OPINION NO. 2002-010

Syllabus:

The Secretary of State has the authority to find invalid a declaration of candidacy for nomination to the office of governor filed by a person who has previously filed, and not withdrawn, a declaration of candidacy for nomination to the office of United States representative at the same primary election. (1948 Op. Att'y Gen. No. 2922, p. 129 and 1993 Op. Att'y Gen. No. 93-052, approved and followed.)

To: J. Kenneth Blackwell, Secretary of State, Columbus, Ohio
By: Betty D. Montgomery, Attorney General, March 14, 2002

You have requested an opinion concerning the ability of a person to seek at the same primary election nomination to the offices of both United States representative and governor. You have explained in your letter of request that, on February 19, 2002, a person filed with the Greene County Board of Elections a declaration of candidacy and nominating petition to become a candidate at the May 7, 2002 primary election for nomination to the office of representative for Ohio's seventh congressional district. *See* R.C. 3513.05. This petition contained a sufficient number of valid signatures, and the board of elections certified the person's name for inclusion on the primary ballot as a candidate for the office of United States representative. *Id.*

On February 21, 2002, this same person filed with the Office of Secretary of State a declaration of candidacy and nominating petition to become a candidate for nomination to

the office of governor, also at the May 7, 2002 primary election. *See* R.C. 3513.04; R.C. 3513.05. He did not withdraw as a candidate for United States representative prior to filing his declaration of candidacy for the office of governor, nor did he do so thereafter. The deadline for filing declarations of candidacy was February 21, 2002, seventy-five days before the primary election. R.C. 3513.05.

On March 7, 2002, you determined that the person's declaration of candidacy for nomination to the office of governor did not have a sufficient number of signatures to qualify for the primary ballot. *See* R.C. 3517.05; note 2, *infra*. However, you are still interested in an opinion regarding whether a person may file valid declarations of candidacy for nomination at the same primary election to the offices of United States representative and governor, since this issue could arise again in the future.

As you note in your request, Ohio Const. art. III, § 14 reads: "No member of congress, or other person holding office under the authority of this state, or of the United States, shall execute the office of governor, except as herein provided."[1] Although the term "execute" is not defined in Ohio Const. art. III, § 14, the expression, to execute a public office, commonly means to carry out, fulfill, or administer the duties constitutionally and statutorily imposed upon such office. *See generally* R.C. 1.42 (words must be "read in context and construed according to the rules of grammar and common usage"). For example, *Webster's New World Dictionary* 489-90 (2nd college ed. 1984) defines "execute" to mean, "to follow out or carry out; do; perform; fulfill ... to carry into effect; administer (laws, etc.)". *See also, e.g., State ex rel. Attorney General v. Wilson*, 29 Ohio St. 347, 348 (1876) ("'[o]ffices consist of a right, and correspondent duty, to execute a public or private trust, and to take the emoluments belonging to it'" (citation omitted)); *Taylor v. Continental Casualty Co.*, 75 Ohio App. 299, 304, 61 N.E.2d 919, 921 (Hamilton County 1945) (The State "had legislated in the interest of the public safety and had created the office of special inspector to execute such legislation," and the "failure of the inspectors constituted misfeasance or nonfeasance in office"); 1992 Op. Att'y Gen. No. 92-008 at 2-23 ("it is necessary to examine the nature of the duties performed by each board or commission member and the independence with which those duties are to be executed to determine whether that position constitutes an office").

In this instance, Ohio Const. art. III, § 14 prohibits a member of congress or other public officer from performing, fulfilling, or administering the duties of the office of governor. Consequently, it would be impossible for a member of congress to also serve as governor since he is prohibited from performing the duties of the latter office. *See* Ohio Const. art. XV, § 7 (a person chosen for office, before entering into the discharge of his duties, must take an oath of office) and R.C. 3.23 (a public officer's oath of office must be "to support the constitution of the United States and the constitution of this state, and *faithfully to discharge the duties of his office*") (emphasis added)). Ohio Const. art. III, § 14 thus renders the offices of United States representative and governor incompatible, such that no person may simultaneously hold both offices. *See* Report of the Committee on the Executive, 3 Ohio Constitutional Revision Commission 1970-1977, 1338 (April 26, 1973) ("[t]he Committee finds merit

[1]As explained in the Summary of the Legislative-Executive Committee, 2 Ohio Constitutional Revision Commission 1970-1977, 981 (March 26, 1973), the language "except as herein provided," found in Ohio Const. art. III, § 14, is included "to cover a case where there has been succession to the governorship by another public official, i.e., the [lieutenant] governor, president of the senate or speaker of the house." Such exception is not applicable in this instance.

in the constitutional inhibition upon simultaneously serving as Governor and holding other public office").

