



Statement by Commissioner Christy McCormick

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Borrowing a pen and a phone from his outgoing boss, Secretary of Homeland Security Jeh Johnson, in a Friday night drop, announced he has designated elections in the United States as critical infrastructure in accordance with Presidential Policy Directive (PPD) #21 (2013).

The scope of the designation is vast and includes “at least the information, capabilities, physical assets, and technologies which enable the registration and validation of voters; the casting, transmission, tabulation, and reporting of votes; and the certification, auditing, and verification of elections.” The list provided by DHS includes, but “is not limited to”: storage facilities, which may be located on public or private property that may be used to store election and voting system infrastructure before Election Day; polling places (including early voting locations), which may be physically located on public or private property, and may face physical and cyber threats to their normal operations on Election Day; centralized vote tabulation locations, which are used by some states and localities to process absentee and Election Day voting materials; information technology infrastructure and systems used to maintain voter registration databases, voting systems and associated infrastructure, which are generally held in storage but are located at polling places during early voting and on Election Day; information technology infrastructure and systems used to manage elections, which may include systems that count, audit, and display election results on election night on behalf of state governments, as well as for postelection reporting used to certify and validate results.

In a call to the National Association of Secretaries of State on Thursday, billed by DHS as a call to inform the Secretaries about Secretary Johnson’s current thinking on whether or not to designate elections as critical infrastructure, the DHS Secretary stated, “This designation is simply the right and obvious thing to do.” Secretary Johnson repeated this sentence in his Press Release on Friday night, clearly indicating that he was reading off a draft of the Press Release on Thursday when he spoke to the States’ Secretaries and that his “thinking” was not actually open to further consideration or discussion with the States’ Secretaries, who are the Chief Election Officials in most of the fifty States.

I challenge Secretary Johnson’s statement. It is not “simply” right and certainly not obvious for at least the following reasons, many of which I highlighted in my previous statement on this issue, made on September 8, 2016.

1. The scope and effect of this action is unknown. There was not a thorough discussion or review of what the designation means. Election officials, including the Commissioners, were still asking for information at the time the designation was announced on Friday night. Serious questions still remain on the actual benefits of the designation, and the role of the other Federal agencies as outlined in PPD #21, such as the Department of Justice, the Commerce Department and the General Services Agency.

The so-called benefits of a critical infrastructure designation provided by DHS appear no different than those that have already been provided. Secretary Johnson stated both on Thursday's call and in his Press Release, "This designation does not mean a federal takeover, regulation, oversight or intrusion concerning elections in this country. This designation does nothing to change the role state and local governments have in administering and running elections."

But that is far from being clear. He told the Secretaries that their participation is "voluntary," but he has now also made clear that if the States don't "volunteer, they will not be able to receive information from DHS to secure their own systems. "This begs the question--if they "volunteer," does that allow DHS to invade ALL of their "information, capabilities, physical assets, and technologies" in order to get the information that may be known by DHS and the U.S. Intelligence Community (USIC)? If States do "volunteer," will they be able to decide on the scope of the Federal Government's access? Will they be able to ask the Federal Government to leave? Will they be required to provide uniformity or consistency in order to participate in DHS's efforts? Will DHS or other Federal agencies require States to conform to a new security standard? If DHS were truly only concerned with the security of these elections, they would simply provide these resources without the declaration or requiring states to "volunteer" before any information or resources will be shared. I am still unconvinced that a declaration of critical infrastructure status is necessary for DHS to help the States with security efforts, because we've already seen them do so.

2. This action politicizes elections. There is a reason that the Founding Fathers gave the authority of conducting elections to the States. There is a reason that when Congress set up the U.S. Election Assistance Commission (EAC), they made it a bipartisan, independent agency and gave it no regulatory authority. Our nations elections should not be handled or governed by a partisan branch of the Federal Government. The party that occupies the White House singularly controls the DHS and other Federal agencies in the Executive Branch.

Pick which party you want driving the security of our elections--are you comfortable with the other party doing so? It's important that we maintain the decentralized nature of our elections so that our voters and citizens can maintain faith and confidence that our elections are run freely and fairly, and that they can depend on the integrity and accuracy of the outcomes.

3. The designation creates a layer of non-transparency and unnecessary Federally controlled bureaucracy. Elections need to be transparent at all levels, and our nation's elections officials

pride themselves on opening their processes at every step. They do so because it is necessary for the public to see what they are doing in order to trust the process.

