

## NEWS ANALYSIS

**Elizabeth Warren's Tax Returns**

by Lee A. Sheppard

Sen. Elizabeth Warren, D-Mass., is already running for president, even as she competes to keep her relatively safe Senate seat. She denies this, but every politician denies it right up until the announcement, because they want to keep on raising money without restrictions.

Like New York Gov. Andrew Cuomo (D), she is currently running for office but actually running against President Trump. Cuomo tells New Yorkers that all their problems lie at the president's doorstep, as if the federal government were exclusively responsible for subway problems and leaky rail tunnels between New York and New Jersey. Like Cuomo, Warren hopes to be the Democratic presidential nominee.

But she's scrambling around trying to clean up loose ends with an eye on the presidential nomination. She and *The Boston Globe*, which originally broke the Native American story, deftly defused the problem of her self-identification as part Cherokee. It's not unusual for Oklahomans to have distant Native American ancestors, but the Cherokees have a Doomsday Book of tribal membership. So Warren told the *Globe* that Native Americans should be the ones to opine on whether she is a member. "Only the tribes can determine tribal citizenship and I respect their right. That's why now I don't list myself here in the Senate as Native American," she told the *Globe* (*The Boston Globe*, Sept. 1, 2018).

Warren listed herself as a minority law professor in the Association of American Law Schools directory, at Penn and at Harvard for more than a decade. The *Globe* concluded that she didn't use the minority self-identification to get her coveted professorial positions. Turned out that the academic doubts about her focused on her being too practical! Nonetheless, her ascent to the Ivy League was remarkable because the meritocracy is not all that meritocratic. Elite schools are a closed loop. They rarely hire anyone who did not attend an elite school. Warren went to Rutgers School of Law. Arguments about credentials wouldn't excite most voters, but they do excite the professional

classes who tend to vote Democratic, as well as Warren's critics, who see her as having taken advantage of affirmative action.

The president humorously trolled her about her refusal to take a DNA test recently, and refuses to release his tax returns. So Warren recently released 10 years of her personal tax returns and introduced a bill requiring the IRS to release presidential and congressional candidates' tax returns. Her bill, the Anti-Corruption and Public Integrity Act (S. 3357), would also impose an excise tax on excessive lobbying, bar legislators from owning individual equities, and prohibit Americans from lobbying for foreign countries. (Prior coverage: *Tax Notes*, Aug. 27, 2018, p. 1330.)

So we're looking at Warren's tax returns. They do have information she'd rather not have people focus on, which is her sizable household income and its origins. Again, most readers in the professional classes wouldn't be offended by either one. Insofar as they're concerned, she's running on her credentials. Wouldn't you rather have a lawyer specializing in consumer issues and bankruptcy as president than a real estate developer turned entertainer? At least both have experience with U.S. bankruptcy rules in common.

During the 2016 election, Warren served as a populist proxy for centrist Hillary Clinton. Only *The Wall Street Journal* thinks she's a real leftist. "The clearest point that comes out of this election is that the American people do not want Wall Street to run their government," she told the *Journal* after the 2016 election, acknowledging her party's Wall Street connections.

**Warren is your first-grade teacher scolding you to stop throwing the chalk and erasers.**

But she might not be progressive enough for young Democratic socialists to whom she is trying to appeal now. Although Warren's personal story is inspiring, those young socialists might find her sources of income just the teensiest bit hypocritical. She wants to be seen as her former self, an accomplished woman from a hardscrabble background in Oklahoma, rather than as the elite One Percenter she has become.



*Elizabeth Warren's utilitarian look serves its purpose.*  
(Kenneth Martin/ZUMA Press/Newscom)

Even if she were to become the Democratic presidential nominee, she would lose because of the beer test. People vote for the person they would like to have a beer with. Warren is your first-grade teacher scolding you to stop throwing the chalk and erasers. No one wants a beer with a first-grade teacher.

Warren prepared her own returns with TurboTax until 2014, when she started using a CPA. And like everyone who prepares her own returns, she made mistakes. She was confused in some years about what constitutes a trade or business. So we look at those mistakes too. San Antonio CPA Steven Bankler helped analyze the returns.

Let's talk fashion since Warren is consistent in her look. There's nothing wrong with formulaic dressing. We're a big fan of formulae. Moreover, a woman *entre deux âges* ought to be assured of herself and have her look together. Warren has all that. She's had the same unflattering haircut forever. Her clothes — Nina McLemore — are expensive but look cheap. The saving grace is that this utilitarian frumpiness helps her politically. Warren looks middle class, trustworthy, and non-threatening. So many other women senators wear variants of this look that it should be called Senate Safe.