In the type of situation you have described, a person holds neither position, but seeks nomination for election to both offices at the same primary. You wish to know whether you are authorized to declare invalid the person's declaration of candidacy for governor where he has already filed, and not withdrawn, a declaration of candidacy for United States representative, since he would be unable to hold both offices if elected thereto, and R.C. 3513.07 requires a person to swear as part of his filed declaration of candidacy that, if elected to office, he "will qualify therefor."[2]

The issue whether an individual may simultaneously be a candidate at a primary election for nomination to two incompatible offices has been addressed in previous opinions of the Attorney General. 1948 Op. Att'y Gen. No. 2922, p. 129, concluded that a person may not file, in connection with the same primary election, declarations of candidacy for nomination to two or more incompatible offices, and that a board of elections should reject a second declaration of candidacy of a person who has already filed if the second declaration is for an office which is incompatible with the first.[3] In reaching its conclusion, 1948 Op. Att'y Gen. No. 2922, p. 129, relied on G.C. 4785-71, the provisions of which now appear in R.C. 3513.07, which, as noted above, requires a person seeking to become a candidate, to swear as part of his declaration of candidacy, that, "if elected to said office or position, I will qualify therefor." The opinion states:

> It is certainly difficult to perceive how a person who is duly sworn can truthfully say that he desires to become a candidate for two different offices which are incompatible and that if elected to each, he will qualify for each. Obviously such declarations can not be carried out. I am unable to bring myself to the position that the General Assembly, when it enacted [G.C. 4785-71, now R.C. 3513.07] and stated therein in express terms that a per-

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[2]R.C. 3513.05 authorizes the Secretary of State to determine all matters affecting the validity or invalidity of a candidate's petition papers filed with him, except for the validity of the petition's signatures, which is determined by the respective boards of elections. R.C. 3501.39 requires the Secretary of State to accept a petition unless "[t]he candidate's candidacy or the petition violates the requirements of this chapter, Chapter 3513. of the Revised Code, or any other requirements established by law." R.C. 3501.39(A)(3). *See also* R.C. 3513.04 (circumstances under which the Secretary of State "shall not accept for filing the declaration of candidacy of a candidate for party nomination to the office of governor"). On the sixtieth day before a (non-presidential) primary election, the Secretary of State must "certify to each board [of elections] in the state the forms of the official ballots to be used at such primary election, together with the names of the candidates to be printed thereon whose nomination or election is to be determined by electors throughout the entire state and who filed valid declarations of candidacy and petitions." R.C. 3513.05. *See also* R.C. 3501.05(I).

[3]*See generally State ex rel. White v. Franklin County Board of Elections*, 65 Ohio St. 3d 45, 50, 600 N.E.2d 656, 660 (1992) (recognizing there is a "common-law rule, effective in other states, against simultaneously running for incompatible offices," but concluding, under the facts of the case, that it was unnecessary for the court to "decide whether the rule prohibiting such candidacies exists in Ohio. But, see, 1948 Ohio Atty. Gen. Ops. No. 2922"). *Cf. State ex rel. Hover v. Wolven*, 175 Ohio St. 114, 191 N.E.2d 723 (1963) (syllabus, paragraph three) (when an elected officer is elected to and accepts a second, incompatible office, he will be deemed to have vacated his first office).

> son declaring himself to be a candidate must state under oath that he desires to be a candidate and that if elected he will qualify for the office, intended thereby to permit such person so declaring himself either to withdraw his candidacy before election or refuse to qualify when and if elected. Furthermore, if the same person were permitted to file a declaration of candidacy to each of the ... offices to which you allude and subsequently thereto he were nominated and in turn elected to each of said offices, he obviously could not qualify for both and, consequently ... the one for which he failed to qualify would have to be filled as in the case of a vacancy.

Id. at 132.

