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Written Testimony of
Barry Fukunaga
Chief of Staff to the Governor

Before the
HOUSE COMMITTEE ON FINANCE
Wednesday, March 17, 2010, 2:00 p.m.
Room 308, State Capitol

SB2007 SD1 RELATING TO BUDGETARY POWERS

Chair Oshiro, Vice Chair Lee, and Members of the Committee:

The Office of the Governor **strongly opposes SB2007 SD1**, which eliminates the Governor and the Director of Finance's authority to restrict funds, reduce allotments, or suspend/abolish programs authorized by the Legislature. SD1 was amended to require the Governor to act contrary to legislative intent only pursuant to a declaration of emergency. The Office of the Governor believes this measure unduly intrudes on the Executive Branch's ability to manage state operations and does not see any value in the passage of SB2007 SD1.

Specifically, this measure bars the Governor and the Director of Finance from suspending or abolishing existing programs, or restricting program funding if the program cannot adequately execute its intended purpose, unless authorized by a legislative act or an emergency declaration. This measure also prohibits allotment reductions to existing programs if it is below the amount required to adequately execute the program's intended purpose, unless authorized by a legislative act or an emergency declaration. Finally, section 5 of this measure allows the Legislature to have the sole

power in determining the establishment or abolishment of new or existing programs if public funds are expended, unless otherwise provided by law.

SB2007 infringes on the separation of powers between the Legislative and Executive Branches, and also infringes on the Governor's authority to administer the budget. It is the responsibility of the Governor to ensure that the budget is balanced and expenditures are made prudently. In order to do so, the Governor requires the flexibility and authority to render financial decisions. As an example, significant restrictions were made to the Executive Branch budget for fiscal year 2008-2009—on the order of $86.2 million in restrictions up to May 2009, with additional restrictions implemented in June 2009. This included restricting funds appropriated by the Legislature, which could not be reasonably released if we were to achieve a balanced budget as required by law. Moreover, many of these restrictions were made in May and June of 2009 after the Legislature adjourned, when revenues were no longer available to pay our expenses. As such, it would be impractical and infeasible for the Legislature to call itself back into session for the sole purpose of authorizing restrictions when the State faced these dramatic budget shortfalls in such a short time span.

Although SD1 allows the Governor to suspend or abolish existing programs, or restrict program funding if an emergency is declared, this exception is impractical. While the State is currently facing an unprecedented budget shortfall, and will likely face more budget shortfalls that require additional cuts in government spending, we question whether every necessary cut or restriction in state program or funding rises to the level of an emergency. This bill will create severe problems in situations when emergency declarations are not warranted, but restrictions and cuts must take place because it is clear the State does not have revenues to fund a program.

Additionally, it is unclear what the threshold is for deeming whether a program is or is not adequately executing its intended purpose. The Administration and departments have been mindful to make restrictions and budget cuts that minimize

impact to public services. Although cutbacks have been implemented, we have maintained our ability to perform the State's core functions and services.

Without the ability to undertake restrictions in an unfettered manner, the State would not have been able to impose the necessary reductions that have enabled the development of a balanced budget. Given the budget challenges we are facing in the current fiscal year, any attempt to limit the Governor and the Director of Finance's ability to balance the budget will erode the State's fiduciary responsibilities to the taxpayers and residents of Hawaii. As such, the Administration strongly opposes SB2007 SD1, and requests that it be held.

TESTIMONY OF THE ATTORNEY GENERAL
TWENTY-FIFTH LEGISLATURE, 2010

ON THE FOLLOWING MEASURE:
S.B. NO. 2007, S.D. 1, RELATING TO BUDGETARY POWERS.

BEFORE THE:
HOUSE COMMITTEE ON FINANCE

DATE: Wednesday, March 17, 2010 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Room 308

TESTIFIER(S): Mark J. Bennett, Attorney General, or
Randall S. Nishiyama, Deputy Attorney General

Chair Oshiro and Members of the Committee:

The Department of the Attorney General opposes this bill, both because it is ambiguous and because it infringes on the Executive Branch's ability to manage state operations, especially in times of an unstable economy.

This bill provides that the Governor cannot utilize the allotment powers granted under sections 37-32 to 37-41, Hawaii Revised Statutes (HRS), to:

1. "Restrict funding to a program to the extent that the program cannot adequately execute its intended purpose;" or
2. "Suspend or abolish any existing program, if the program has been authorized by the legislature and moneys have been appropriated for the program, unless specifically authorized by the legislature by legislative act, or the restriction, suspension, or abolition is made pursuant to a declaration of emergency by the governor."

