherer said on MSNBC Monday that Warren's proposals were more about defining her candidacy than being realistic. Should Warren get elected president but face a divided Congress—Republicans currently hold 53 U.S. Senate seats—she would have immense difficulty passing tax hikes.

"What's interesting about what Warren is doing is not policy that has a really good chance of passing should she win the presidency," he said. "Barring a huge wave election that sweeps Democrats into power in both chambers … most of this stuff won't happen. What these policies are are real symbols for the kind of campaign that Warren is running, which is a really ambitious one … It's allowed her to communicate her message in a way that other candidates in this very broad field have really struggled to in the last few months."

Western Michigan University student Henry Thiry told the *Free Beacon* in Detroit if her policies were challenged in the courts, assuming a President Warren got Congress to pass them, so be it. Like many of her supporters, he applauded Warren's laundry list of policies.

"People think it's unconstitutional and they want to challenge it in the courts, challenge it in the courts!" Thiry said. "Why would we right now step away from doing something like that because someone might challenge it in the courts?"

That leads to an obvious question: Does the "I've got a plan for that" candidate have a back-up plan if her wealth tax falls apart? Her campaign didn't return a request for comment.