Stating that, "[c]ertainly, the General Assembly can not be presumed to have enacted a law which, under any circumstances, would, in its application, produce such unreasonable and absurd consequences," the opinion concludes that "a person may not file declarations of candidacy to become a candidate for nomination to two or more incompatible offices at the same primary election." *Id.* at 132-33. In reliance on the 1948 opinion, 1993 Op. Att'y Gen. No. 93-052 concluded that an individual may not seek nomination as a party's candidate for the incompatible offices of county commissioner and county auditor at the same primary election.[4]

The conclusions reached in 1948 Op. Att'y Gen. No. 2922, p. 129 and 1993 Op. Att'y Gen. No. 93-052 are supported by *State ex rel. O'Donnell v. Cuyahoga County Board of Elections*, 136 Ohio App. 3d 584, 737 N.E.2d 541 (Cuyahoga County 2000), wherein the court found that a person could *circulate* a declaration of candidacy and petition for nomination at a primary election for the office of common pleas court judge, even though he had already filed a declaration of candidacy and petition for nomination to the office of judge of the appeals court. The *O'Donnell* court specifically decided that, "there existed no prohibitions within R.C. Title 35 that prevented the [candidate] from circulating the common pleas petition while possessing the previously certified appeals petition." *Id.*, 136 Ohio App. 3d at 588, 737 N.E.2d at 544. Most importantly here, however, the court further stated that, *"[o]nce the [candidate] properly withdrew his original appeals petition*, no legal impediment existed to prevent the [candidate] from filing his newly circulated common pleas petition" (emphasis added). *Id.* Thus, *O'Donnell* strongly indicates that a declaration of candidacy will not be considered valid, where the candidate has previously filed, and not withdrawn, a declaration of candidacy for nomination to a different, incompatible office at the same primary election.

We also find it instructive that the General Assembly has taken no action since the 1948 opinion was issued to legislatively overturn the opinion's interpretation, which, you have stated, has been followed by Ohio election officials since its issuance. As we recently explained in 2002 Op. Att'y Gen. No. 2002-007, slip op. at 7, there is a principle of statutory construction that, "legislative inaction in the face of longstanding judicial interpretations of that section evidences legislative intent to retain existing law." *State v. Cichon*, 61 Ohio St. 2d 181, 183-84, 399 N.E.2d 1259, 1261 (1980). Although an opinion of the Attorney General

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[4]R.C. 3.11 reads: "No person shall hold at the same time by appointment or election more than one of the following offices: sheriff, county auditor, county treasurer, clerk of the court of common pleas, county recorder, prosecuting attorney, and probate judge." R.C. 319.07 reads: "No judge or clerk of a court, county commissioner, county recorder, county engineer, county treasurer, or sheriff shall be eligible to the office of county auditor."

is not a judicial decision, the same argument may be made that the 1948 opinion has been known and applied for many years, during which time the General Assembly has amended R.C. Chapter 3513, and specifically R.C. 3513.07, several times without disturbing the conclusion of the 1948 opinion, thus implying legislative approval of the opinion's interpretation.[5] 2002 Op. Att'y Gen. No. 2002-007, slip op. at 7.

We are aware that the courts have held that, absent express constitutional or statutory language to the contrary, a person need not qualify to hold an office at the time he becomes a candidate therefor, but must qualify only upon assuming office. *See, e.g., State ex rel. Vana v. Maple Heights City Council*, 54 Ohio St. 3d 91, 561 N.E.2d 909 (1990); *State ex rel. Fisher v. Brown*, 32 Ohio St. 2d 23, 289 N.E.2d 349 (1972); *State ex rel. Gains v. Rossi*, No. 98-C.A.-51, 1999 Ohio App. LEXIS 986 (Mahoning County 1999), *aff'd*, 86 Ohio St. 3d 620, 716 N.E.2d 204 (1999); *State ex rel. Wolfe v. Lorain County Board of Elections*, 59 Ohio App. 2d 257, 394 N.E.2d 321 (Lorain County 1978).[6] Unlike the instant situation, however, the candidates in these cases were not in the position of being required to file and swear to two, inherently inconsistent declarations. If a person has already filed one declaration of candidacy, swearing that, if elected to office, he will qualify therefor, it is impossible for him to do the same in a subsequent filing for a different office if he is, in fact, constitutionally prohibited from assuming and executing the duties of both offices. *See generally State ex rel. Flynn v. Board of Elections*, 164 Ohio St. 193, 200, 129 N.E.2d 623, 628 (1955) ("one who would be ineligible to hold a public office has no right to be a candidate for election thereto," and "the board of elections has statutory authority to determine whether the relator, if elected, could successfully assume the office he seeks"), *overruled in part on other grounds by State ex rel. Schenck v. Shattuck*, 1 Ohio St. 3d 272, 439 N.E.2d 891 (1982). *See also, e.g., State ex rel. Keefe v. Eyrich*, 22 Ohio St. 3d 164, 489 N.E.2d 259 (1986) (upholding under the federal constitution Ohio Const. art. IV, §6(C), which prohibits a person from being elected to judicial office if on or before the day he assumes office he will have reached the age of seventy years, and denying a writ of mandamus to order a board of elections to certify a judge's name for placement on the primary election ballot where he was seventy years old at the time of filing).

