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Novel Threats: National Security and the Coronavirus Pandemic – Rebecca Ingber on Coronavirus, Congress and the “Deep State”

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Novel Threats is a series of brief conversations with fellows and affiliates of the Reiss Center on Law and Security exploring the intersection of the coronavirus pandemic and key national security challenges.

Rebecca Ingber on Coronavirus, Congress and the “Deep State”

July 29, 2020

Rebecca Ingber is a Non-Resident Senior Fellow at the Reiss Center on Law and Security at NYU School of Law and a Professor of Law at Cardozo Law. She is a scholar of international and national security law, foreign relations law, bureaucracy and presidential power. Ingber previously served for six years in the Office of the Legal Adviser at the U.S. Department of State, where she worked on a range of matters, including the law of armed conflict, detention policy and national security. [Full bio](#)

You’ve written extensively about both the power and the limitations of the federal bureaucracy to influence policymaking. During the Ukraine scandal, you wrote in *Just Security* that “Our elected President, wielding the enormous power of the executive branch...is the threat that should concern us. The deep state bogeyman is not. But it is not going to save us, either.” Are these observations apt in the context of the coronavirus?

Yes. The Trump administration has worked hard to paint as an enemy what I call the “entrenched executive branch bureaucracy”—the thousands of people working throughout the executive branch who, since the end of the spoils system, do not tend to depart the government with the change in administration. This bureaucratic class includes everyone

from the FBI agents and diplomats who populated the news reports during the first half of this presidency, to Doctors Anthony Fauci and Deborah Birx and scientists toiling away inside labs at the CDC. Given the role of these actors in keeping the lights on despite whatever partisan winds may blow, it is understandable that critics of the president might wonder if the very officials he has painted as his enemy could actually save us from him, including in the face of the COVID-19 pandemic.

Certainly, any solution to this crisis *requires* the expertise and institutional work of the entrenched bureaucracy, but it alone cannot save us from a failure of leadership, or a leader determined to fail us. The entrenched executive branch bureaucracy does have significant influence on presidential decision making, and it plays three important roles that are relevant to the COVID-19 crisis: First, it is a fount of expertise and institutional memory. Second, it can be a force for stability. And third, as a result of the first two, the involvement of the expert class of the bureaucracy can lend some legitimacy to a president or political actor who wishes to appeal to a broader politic or otherwise project a non-partisan rationale behind his or her policies or actions. Each of these roles is essential to ensure good government. But none gives the entrenched bureaucracy the capacity to save us from this administration's extraordinary mismanagement of the pandemic response.

Experts within the government bureaucracy spend their careers working on narrow issues, often out of the public eye, providing information and institutional memory for the transient political actors who must suddenly jump into their jobs. These experts act as a ballast, ensuring that the U.S. executive branch does not simply turn around full steam in the opposite direction every time there is a change in the political administration. But that very characteristic also means that the entrenched bureaucracy cannot itself, without leadership, suddenly rise up to change course and dramatically shift priorities in order to address novel circumstances like a global pandemic. In the context of the current COVID-19 crisis, reports suggest that this dynamic was evidenced by scientists at the CDC continuing their work without being driven to act urgently by leadership, and officials at the FDA continuing to enforce normal regulations that slowed down testing because they were not directed to account for the emergency context. It so happens that there *was* an office that should have imparted the requisite directives and coordinated such conflicts between agencies: the pandemic response office within the National Security Council. The Trump administration eliminated that office in 2018, and ousted the White House official who oversaw it.

“But each account of the U.S. government’s response to the crisis has turned on the complete failures of management and coordination—essentially, a crisis in leadership, from the top down...the president and his political administration aggressively failed at every turn to combat the pandemic by doing what was necessary, and what only the president had the power to accomplish. “

Political actors turn to the entrenched bureaucracy not only for expertise, but also to shore up their own legitimacy in the eyes of the public more broadly. Dr. Fauci is in the public eye not because he is a secret deep state threat working to undermine the president, but because the president has *chosen* to put him out in front of his policies—even though his statements often appear to be at odds with the president’s—likely because the president views his work as legitimizing of his own authority with an audience larger than his core supporters.

For the bureaucrat in question, their power lies predominantly in persuasion: persuading their political superiors to take their views into account and, on the rare occasion they have a public platform, persuading the public of their perspective. This is precisely what we see Dr. Fauci trying to do throughout this crisis (though notably, bureaucrats can also be effectively silenced by those same political superiors, as we have seen Dr. Fauci come and go from the public eye). The bureaucrat’s rhetorical power relies largely on remaining within the non-partisan, expert parameters that instill on them their legitimacy.

In the rarest of cases, career bureaucrats have been willing and able to speak publicly against the will of their political bosses, or even to leak information secretly. Their position and access to inside information may afford them or their story fifteen minutes of fame. But as we saw with the line of career officials who trudged up to Capitol Hill to testify in the impeachment hearings against President Trump—the most dramatic step a career official can take—they are ultimately constrained by political actors. If Congress fails to act, if these bureaucrats fail to persuade the public to *compel* Congress to act, then that is the end of the line.