### Sources of Income

Moreover, Warren's anodyne look obscures her affluence. During the years for which she

released returns, 2008-2017, Warren's household adjusted gross income varied from \$409,000 to \$1.5 million, hovering around \$900,000 most years, which makes her solidly a One Percenter.

For the 10 years for which she released returns, Warren was a Harvard professor and then a U.S. senator. For 38 years, she has been married to another Harvard professor, Bruce H. Mann, who joined the faculty a decade after she did. Harvard professors get paid quite well; each earned about \$300,000 to \$400,000 annually. Warren took a big salary cut when she joined the Senate.

Indeed, just being a Harvard professor with long tenure makes an earner a One Percenter. As of the year for which Warren first released returns, she had been at Harvard for more than a decade. Moreover, Harvard provides health insurance, offers a funded retirement plan, and negotiates housing assistance individually. Faculty compensation at elite schools has veered far from the traditional genteel poverty with tenure.

Harvard has an employer-funded faculty defined contribution retirement plan with elective deferral accounts on top (elective deferrals, invented by a Harvard professor, were meant to defer bonuses, not to be the substitutes for employer-funded plans that they have become). For faculty members over age 40, Harvard contributes 10 percent of salary up to the Social Security wage base, and 15 percent of salary above the Social Security wage base (up to the \$275,000 statutory limit) to the employer-funded plan (the school's contribution would be \$35,000 in 2018 for a well-paid faculty member). For some years, Warren and her husband did not contribute to elective deferral accounts, and when they started, did not reach the statutory maximum until after she became a senator.

Harvard's broad range of free housing services for faculty includes Harvard-owned condos priced below fair market value, leasing assistance for Harvard-owned rentals and other rentals, reduced mortgage rates and closing costs, cash back on sales through the school's Coldwell Banker deal, relocation services, and advice on buying or selling a house. It is not known what housing arrangements Warren and her husband had or where in Cambridge they live. In 2008 they

reported expenses for physical alterations to and depreciation of a home office, so they could have had a free-standing house. But their property taxes were not high by East Coast standards.

In 2008 and 2009, Warren's joint return shows that the couple incurred large losses on sales of mutual fund holdings. The only good reason for liquidating in a downdraft is a margin call. Sophisticated investors get in and buy. The investments were held in taxable accounts. In 2008 they lost \$217,000 on the sale of Sentinel Investments shares for which they had paid \$368,000. In 2009 they lost \$306,000 on the sale of Dreyfus Third Century Fund shares. Since there was little offsetting investment income, use of the capital losses was restricted to \$3,000 annually. There are enough remaining capital losses to provide \$3,000 annual deductions in perpetuity.

For several years, the couple received dividends on 1,108 IBM shares purchased for \$211,000 (Warren's first husband worked for IBM). They sold all their shareholdings at a small loss in January 2013 when Warren became a senator. The proceeds seem to have gone into a Vanguard index fund, and the couple keep a lot of money in bank deposits. The couple pay Obamacare taxes on dividends and interest net of investment losses (section 1411(c)). Warren reported \$562,000 of Schedule C income that year, so they weren't hurting.

Before she became a senator, Warren contributed roughly 3 percent of her income to charity. The year she took her Senate seat, her contributions increased to 7 percent of gross income, or \$70,000, before falling back to her habitual 3 percent of gross income. Then contributions went up again as elections loomed; in 2017 the couple made charitable contributions of \$82,000, which is 8 percent of their \$913,000 gross income that year.

The couple's state income taxes are low by East Coast standards. Their income tax rate in Massachusetts — previously maligned as Taxachusetts — averages roughly 5 percent. Warren and her husband listed small moving expenses in 2010 and 2011, even though they appear to have remained in the same ZIP code. Massachusetts is densely populated. The same ZIP code might not have covered the statutory distance requirement, which is 50 miles (section 217).

## Schedule C

Until last year, Warren listed several businesses on her Schedule C: writing, consulting, lecturing, and investing. Mann, a legal history specialist, filed his own Schedule C each year, on which he reported tiny amounts of business income. Warren may well have thought, as her academic peers seem to think, that whatever non-employee activity she pursued as an expert in bankruptcy and consumer finance should all go in one pot. But those activities are separate businesses.

Technically, there should be a separate Schedule C for each business. The instructions for line A of Schedule C say that there must be a separate Schedule C for each business. Line B requires a NAICS code. Warren listed 541990 until 2017, which is professional, scientific, and technical services. Writing, publishing, and lecturing on bankruptcy and consumer credit might generously be considered one business, but consulting is clearly a separate business. Investing for one's own account is not a trade or business. Warren's office had not responded to questions about the nature of her investing and consulting activities at press time.