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[5]R.C. 3513.07 was amended most recently in Am. Sub. H.B. 5, 124th Gen. A. (2001) (eff. Aug. 28, 2001).

[6]We also note that, in *State ex rel. Donnelly v. Green*, 106 Ohio App. 61, 148 N.E.2d 519 (Cuyahoga County 1958), the court found that no provision of law prevented a person from filing declarations of candidacy for incompatible public offices, and upheld the board of elections' delay in determining the validity of a person's declarations of candidacy for incompatible offices until after the deadline for withdrawing declarations had passed. We are unaware of any other authority that has sanctioned the filing of declarations of candidacy for incompatible offices by the same person for the same primary, and used the deadline for withdrawal as the time by which the Secretary of State or board of elections must find the declarations to be valid or invalid. Further, at the time *Donnelly* was decided, R.C. 3513.30 permitted a candidate to withdraw his declaration only if he acted prior to the eightieth day before the election, and the candidate in that case had indeed withdrawn as a candidate for one of the offices. 1955-1956 Ohio Laws 205, 224 (Am. S.B. 220, eff. Jan. 1, 1956). R.C. 3513.30 has been subsequently amended, however, and a person may now (in a non-presidential primary) withdraw as a candidate "at any time prior to the primary election." R.C. 3513.30(B). *See* 1995-1996 Ohio Laws, Part I, 549, 684 (Am. Sub. H.B. 99, eff. Aug. 22, 1995). *See also* R.C. 3501.39(B) (preventing a board of elections from invalidating a declaration of candidacy after the fiftieth day prior to the election at which the candidate seeks nomination to office). Therefore, we do not find *Donnelly* to be useful guidance.

We find, therefore, that 1948 Op. Att'y Gen. No. 2922, p. 129, arrived at the proper result, and applying the reasoning thereof to the question you have raised, we conclude that the Secretary of State may find invalid a declaration of candidacy for nomination to the office of governor filed by a person who has previously filed, and not withdrawn, a declaration of candidacy for nomination to the office of United States representative.

In concluding that 1948 Op. Att'y Gen. No. 2922, p. 129 reached the correct result, we are mindful of the court's findings in *Cicchino v. Luse*, No. C-2-99-1174 (S.D. Ohio Feb. 1, 2000) (unreported). In support of its decision that the State could require candidates for the office of sheriff to obtain a certificate of training *prior to* being placed on the ballot rather than at the time of election, *see* R.C. 311.01, the court declared that, "Ohio has an important interest in policing its ballot and minimizing frivolous candidacies." *Id.*, slip op. at 24. Requiring candidates to meet the qualifications for holding office at the time of filing for candidacy rather than at the time of election, "enables Ohio to minimize frivolous candidacies, and allows it to conduct its election with fairness, honesty and order." *Id. See also Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (States have an interest in avoiding voter confusion and overcrowded ballots, and in being able to clearly identify the election winner).

It is, therefore, my opinion, and you are hereby advised that, the Secretary of State has the authority to find invalid a declaration of candidacy for nomination to the office of governor filed by a person who has previously filed, and not withdrawn, a declaration of candidacy for nomination to the office of United States representative at the same primary election. (1948 Op. Att'y Gen. No. 2922, p. 129 and 1993 Op. Att'y Gen. No. 93-052, approved and followed.)