None of this provides much of a roadmap for a bureaucracy to work against or “save us from” a sitting president. In the case of the current pandemic, there have been hurdles and mistakes at every level, and some of these—the CDC’s failures on testing, red tape from the Food and Drug Administration, and quite possibly the most consequential, the mixed signals on mask wearing—have been portrayed by some of the president’s allies looking for a scapegoat as failures of the bureaucracy. But each account of the U.S. government’s response to the crisis has turned on the complete failures of management and coordination—essentially, a crisis in leadership, from the top down. From dismantling the pandemic response office, to dismissing the threat and failing to create a sense of urgency in agency leadership, to failing to cut through the red tape and crossed mandates of different agencies, to delaying or declining to use federal authorities to coordinate and compel production of essential personal protective equipment (PPE), to refusing to be an example for the country by choosing to model mask-wearing and social distancing practices—in fact doing the precise opposite by stubbornly insisting on holding mass rallies against the advice of public health experts—the president and his political administration aggressively failed at every turn to combat the pandemic by doing what was necessary, and what only the president had the power to accomplish.

You have argued that Congress can and should shape the foreign policy directions of the executive branch, by influencing its inner workings through exerting “process controls.” What should congressional intervention in the COVID-19 crisis look like, and what is realistic to expect?

Congress certainly has tools at its disposal that it is not currently using. In addition to substantive legislation, for example mandating the use of masks or promoting production of PPE, Congress could also use what I have called “process controls” to manage the executive branch administration itself. So, for example, when President Trump dismantled the White House pandemic response office, Congress could have enacted legislation setting one up. And through the use of delegations of authority and conditions on that authority, Congress could also have required that office to be responsible for pandemic response decisions.

But it is important to keep in mind that—as with the bureaucracy itself—the process controls that Congress can implement to exercise control over the bureaucracy are hurdles, not total barriers, for a president dead set on doing otherwise. Congress can promote action, but it cannot in many cases compel it. Ultimately Congress’s power is largely political—it has a platform to shape the narrative as well as to be influenced by it. But as I’ve noted before, Congress will not care if we ourselves do not care enough to make it a voting issue.

You’ve recently highlighted examples of states forging their own kind of foreign policy during the COVID-19 pandemic. If the bureaucracy can’t do it, will the states save us instead?

Certainly, state governments are by necessity taking on many of the roles we normally expect of the federal government, including recent forays into foreign policy. The conventional wisdom about U.S. foreign policy is that the federal government speaks with one voice, and that voice is supposed to belong to the president. The reality has never been quite that simple. But in the Trump era it sometimes feels as though the president is trying to compel other actors to challenge that concept. As a result of the president’s aggressive use of unilateral action and rhetoric—on matters from trade agreements to the use of force and even the sudden withdrawal of troops, to threats to withdraw from bedrock treaties and longstanding alliances—we have seen Congress at least tentatively looking to reassert its constitutionally mandated role in these areas. And with the president’s intransigence in addressing the COVID-19 pandemic, states are stepping up in the realization that they may have to forge their own relationships abroad in order to accomplish some basic things that are normally the purview of the federal government.

“So will the states save us? It appears that to the extent feasible, many are going to take some matters into their own hands—in a way that career bureaucrats within the federal executive branch cannot and Congress will not. But this can only take us so far, and there are real risks to the states engaging in their own ad hoc foreign policy.”

Historically there have been significant barriers to states engaging in foreign policy. States cannot themselves engage in treaty making *per se*—though there are examples of states signing on to non-legal documents with foreign entities. And U.S. courts have struck down state legislation on the grounds that it improperly interferes with the federal government’s foreign policy. Nevertheless, in the midst of the pandemic, governors have found themselves in situations where they must act—not as a challenge to the federal government’s foreign policy, but in the *absence* of it. And so, for example, governors of both parties, from Washington State to Maryland, have reached out to foreign states, often with the help of private actors acting as informal diplomats, to secure and import testing and PPE for their citizens. In some cases, this has led to clashes with federal authorities who have seized equipment bound for states, despite the president’s directive to governors to “try getting it yourselves.” One Republican governor, described the extraordinary lengths he went to in light of these risks of federal confiscation, transporting his imported tests in “a caravan of Maryland National Guard trucks escorted by the Maryland State Police” and then depositing them at a “secure warehouse at an undisclosed location.” His ominous explanation: “We weren’t going to let Washington stop us from helping Marylanders.”

Obviously, battles between the federal government and the states over essential equipment to fight this pandemic is not an ideal use of resources. So will the states save us? It appears that to the extent feasible, many are going to take some matters into their own hands—in a way that career bureaucrats within the federal executive branch cannot and Congress will not. But this can only take us so far, and there are real risks to the states engaging in their own ad hoc foreign policy. As with the many institutional norms this administration has eroded, this lack of faith in the government’s ability to coordinate a response to national crisis may be hard to recover in the eventual wake of the Trump administration.

To be sure, there have naturally been mistakes made at every level throughout this crisis—including among bureaucrats, in state governments and within the private sector, such as hospitals. And even if we had competent leadership with the best intentions working with officials at every level of government and the private sector, we would nevertheless have faced enormous challenges and no easy fix. But ultimately the most significant component here—and one that separates us from other countries that are having more success—is a crisis in leadership at the very top, at every step of the way.

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