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OPINION COMMITTEE

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October 26, 2018

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FILE # ML-48457-18
I.D. # 48457

Re: The Federal Protective Service's powers of arrest, search, and seizure under art. 2.122(b) of the Texas Code of Criminal Procedure, post Homeland Security Act of 2002

Dear Attorney General Paxton:

Recently, the Federal Protective Service ("FPS") of the U.S. Department of Homeland Security ("DHS") has encountered an issue with the presentation of cases to some district attorney offices in Texas, concerning whether, following the Homeland Security Act of 2002, the FPS still has law-enforcement authority under Texas law. As will be discussed in detail below, the issue stems from the federal legislature's repealing of a statute referenced in Texas' statutory grant of powers of arrest, search, and seizure to the FPS under article 2.122(b) of the Texas Code of Criminal Procedure. Consequently, I seek an opinion from your office with respect to the following question:

Does the federal legislature's repealing of 40 U.S.C. 318 and 318d—the federal statutes referenced in article 2.122(b) of the Texas Code of Criminal Procedure, granting officers of the Federal Protective Service the powers of arrest, search, and seizure as to any offense under Texas law—such that the Federal Protective Service is longer under the administration of the General Services Administration, but rather that of the Department of Homeland Security, strip the Federal Protective Service of its law-enforcement authority in Texas where, despite the federal government's transfer of the Federal Protective Service from the General Services Administration to the Department of Homeland Security, and its subsequent re-designation of Federal Protective Service officers from "special police" to "officers and agents," the function of the Federal Protective Service remains the same, namely, the protection of federal property and persons thereon?

I. Article 2.122(b) of the Texas Code of Criminal Procedure and subsequent changes to the federal statutes referenced therein

In 1993, the Texas Legislature amended article 2.122, titled "Special Investigators," to add the FPS to the list of federal agencies that, although not "peace officers" in the state of Texas, are nonetheless statutorily authorized to act on certain Texas laws. *See* Act of June 19, 1993, 73rd Leg., R.S., ch. 927, § 1, Tex. Sess. Law Serv. 1993 (West) (to be codified in Tex. Code Crim. Proc. art. 2.122(b)). While other federal special agents already had powers of arrest, search, and seizure under the statute as to felony offenses only, the amendment granted those powers to the FPS as to *any* offense under Texas law. *See id.* At the time of the enactment of article 2.122(b), the FPS was organized under the General Services Administration ("GSA") of the federal government and headed by the Administrator of the GSA ("GSA Administrator"). *See* Public Buildings Amendments of 1988, Pub. L. No.100-678, § 8(a)-(b), 102 Stat. 4049, 4052-53 (1988) (amending 40 U.S.C. 318-318d to replace all references to the "Federal Works Agency" and "Federal Works Administrator" with "General Services Administration" and "Administrator of General Services," respectively, in their stead, and delineating the powers of "special policemen" appointed thereunder). The Texas Legislature's amendment to article 2.122 thus added the following language:

- (b) A person designated as a special policeman by the Federal Protective

Services of the General Services Administration under 40 U.S.C. Section 318 or 318d is not a peace officer but has the powers of arrest and search and seizure as to any offense under the laws of this state.

Act of June 19, 1993, 73rd Leg., R.S., ch. 927, § 1, Tex. Sess. Law Serv. 1993 (West) (to be codified in Tex. Code Crim. Proc. art. 2.122(b)) (introduced as “AN ACT relating to granting law enforcement authority to special policemen of the General Services Administration.”).

Thereafter, in August of 2002, seeking to “revise, codify, and enact without substantive change certain general and permanent laws[] related to public buildings, property, and works, as title 40,” the federal legislature passed the Public Buildings, Property, and Works Act, effectively repealing sections 318-318d and replacing them with section 1315. *See* Public Buildings, Property, and Works Act, Pub. L. No. 107-217, § 1315, 116 Stat. 1062, 1140 (2002). Under the new federal statute, 40 U.S.C. 1315, the “special police” (a.k.a. FPS) was appointed by the GSA Administrator or his/her authorized agent, but they retained the same powers as those delineated under former sections 318-318d. *See* Public Buildings, Property, and Works Act, Pub. L. No. 107-217, § 1315(b), 116 Stat. 1062, 1140 (2002).¹ A few months later, under the Homeland Security Act of

¹ Except for a few stylistic changes in wording, the powers set out under the newly enacted § 1315(b) were virtually identical to those delineated under § 8(b) under the Public Buildings Amendments of 1988.

The former statute stated, in pertinent part:

Section 1. Special Police.

- (b) Powers.—Special policemen appointed under this section shall have the same powers as sheriffs and constables upon property referred to in subsection(a) to enforce the laws enacted for the protection of persons and property, and to prevent breaches of the peace, to suppress affrays or unlawful assemblies, and to enforce any rules and regulations promulgated by the Administrator of General Services or such duly authorized officials of the General Services Administration for the property under their jurisdiction; except that the jurisdiction and policing powers of such special policemen shall not extend to the service of civil process.

