



Legal Waters Are Murky in Fed Fight

BY NICK TIMIRAOS

At the heart of President Trump's threat to fire Jerome Powell lies an unsettled legal question: When the Fed chair's term expires without a confirmed successor, who gets to decide what happens next?

This week, the administration signaled that if no successor is confirmed by May 15, Powell shouldn't continue as chair. Treasury Secretary Scott Bessent said Tuesday that several people—not just Powell—could serve as the Federal Reserve's interim leader, naming Vice Chair Philip Jefferson and governor Christopher Waller as alternatives.

On Wednesday, Trump went further, saying "I'll have to fire him" if Powell didn't step aside.

But last month, Powell staked out his position, announcing he would continue leading the central bank as "chair pro tempore" if no successor is confirmed on time. "That is what the law calls for," Powell said. "That's what we've done on several occasions, including involving me. And it's what we're going to do in this situation."

Powell's forceful public claim to the job is itself a message to the White House: contesting it would mean yet another courtroom fight over the Fed's independence. His apparent confidence rests on legal arguments the Fed has honed over many decades, even though the law is open to interpretation. The ambiguity has produced dueling legal opinions between the executive branch and the Fed going back to 1978. No court has ever been asked to resolve that dispute.

The Senate is set to hold confirmation hearings Tuesday for Kevin Warsh, Trump's nominee to succeed Powell, but it faces a potential delay because Sen. Thom Tillis (R., N.C.) has vowed to oppose any nomination until a criminal probe about the Fed's building renovations has been resolved.

A 1978 dispute

Since Congress adopted the central bank's current structure in 1935, there have been five times where the chair's term has expired before the Senate confirmed who would serve next. Each time, the incumbent chair continued to serve. No president has ever contested the arrangement.

The question produced a significant legal dispute only once. In 1978, when the confirmation of Arthur Burns's successor was delayed by several weeks, the Justice Department and the Fed reached opposite conclusions about who had the authority to fill the gap.

Carter administration lawyers said the president had the authority to designate an acting chair from among any of the Fed's seven governors, and Carter issued an order designating Burns as the acting chair.

But the Fed disagreed, and two senators—including Banking Committee Chairman William Proxmire—amplified the objections. They warned that a president who could designate acting chairmen could render meaningless the four-year term Congress had created for Fed chiefs to insulate them from political pressure.

Five years later, the Reagan White House weighed the same question when considering whether to reappoint then-Chairman Paul Volcker. A 28-year-old White House lawyer named John Roberts—now the chief justice of the Supreme Court—wrote a memo for his bosses that agreed in part with the Carter administration position. But Roberts imposed a critical limit: The president could designate an acting chair only for a short period, in an emergency, and only if a nominee was pending before the Senate or about to be submitted.

“There is pertinent case law to the effect that the President cannot appoint ‘acting’ officers in the face of statutes requiring Senate confirmation, in the absence of an emergency situation,” Roberts wrote.

The Carter administration’s position is also weaker today than when it was written. When the Justice Department issued its view in January 1978, the president could designate any sitting governor as chair without Senate approval. A law Congress passed in 1977, which took effect in 1979, changed that. It required the chair to be separately confirmed by the Senate.

That change significantly undercuts the argument that the president could bypass the Senate by designating an acting chair, said Scott Alvarez, former general counsel at the Fed.

Battle’s irony

The legal landscape has shifted further against the executive branch since then. Congress in 1998 passed the Federal Vacancies Reform Act, which laid out the exclusive circumstances under which the president can temporarily fill agency leadership positions. It specifically excluded multimember independent commissions like the Fed.

Last year, federal courts in Washington ruled in three separate cases that the president likely lacks inherent constitutional authority to designate acting principal officers without Senate confirmation.

“I think it’d be very hard for the White House to win this one,” said Alvarez.

A legal challenge could also backfire on Trump. Powell hasn’t hidden from current and former colleagues that he would like to leave the Fed when his term as chair ends. But he has also implied that he wouldn’t resign his seat on the board if doing so would hand the administration a weapon to further damage the central bank’s independence.

In other words, Powell and Trump want the same thing— for Powell to leave. But the president’s approach could drive Powell to stay. A White House attempt to wrest control of the chairmanship during any vacancy would make it far more likely that Powell remains on the board as a governor— a seat he can hold until January 2028. *Note*

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