While this bill prohibits the Governor from imposing restrictions on funding a program to the extent that the program cannot adequately execute its intended purpose, this provision

is ambiguous because no standard is articulated to judge whether a program is adequately executing its intended purpose.

In addition, under section 5 of this bill, the Legislature, unless otherwise provided by law, would "have the sole power by law to establish new programs or suspend or abolish an existing program for which public moneys must be appropriated and expended."

We believe that this provision infringes on the Governor's authority to administer the budget because discretion over state spending is a fundamental power of the Executive Branch.

The allotment system highlights the distinction between *appropriating* state funds and *spending* state funds. An appropriation is an authorization to spend State money; it is not the money itself. Section 37-31, HRS (an appropriation is the "maximum amount authorized"); Haw. Const. article VII, section 9 (describing the general appropriations bill as "authorizing operating expenditures"). As the Connecticut Supreme Court noted, "[a]n appropriation is a statute passed by the legislature to authorize expenditures, while an allotment is the action by which the executive branch sets aside funds sufficient to cover a portion of the expenditure authorized by the appropriations act." University of Connecticut Chapter AAUP v. Governor, 512 A.2d 152, 156 (Conn. 1986).

Under the principles of separation of powers, the *spending* of an appropriation is an inherently executive function:

- "[T]he activity of spending money is essentially an executive task." New England Div. Of American Cancer Soc. V. Commissioner of Admin., 769 N.E.2d 1248, 1256 (Mass. 2002).

- "[A]ppropriation is a legislative power, but spending is an executive power." Hunter v. State, 865 A.2d 381, 392 (Vt. 2004).

- "[T]he exercise of discretion in determining when and how to distribute funds is an executive function." McInnish v. Riley, 925 So. 2d 174, 182 (Ala. 2005) (internal quotation marks and brackets omitted).

- "[W]hile the legislature is vested with the power to appropriate, that power may not unduly intrude on the spending prerogatives of the executive." Common Cause of Pennsylvania v. Commonwealth, 668 A.2d 190, 206 (Pa. Cmwlth. Ct. 1995) (citations omitted).

- "[T]here is one thing the Legislature cannot do. It cannot exercise the functions of the executive. It cannot administer the money after it has been once appropriated." Communications Workers of America v. Florio, 617 A.2d 223, 235 (N.J. 1992) (internal quotation marks, citations and ellipses omitted).

The Hawaii Supreme Court has acknowledged the Governor's role in the budgetary process as chief executive. In Board of Educ. v. Waihee, 70 Haw. 253, 768 P.2d 1279 (1989), the Court rejected a claim by the Board of Education that Haw. Const article X, section 3, freed the Board from the Governor's executive control over the budget:

> Article X, section 3, therefore, can hardly be characterized as a constitutional declaration emancipating the Board of Education from all executive direction, and what has been "provided by law" is consistent with the

> intention of the framers not to divest the Governor of his [or her] "statewide policy-making an executive powers" or his [or her] authority over the executive budget.

Id. at 264, 768 P.2d at 1286. This case acknowledges the fundamental executive nature of the Governor's authority over the budget.

The separation of powers doctrine is meant to preclude a commingling of essentially different powers of government in the same hands, and thereby prevent a situation where one branch of government would be controlled by, or subjected, directly or indirectly, to the coercive influence of either of the other branches of government. State v. Augafa, 92 Haw. 454, 470 (Haw. App. 1999)(citations omitted).

The Executive Branch's responsibility in expending public funds is expressed, in part, by section 5, article VII of the Hawaii State Constitution, "general fund expenditures for any fiscal year shall not exceed the State's current general fund revenues and unencumbered cash balances . . . ."

The Governor's authority to restrict appropriated funds as authorized by article VII, section 5 of the Hawaii State Constitution, which requires that "[p]rovision for the control of the rate of expenditures of appropriated state moneys, and for the reduction of such expenditures under prescribed conditions, shall be made by law," is implemented through the allotment system which is set forth in sections 37-31 to 37-43, HRS. The allotment system requires departments to request the release of appropriated moneys from the Director of Finance or the Governor before the expenditure of such moneys can occur. While article VII, section 5 of the Hawaii State Constitution, provides that the Governor's allotment powers "shall be made by law," the provisions of this bill intrude on the Governor's ability to manage the budget.