See Public Buildings Amendments of 1988, Pub. L. No.100-678, § 8(b), 102 Stat. 4049, 4052-53 (1988).

2002, the purpose of which was “[t]o establish the Department of Homeland Security, and for other purposes,” the functions of the GSA Administrator—and, specifically, as they related to the FPS—were transferred to the Secretary of the Department of Homeland Security. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, § 403, 116 Stat. 2178, 2178 (2002) (codified at 6 U.S.C. 203) (“In accordance with title XV (relating to transition provisions), there shall be transferred to the Secretary the functions, personnel, assets, and liabilities of—...(3) the Federal Protective Service of the General Services Administration, including the functions of the Administrator of General Services relating thereto[.]”). In the same Act, under a section titled, “Transfer of Certain Security and Law Enforcement Functions and Authorities,” the federal legislature amended the language of section 1315 to read as follows:

- (a) In general.—To the extent provided for by transfers made pursuant to the Homeland Security Act of 2002, the Secretary of Homeland Security (in this section referred to as the ‘Secretary’) shall protect the buildings, grounds, and property that are owned, occupied, or secured by the Federal Government...and the persons on the property.
- (b) Officers and Agents.—
 - (1) Designation.—The Secretary may designate employees of the Department of Homeland Security, including employees transferred to the Department from the Office of the Federal

The new statute similarly stated:

- (b) Powers.—Special police appointed under this section have the same powers as sheriffs and constables on property referred to in subsection (a) to enforce laws enacted for the protection of individuals and property, prevent breaches of the peace, suppress affrays or unlawful assemblies, and enforce regulations prescribed by the Administrator or an official of the Administration authorized by the Administrator for property under their jurisdiction. However, the jurisdiction and policing powers of special police do not extend to the service of civil process.

See Public Buildings, Property, and Works Act, Pub. L. No. 107-217, § 1315, 116 Stat. 1062, 1140 (2002).

Protective Service of the General Services Administration..., as officers and agents for duty in connection with *the protection of property owned or occupied by the Federal Government and persons on the property*,....

- (2) Powers.—While engaged in the performance of official duties, an officer or agent designated under this subsection may—
- (A) enforce Federal laws and regulations *for the protection of persons and property*;
 - (B) carry firearms;
 - (C) make arrests without a warrant for any offense against the United States committed in the presence of the officer or agent...;
 - (D) serve warrants and subpoenas...;
 - (E) conduct investigations, on and off the property in question, *of offenses that may have been committed against property owned or occupied by the Federal Government or persons on the property*;....

See Homeland Security Act of 2002, Pub. L. No. 107-296, § 1706, 116 Stat. 2316, 2316-2317 (2002) (emphasis added).

II. The statutory construction of article 2.122(b) and the legislative intent underlying its enactment

While well-settled law in Texas requires that a statute not be interpreted in a way that renders the legislature's enactments a nullity, *see Baker v. Bell Helicopter Textron, Inc.*, 985 S.W.2 272, 275 (Tex. App.—Fort Worth 1999, pet. denied) (“[T]he legislature is not presumed to have done a foolish or useless thing”); *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991) (reviewing courts assume the legislature would not act in an absurd way), such a rule of statutory construction does not appear to clearly resolve the issue raised regarding FPS' current statutory authority in Texas. This is because until the FPS was transferred to the DHS in 2002, the plain language of article 2.122(b) (identifying FPS as a division of the GSA under then-existing 40 U.S.C. 318 or 318d) clearly and unambiguously granted FPS the powers of arrest, search, and seizure. In other words, at the time of the legislature's enactment of article 2.122 (and for nearly a

decade thereafter) the legislature's actions were clearly not futile or null.

On the other hand, a reading of the plain language of article 2.122(b) *now* would seem to lead to absurd results that the legislature could not have intended—*i.e.*, that whenever the federal government undertook a re-organization of its law-enforcement agencies and/or re-assigned the FPS to another agency, article 2.122(b) would be rendered null and void. Certainly, reading the statute as a whole, it is evident from the plain language of the statute that the legislature enacted article 2.122 (and its subsequent amendments, including the subsection at issue here) for the simple purpose of identifying federal investigative agencies that could exercise their law-enforcement authority in enforcing Texas criminal law. *See, e.g., Rodriguez v. Waak*, — S.W.3d —, 2018 WL 3977868, at *2 (Tex. App.—Houston [1st Dist.], Aug. 21, 2018, no pet.) (not yet reported) (statutory language should be analyzed in its context, in light of the specific sections at issue as well as the statute as a whole) (and cases cited therein). It is also evident from article 2.122(b)'s legislative history that the only discernible basis for granting the FPS the powers of arrest, search, and seizure as to any offense under Texas law was that of the FPS' *function* as a law-enforcement agency for the protection of federal property and persons located thereon. That is, despite its inevitable, incidental reference to the FPS as “the Federal Protective Services division of the **General Services Administration under 40 U.S.C. Section 318 or 318d**” (the specific statute under which the FPS was then organized and administered), there is nothing in the plain language of the statute or the legislative history thereof to indicate that there was anything functionally unique about the GSA itself (or the unavoidable, attendant fact that the FPS was then administered by the GSA at the time) that would indicate, or even imply, that it was the FPS' administration *by the GSA*, and not its *function* as a law-enforcement agency, that formed the impetus for the Texas Legislature's grant of law-enforcement authority to the FPS.

