Hamilton acted in good faith. Will Steven Mnuchin do the same?

David J Reiss
Mnuchin, When No One Is Watching

UCLA’s legendary basketball coach John Wooden said that the “true test of a man’s character is what he does when no one is watching.” Steven Mnuchin, another leading citizen of Los Angeles, is now in the spotlight as President-Elect Trump’s nominee to lead the Department of the Treasury. Running the Treasury requires financial know-how, which this former Goldman Sachs banker has in spades. But it also requires character, as a large part of the Treasury Secretary’s job is to embody the good faith that the American people want the rest of the world to have in us.

In Alexander Hamilton’s Report Relative to a Provision for the Support of Public Credit, written just after he became the first Secretary of the Treasury, he notes that the government must maintain public credit “by good faith, by a punctual performance of contracts. States, like individuals, who observe their engagements, are respected and trusted: while the reverse is the fate of those, who pursue an opposite conduct.” OneWest’s actions during Mnuchin’s tenure as CEO raise questions about whether Mnuchin has demonstrated the character necessary to be a worthy successor to Alexander Hamilton.

A recently disclosed memo by lawyers at California’s Office of the Attorney General documents a pattern of bad faith toward homeowners with OneWest mortgages. The memo documents evidence of widespread wrongdoing that helped the bank and hurt the homeowners. The evidence includes the backdating of notarized and recorded documents in 99.56% of the examined mortgage files and unlawful credit bids and substitutions of trustees in 16.03% of those files. These are not merely technical violations: they shortened the time that homeowners had to get their mortgages back in good standing and they violated a number of procedural protections for homeowners facing non-judicial foreclosures.

Non-judicial foreclosures give lenders the ability to bypass the courts so long as they strictly abide by the procedural protections set forth by statute. Non-judicial foreclosures can only maintain their legitimacy if lenders respect those procedural protections. This is because there is no judge to make sure that the procedural protections are being adhered to. Without them, a homeowner can be no more than a sheep being led to the financial slaughterhouse of an improper foreclosure. The memo documents OneWest wrongdoing that flaunts those protections: for instance, it found numerous examples of backdating to dates prior to when OneWest opened for business. Effectively, the memo found that OneWest violated the law when it thought that no one was watching.

Some bankers have argued that focusing on violations of mortgage terms is overly legalistic, and beside the point given the widespread defaults during the financial crisis. It isn’t. The violations documented in the memo benefited the bank and harmed homeowners by allowing foreclosures to occur faster than they would if the formalities were followed. They also allowed the bank to avoid paying various taxes relating to the sale of foreclosed properties. Some of the violations documented in the memo can result in felony convictions, which shows just how seriously California views the procedural requirements relating to non-judicial foreclosures.
Ultimately, California’s then-Attorney General (and now U.S. Senator) Kamala Harris, chose not to file this complex lawsuit, but the memo’s findings are disturbing nonetheless.

As Hamilton knew, acting in good faith, performing agreements as they are written and keeping promises lead to respect and trust, “while the reverse is the fate of those, who pursue an opposite conduct.” The American people deserve a leader at Treasury with those traits, one who cherishes the rule of law as the basis of a both a healthy market economy and a well-functioning democratic government.

And other nations expect that we meet this standard too. If they see us as just another bully on the world stage, we will lose our ability to lead by example. Members of the Senate Banking Committee should ask Mnuchin whether his actions at OneWest met the standard set forth by Hamilton. We won’t be in the rooms where important decisions happen, so we need to have confidence in how Mnuchin will act when he thinks that no one is watching.

David Reiss is a professor at Brooklyn Law School and director of academic programs at the Center for Urban Business Entrepreneurship. He is the editor of REFinBlog.com, which tracks developments in the changing world of residential real estate finance.