This critical infrastructure designation departs from that transparency standard and provides for the establishment of numerous councils and centers that will be out of the view of the public and run solely by Federal bureaucrats. Election officials already meet and discuss security issues as necessary, and the bureaucratic structures that will be formed after this designation would be secret. Closed discussion or control of election administration by various councils and groups out of the view of the public does not engender faith or confidence in the elections. Certainly, if there is confidential information that needs to be shared with elections officials, it can be done as it is currently without the additional bureaucracy. By the way, these councils and centers also cost the taxpayer money that could be better focused elsewhere, including on funding more modern and secure voting systems.

3. The technical explanation for this designation is insufficient. The recently declassified report on “Russian hacking,” the release of which is an extraordinary event in and of itself, has been described by intelligence experts as disappointing, underwhelming, and thin. This declassified report was not about the November elections; it was about politics. Connecting the allegations in the report to the election administration process and asserting that it rose to the level of interference in our elections is a gross and incorrect characterization.

John McAfee, a cyber security expert and creator of the McAfee anti-virus program has stated that the intelligence report, nicknamed “Grizzly Steppe” by the intelligence community, is “utter nonsense.” McAfee believes that the report is deceptive propaganda perpetrated on the American public, and I agree. Using intelligence agencies and reports that are full of allegations and purport to demonstrate, with no actual evidence (and which actually veer away from the “hacking” narrative), to justify the extraordinary and invasive action of declaring the States’ election infrastructure as critical infrastructure subject to Federal oversight is outrageous and wrong.

The declassified report allegation that Russian intelligence had “obtained and maintained access to elements of multiple U.S. state or local electoral boards” is patently untrue. The DHS and other intelligence agencies have provided no evidence of this to the EAC, or to the Secretaries of State. In fact, upon inquiry of this particular allegation, DHS officials told us that it was a mistake to include that statement in the report and that they do not have evidence to support the statement.

The DHS effort to justify this action, which occurred during the run up to the 2016 General Election, robbed valuable time from elections administrators who had to continually respond to the concerns caused by the DHS and other intelligence agencies who played out the “hacking” narrative in the media. Anyone who has worked on national intelligence concerns, as I have, knows that this public campaign to justify this action is unprecedented and unprofessional and was calculated to create undue concern and worry among the public and with the American voter. What is obvious is that it smacks of partisan politics. Instead of accepting what the

intelligence community is plying as evidence of “hacking” of the election, the public and the media ought to be challenging it. The only actual evidence of State meddling in state and local electoral boards is attempted meddling from our own Department of Homeland Security and they have yet to explain their actions adequately.

In his Thursday call to the Secretaries of State, Secretary Johnson asserted that the designation of critical infrastructure protects the election infrastructure by intrusion by foreign states through deterrence, because of an international agreement made at the United Nations requiring nations to keep their hands off other states’ designated critical infrastructure.

Either he is delusional or naïve. Since when are cyber criminals deterred from their efforts by an international agreement with no teeth and no enforcement remedies?

Secretary Johnson also stated that he was standing on the October Joint Statement on Election Security he made with The Office of the Director of National Intelligence. That Statement included the following:

The recent disclosures of alleged hacked e-mails on sites like DCLeaks.com and WikiLeaks and by the Guccifer 2.0 online persona are consistent with the methods and motivations of Russian-directed efforts. These thefts and disclosures are intended to interfere with the US election process. (*Italics added.*)

Being consistent with and having evidence that demonstrates it actually was the Russian Government are two different things. The Statement went on to say:

Some states have also recently seen scanning and probing of their election-related systems, which in most cases originated from servers operated by a Russian company. However, we are not now in a position to attribute this activity to the Russian Government. The USIC and the Department of Homeland Security (DHS) assess that it would be extremely difficult for someone, including a nation-state actor, to alter actual ballot counts or election results by cyber-attack or intrusion. This assessment is based on the decentralized nature of our election system in this country and the number of protections state and local election officials have in place. States ensure that voting machines are not connected to the Internet, and there are numerous checks and balances as well as extensive oversight at multiple levels built into our election process.

What happens on or to the email systems of political parties or their committees, purported influence campaigns, and celebrations for one candidate or another have no impact on the security and integrity of our election infrastructure. In spite of this statement, DHS and the USIC have not provided any evidence of the scanning and probing of “election-related systems” of ANY state or local election office connected to the Russians. They HAVE stated to us many times since the October statement that there is NO EVIDENCE voting systems or the results of the election were hacked or changed. Director of National Intelligence James Clapper recently testified on the Hill that that the purported hacks “did not change any vote tallies or any of that

sort.” In fact, the election reflected the “choices of the electorate.” Our State and local election administrators do have many layers of protection in place and they did an excellent job securing their processes and systems. They were prepared, as always, with contingency plans to address any situation of possible concern. The November election was one of the smoothest in memory. Voters can and should have faith that the 2016 General Election was run with the highest standard of integrity and security, and that the result is accurate.