Indeed, noting that the FPS was the federal law-enforcement agency charged with securing federal property and investigating crimes occurring thereon, the stated purpose of the bill to add subsection (b) to article 2.122 was simply to “add the Federal Protective Service to the list of federal agencies that are listed in Article 2.122 of the Code of Criminal Procedure.” *See House Committee Report, Bill Analysis, Tex. H.B. 1182, 73rd Leg., R.S. (1993)*. The House Research Organization summarized the bill's support as follows:

Supporters say:

The Federal Protective Services Division is **the U.S. law enforcement agency responsible for security on federal property in Texas**. This bill would simply give the division's police officers limited law enforcement authority for felony crimes committed on federal properties.

See House Research Organization, Bill Analysis, Tex. H.B. 1182, 73rd Leg., R.S. (1993) (emphasis added). The Senate Research Center likewise noted the FPS' function as the federal law-enforcement agency responsible for securing federal property:

Background

The Federal Protective Services Division of the General Services Administration is the federal law enforcement agency that secures federal properties in Texas. Agents employed by the Federal Protective Service are peace officers commissioned by the federal government. This agency is responsible for investigating crimes on federal property.

See Senate Research Center, Bill Analysis, Tex. H.B. 1182, 73rd Leg., R.S. (1993).² Notably, lacking in any of the reporting committees' bill analyses was any discussion of the GSA itself or any possible unique functional aspect which would motivate the grant of the powers enumerated in the amendment to article 2.122.

And as the substance of the subsequently enacted federal statutes discussed above demonstrate, despite the numerous federal legislative changes to statutes encompassing the administration of the FPS, the FPS' principal, overall function—the protection of federal property and persons thereon, as well as the investigation of crimes committed on federal property—has remained the same.

Moreover, even if there is no “ambiguity” or “absurdity” in the plain language of article 2.122(b) that merits the examination of its legislative history,

² The House Committee's Report set forth the same “background” information, adding only that “[w]hen a crime occurs on federal property, this is the agency that is responsible for investigating the crime.” *See* House Committee Report, Bill Analysis, Tex. H.B. 1182, 73rd Leg., R.S. (1993).

under the well-settled rule of law that, absent clear legislative intent to the contrary, when a referenced statute (here, 40 U.S.C. 318 or 318d) is repealed, the meaning and scope of the referencing statute (here, article 2.122(b)) do not change, it would appear that article 2.122(b)'s granting of powers of arrest, search, and seizure to the FPS would remain unchanged. *See, e.g., In re Emeritus Corp.*, 179 S.W.3d 112, 116 (Tex. App.—San Antonio 2005, no pet.); *In re R.J.J.*, 959 S.W.2d 185, 186 (Tex. 1998); *Harris County Dist. Attorney's Office v. J.T.S.*, 807 S.W.2d 572, 572 (Tex. 1991).³

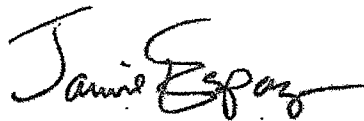
III. Conclusion

In light of the above, it appears that, despite the change in the administering agency of the FPS through the enactment of the Homeland Security Act of 2002, and because the overall, primary function of the FPS remains the same, the operation of article 2.122(b) to confer law-enforcement authority on the FPS should continue.

In any event, because nullification of the authority previously bestowed upon the FPS by the Texas Legislature would fundamentally alter the State's ability to prosecute cases investigated and presented by the FPS, the undersigned respectfully requests clarification on the issue.

Thank you, in advance, for your consideration of this matter.

Sincerely,



Jaime Esparza
District Attorney, 34th Judicial District

³ When the referenced statute is revised or amended, rather than repealed, the referencing statute incorporates the amendments or revisions. *See In re Emeritus Corp.*, 179 S.W.3d at 116; *In re R.J.J.*, 959 S.W.2d at 186; *Harris County Dist. Attorney's Office v. J.T.S.*, 807 S.W.2d at 572.

cc: Wilbur E. Hooks Jr., Deputy Regional Director, U.S. Department of
Homeland Security