There's no indication that Warren and her husband had a sideline as investment advisers. They did not treat their investment losses as business losses. No associated expenses are reported on these schedules. The expenses that are reported — travel, meals, trade publications, home office — relate to writing and lecturing as a bankruptcy expert. How is investing for your own account even a trade or business? It isn't, but that apparent mischaracterization on Schedule C continued through Warren's 2016 return. For 2017, she listed her business as 711510, which is independent writing.

A securities trader is engaged in a trade or business. An investor is not. Case law makes it difficult to be a trader. The Supreme Court held that continuity and regularity are not enough to establish a trade or business when the activity is essentially personal investment management. The Court stated that "no matter how large the estate or how continuous or extended the work required may be, managerial attention to your own investments does not constitute a trade or business." The Court deferred to the tax

administrator's discretion to interpret the phrase "trade or business" (*Higgins v. Commissioner*, 312 U.S. 212 (1941)). The Tax Court refined the inquiry, stressing that a trader's profits come from the act of trading, not holding investments (*Liang v. Commissioner*, 23 T.C. 1040 (1955)).

What was the nature of Warren's consulting? She listed professional services as her business through 2016. Warren advised on bankruptcy reform commissions. She practiced law for a while and is a fellow of the American College of Bankruptcy. Her Schedules C don't separate publishing income from consulting income. Those are two different activities.

***Becoming a senator saw her writing political books that sell well. She reported less Schedule C income in years when she didn't have a new book out, and more after she became a senator.***

In the early '90s, several large corporate bankruptcies brought her specialty out of obscurity. Warren, a bankruptcy expert, would have been highly qualified to be an expert witness in large corporate bankruptcy cases. Many law professors appear as expert witnesses, but they don't list their consulting gigs on their CVs. Professional fees have administrative priority in bankruptcy. Fraudulent conveyance, an ancient doctrine, has been revived and is the kind of issue for which an academic expert witness would be useful.

She earns considerable income from publishing. There is no breakdown, but it may well be that most of her Schedule C income comes from that. Warren is one of the most cited bankruptcy experts. She has a bankruptcy casebook, *The Law of Debtors and Creditors: Text, Cases and Problems*, published in 2005. Her *Chapter 11: Reorganizing American Businesses* was published in 2008. She reported \$232,000 of Schedule C income that year. She became famous for her work during the financial meltdown. Warren oversaw the Senate Troubled Asset Relief Program hearings, where she famously embarrassed then-Treasury Secretary Timothy Geithner. She reported \$158,000 in 2009 and \$218,000 in 2010 on Schedule C.

Becoming a senator led her to writing political books that sell well. She reported less Schedule C income in years when she didn't have a new book out, and more after she became a senator. She reported \$562,000 in Schedule C income in 2013, without a new book. In 2014 Warren released the *New York Times* bestseller *A Fighting Chance*, describing her experience in Washington, and reported \$1,083,000 on Schedule C for that year and \$643,000 the following year. In 2017 she published a campaign preparatory biography, *This Fight Is Our Fight: The Battle to Save America's Middle Class*. She reported \$387,000 on Schedule C that year.

Well, gee, isn't donation of campaign book proceeds to charity customary for officeholders? While their husbands were in office, Michelle Obama, Barbara Bush, Laura Bush, and Hillary Clinton donated their book royalties. While out of office, the Clintons kept most of their earnings, including the earnings from her campaign biography, while directing millions to their own foundation. (Prior coverage: *Tax Notes*, Aug. 10, 2015, p. 587.) And Warren and her husband have more than made up their investment losses from the financial meltdown that nonetheless put her on the political map.

"Senator Warren made substantial sums from publishing her books. Unlike other previous presidential candidates who donated large portions of book proceeds to charities, her donations range from just over 2 percent to less than 4 percent of income, except near election years," Bankler commented.

Back when she began studying consumer bankruptcy — using actual data — she converted from Republican to Democrat. She coauthored *Secured Credit: A Systems Approach* in 2005, *The Fragile Middle Class: Americans in Debt* in 2000, and *As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America* in 1989. She even wrote a personal finance book, *All Your Worth: The Ultimate Lifetime Money Plan*, in 2005 and appeared on the Dr. Phil show to give personal advice. *The Two-Income Trap: Why Middle Class Mothers and Fathers Are Going Broke* was a big seller early in this century. Warren did not release returns from those earlier years, but those books are still in print, so she could still be profiting from them. ■