4. The critical infrastructure designation opens the States to legal, financial and privacy liabilities. If the DHS instructs a State to take a particular course of action and the State declines to do so, will the State be opening itself up to lawsuits requiring it to conform to the Federal standard? We have seen this happen many times in the election administration context, which means that the States could lose some decision-making authority over elections. If DHS recommends a particular course of action, who will pay for it?

DHS will be holding activities related to this designation, including working groups, meetings, exercises, trainings etc. Election administrators already have incredibly busy, deadline-oriented jobs. Will States who “volunteer” be required to participate in those activities? Who will pay for the expenses and costs?

Will the States be required to monitor and report to the Federal Government on their activities or the activities of others that could have an effect on elections? Will they be able to make the decision to handle a situation on their own, or will the critical infrastructure designation trigger a flood of additional reporting responsibilities? There has been no discussion on the requirements that fall on the states as a result of this designation or of the recent Executive Order signed by the President last week (EO 13694, December 29, 2016) providing for the Secretary of the Treasury to “sanction persons responsible for cyber enabled activities that tamper with, alter or cause a misappropriation of information with the purpose of effect of interfering with or undermining election processes or institutions.” What is the scope of these actions and what do they mean practically and legally to State and local election officials? Why have these decisions been made without consulting with those who actually conduct the elections?

The designation gives the Federal government access to information and systems used to manage elections, which necessarily include state agency databases. If States “volunteer,” which of course they will have to do in order to get needed cyber security information, will that increase the Federal Government’s access to the databases of DMVs, public assistance agencies, vital statistics bureaus and other agencies containing personal information to which it may not already have access? What is the scope of the information that election officials will have to share with the Federal Government? We already know how onerous it is for the States to reply to our Congressionally mandated Election Administration and Voting Survey (EAVS). What additional information will the States now need to provide to the Federal Government? Will the States be open to lawsuits from the Federal Government for not responding to their information requests as they already are for the EAVS information requirements?

5. The process leading up to this designation has been disingenuous, at best. This designation blindsided election officials, who were not provided an adequate opportunity to engage in the decision-making process. While DHS claimed that it would publish notice of the consideration of the designation in the Federal Register and provide a comment period, it did not do so. Additionally, DHS set up an "Election Infrastructure Cybersecurity Working Group," which included some of the Secretaries of State, to participate in the process, but it effectively never utilized that group. It is obvious to me that Secretary Johnson discarded and dismissed the opinions and concerns of the Secretaries and of the EAC Commissioners, the very people who actually have deep professional experience in conducting and administering elections in this Country, before making this decision.

DHS officials represent that they are speaking for the Federal Government, but this Federal agency, the sole mission of which is to assist the States and local election officials in the administration of elections, and which sets the national guidelines for voting systems and tests and certifies those systems, and is a clearinghouse for the best practices in election administration, speaks for itself, and it does not agree with this designation.

While this statement is not on behalf of the Commission or my fellow Commissioners, I can say that all of the EAC Commissioners have publicly stated they are not in favor of this designation and had advised Secretary Johnson and his subordinates that he should not move forward with it.

Moreover, we have often been dismayed and confused over either the lack of or conflicting information that has been provided to us. There have been occasions when we have spoken to or been briefed by DHS officials and sometimes even less than an hour later seen different or additional information provided by or leaked to the media by DHS officials. Numerous times after our discussions with DHS and/or other members of the USIC we have been left shaking our heads and unable to reconcile the pieces of information that they have given to us.

One must question the end game of this effort, especially when the touted benefits of this designation have already been offered and provided to elections officials throughout the past four months. Our states and territories have Constitutional authority to conduct elections, NOT the Federal Government. Elections officials have been aware of and have been dealing with cyber security and physical security of election infrastructure for many, many years and do an excellent job of it. This designation appears to be purely political, especially given that it was made with two weeks before the change in administrations.

Elections officials asked for more time, conversation, and discussion and a thorough understanding of the scope and benefits of the critical infrastructure designation. That request was flat out denied by the unilateral action of Secretary Johnson. I ask that President-elect Trump and his designated DHS Secretary General Kelly immediately reverse this unjustified and unsupported critical infrastructure designation, as well as Executive Order 13694, review the actions of DHS, provide a non-intrusive way for our intelligence community to provide information and resources to our election administrators, and leave the conduct of elections to the States as mandated in our Constitution. Thank you.