

May 24, 1977

**77-29 MEMORANDUM OPINION FOR THE  
GENERAL COUNSEL OF THE CIVIL  
AERONAUTICS BOARD**

**President's Authority To Appoint an Acting  
Chairman of the Civil Aeronautics Board**

This is in response to your letter concerning the President's authority to appoint an Acting Chairman of the Civil Aeronautics Board (CAB). Your communication to the Assistant Counsel to the President took the position that the President may not designate an Acting Chairman as long as it had a Vice Chairman. You based that view on 49 U.S.C. § 1321(a)(2), which provides that the Vice Chairman of the Board "shall act as chairman in the absence or incapacity of the chairman."

Statutes that authorize an officer to "act" for another normally cover three situations: vacancy, absence, and incapacity.<sup>1</sup> The three terms are not synonymous. "Vacancy" connotes the lack of any incumbent, as through death or resignation, while "absence" and "incapacity" describe an incumbent who is physically or legally unable to perform the duties of his office. *See* 63 Am. Jur. 713. Therefore, a statute that deals only with absence or disability does not provide for an acting officer in the event of a vacancy.<sup>2</sup>

Had Congress intended that the Vice Chairman of the CAB should serve as Acting Chairman in case of a vacancy in the office of Chairman, it could readily have so provided by including "vacancy" among the contingencies covered by § 1321(a)(2). Whether it should have, is not the issue. It did not, and nothing in the legislative history of the

---

<sup>1</sup>*See, e.g.*, 12 U.S.C. § 4 (Deputy Comptroller of the Currency); 28 U.S.C. § 508(a) (Deputy Attorney General); 31 U.S.C. § 16 (Deputy Director, Office of Management and Budget); 31 U.S.C. § 42 (Deputy Comptroller General). "Incapacity" and "disability" are used synonymously in these statutes.

<sup>2</sup>*Compare, for example*, 10 U.S.C. § 134(b), which authorizes the Deputy Secretary of Defense to act as Secretary only in the event of absence or disability, *with* 10 U.S.C. § 3017, which empowers the Under Secretary of the Army to perform the Secretary's duties in the event of death, resignation, removal, absence, or disability.

statute shows any intent to the contrary. It is therefore our opinion that § 1321(a)(2) did not preclude the President from designating a member of the Board as Acting Chairman.

LEON ULMAN  
*Deputy Assistant Attorney General*  
*Office of Legal Counsel*