Article VII, section 5, was added to Hawaii's Constitution in 1950. The framers of Hawaii's constitution stated:

> "[Y]our Committee is of the opinion that there should be <u>vested in the chief executive</u> the authority to reduce the level of expenditures when conditions dictate such action as essential in the interest of preserving financial stability."

Stand. Comm. Rep. No. 51, 1 <u>Proceedings of the Constitutional Convention of Hawaii 1950</u>, 194 (emphasis added). One delegate addressed this concern directly by commenting that the authority was delineated by the constitution itself: this constitutional provision "would not be construed as an encroachment by the governor on the power of the legislature since the appropriations made were based on estimated revenue submitted by him [or her]. Such a delegation of power must be provided in the Constitution in order to be effective." Committee of the Whole Debates, 2 <u>Proceedings of the Constitutional Convention of Hawaii 1950</u>, 451 (remarks of Delegate Henry White).

While the separation between the three branches of government is not "watertight", this bill appears to constitute too much legislative interference with the functions of the Executive branch. <u>Compare</u> <u>Akahane v. Fasi</u>, 58 Haw. 74 (1977) (holding that the Executive branch is vested with primary responsibility for municipal planning and should initially conduct studies related to city planning rather than the city council). It subjects the Executive Branch to the control of the Legislature with respect to the administration of State moneys.

We believe that this bill is ambiguous and infringes on the Executive Branch's ability to manage State operations, and we ask that this bill be held.

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March 15, 2010

Testimony on SB 2007, Relating to Budgetary Powers
House Finance Committee
Chair: Representative Marcus R. Oshiro
Vice-Chair: Representative Marilyn B. Lee
Wednesday, March 17, 2010, Room 308, State Capitol
Presented by Howard S. Garval, President & CEO, Child & Family Service

Good afternoon, Chair Oshiro and Vice-Chair Lee and Committee members. I am Howard Garval, President & CEO of Child & Family Service, Hawaii's oldest and largest human service nonprofit, serving keiki to kupuna on every island. We touch the lives of over 45,000 residents of Hawaii each year.

We applaud the Legislature for this bill. I have only been in Hawaii for four years, but it is evident to me and many others that there is a major imbalance of power that has had a substantial negative impact on funding for nonprofit organizations here in Hawaii. We have had several years in which the Legislature has appropriated funds for a variety of programs and capital needs only to have the Administration either refusing to release these or completely disregarding the Legislature's appropriation and moving the funds somewhere else. While the Administration should have enough discretion to restrict funds when revenue falls short, their actions have gone as far as eliminating funding for programs for which the Legislature allocated funds that resulted in programs closing. This essentially renders meaningless the authority of the Legislature to appropriate funds. The result is a lack of balance of power in our government. This is a very serious flaw that must be addressed and that is why Child & Family Service strongly supports SB 2007.

One clear example of this in the last legislative session was the Legislature's restoration of funding for Hawaii's Healthy Start program that the Governor had proposed eliminating in the state budget. The Legislature restored $3 million a year over the two years of the biennium through the appropriation of tobacco funds. The Department of Health decided in July 2009 not to release any portion of the $3 million. If it weren't for the Legislature appropriated TANF funds to the Department of Human Services for Healthy Start, the program would have been completely eliminated in the state. If the Administration could ignore the $3 million for Healthy Start that was appropriated, it could have ignored the $1.5 million that was designated in TANF funds for Healthy Start, thereby eliminating the entire program in Hawaii. As it is, the $1.3 million in TANF funds (after 12% TANF funding cut to all TANF funded programs) that remain only preserve two programs, one on Oahu and one in Hilo. Thousands of families at high risk for child abuse are no longer receiving services, and it is only a matter of time before we see more abuse and neglect. The Healthy Start program has also been changed dramatically from its original intent; i.e..to prevent abuse before it occurs. Now the families who are eligible are already involved in Child Welfare Services. The limitation of only serving families with children from birth to six months also reduces the impact we can have. The previous time frame was birth to 3 years. I submit to you that the Department of Health eliminated funding the Legislature allocated to Healthy Start and the Administration has dramatically changed the program from its original intent.

We support this bill not for partisan reasons but to restore a sense of democracy back into the legislative and budget process. The importance of separation and balance of powers between the legislative and executive branches is not a Democratic Party or Republican Party issue but is fundamental to a democracy, and the citizens of Hawaii deserve nothing less.

Thank you for the opportunity to present testimony on this important bill.

Howard S. Garval, President & CEO

Our Mission: Strengthening Families and Fostering the Healthy Development of Children