



Written by [Michael Tennant](#) on March 13, 2017

DHS to States: Election Systems Remain “Critical Infrastructure”

The change of administrations in Washington has not led to a change in the policy of the Department of Homeland Security (DHS) designating election systems “critical infrastructure,” much to the dismay of state officials who worry that the policy could lead to a federal takeover of elections, traditionally and constitutionally a state function.



In a March 6 [letter](#) to Connecticut Secretary of State Denise Merrill (D), president of the National Association of Secretaries of State (NASS), senior DHS official David Hess indicated that the Trump administration plans to retain the critical-infrastructure designation originated by the Obama administration during its waning days.

The designation was [announced](#) by then-DHS Secretary Jeh Johnson on January 6. Johnson said the move would enable DHS “to prioritize our cybersecurity assistance to state and local election officials.” He explained that the designation covered the entirety of state electoral systems, including “polling places,” “centralized vote tabulations locations,” “voter registration databases,” and “voting machines.”

State officials are concerned that the designation could lead to the federalization of elections. At its winter meeting, NASS passed a resolution calling on the DHS to rescind the designation. At that time, Merrill and other NASS leaders said the Obama administration had been unresponsive to their requests for further information about the designation.

“We were continually asking [the Obama DHS] ‘what does this mean, what will it cover, what are the implications?’ And we sort of never got anything back,” Merrill told the [Daily Caller](#) on February 19.

Louisiana Secretary of State Tom Schedler, immediate past NASS president, told the website that the inquiries of NASS had been met with “stonewalling” from the Obama administration and about the same from the Trump administration. However, he said NASS hoped to meet with both DHS Secretary John Kelly and Vice President Mike Pence to discuss the designation.

Kelly appears to have delegated matters to Hess, who wrote that Kelly had asked him to respond to the January 12 letter by NASS to Johnson.

“Establishing election infrastructure as a critical infrastructure subsector within the government facilities sector enables state, local, tribal, and territorial governments to receive prioritized assistance from the federal government in their efforts to manage risks to election infrastructure,” penned Hess.

A 2013 presidential directive identifies 16 “essential services” sectors, such as energy, financial services, and healthcare, that DHS is required to protect. Within each sector, the DHS secretary can



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designate certain subsectors as critical infrastructure, giving the department authority “to identify and prioritize those sectors, considering physical and cyber threats against them,” according to the [Associated Press](#).

“Designation as a subsector,” wrote Hess, “establishes mechanisms to rapidly share information across the community to identify and mitigate system vulnerabilities.”

That DHS has opted to retain the designation is not much of a surprise. Although Kelly said during his Senate confirmation hearing that the designation “appears to be a political question beyond the scope of DHS’ current legislative cyber mandates,” by a February 7 appearance before the House Committee on Homeland Security, he had changed his mind, declaring, “We should keep that [designation] in place.”

Hess at least attempted to allay the concerns of NASS, which is more than can be said for anyone in the Obama DHS. “Establishing this subsector does not involve federal intrusion, takeover, or regulation of any kind,” he asserted, although this merely restated what Johnson had said in his announcement.

“This designation,” he added, “does not allow for any type of technical access by the federal government into the systems and assets of election infrastructure, without explicit, voluntary legal agreements made with the owners and operators of those systems.”

Secretaries of state have expressed particular fears that the feds would gain access to sensitive data in their election systems and that linking these decentralized, non-Internet-connected systems into a federal database would open them up to cyberattacks.

Hess stressed that participation in the federal program is “voluntary.” He also noted that among the benefits of participation are meetings that are “closed to the public” and the sharing of information with DHS that is protected from “disclosure in response to Freedom of Information Act requests, use in civil litigation, and regulatory use.” This, the AP warned, “potentially inject[s] secrecy into an election process that’s traditionally and expressly a transparent process.”

Hess’s letter did not appear to win many converts among NASS members.

Georgia Secretary of State Brian Kemp (R), who has been one of the most vocal critics of the designation ever since Johnson [suggested it last August](#), told the [Daily Caller](#) in a statement, “DHS still failed to alleviate states’ real concern — what is the limit to this federal power? Until this question can be answered, I will remain opposed to the designation of elections systems as critical infrastructure.”

Kemp has good reason to be concerned about his state election system’s security and about DHS’ intentions. Georgia’s system was attacked repeatedly — and unsuccessfully — last year from a computer having a DHS Internet Protocol (IP) address, a matter that the DHS inspector general is now investigating. Indiana’s and West Virginia’s systems were likewise attacked. “State officials such as Kemp believe the DHS attacks were designed to intimidate state officials who were outspoken against the designation and declined any help from DHS for cybersecurity protection,” reported the *Daily Caller*.

Indiana Secretary of State Connie Lawson (R), the incoming NASS president, told the *Daily Caller* NASS “hope[s] the White House will get involved in the decision and reverse the DHS position.” A Lawson spokeswoman told the website that Pence is “currently reviewing” the issue.

Only time will tell if the efforts of NASS prove successful. Nevertheless, it is good to see states fighting back against federal intrusion. If only they had put this much effort into opposing far more egregious



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federal overreach in the past, DHS would not exist, and they would not now be forced to parry its attacks on their constitutional prerogatives.



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