

John Hood: Biden's mandate goes too far

John Hood

September 17, 2021

RALEIGH — I got the COVID-19 vaccine shortly after it became publicly available. I did so because I was persuaded that the benefits of vaccination far outweighed the risk.

Over the subsequent months, the case for vaccination has only gotten stronger. While the delta variant is easier to spread than prior strains, the best-available evidence is that about one in 5,000 vaccinated people are testing positive for the virus. Unvaccinated Americans are nearly five times more likely to get infected. More importantly, the death rates between vaccinated and unvaccinated people are wildly disproportionate. The unvaccinated are 10 times as likely to be hospitalized and 11 times as likely to die from COVID-19.

In other words, for the vast majority of people eligible for vaccination, saying yes is the right answer. It's the right answer for your own health and for your families' well-being. It's also the right answer to alleviate stress on hospitals and medical personnel. There are some exceptions. But don't ask the Internet if you're one of them. Ask your doctor.

Although an advocate of vaccination, I strongly oppose President Joe Biden's attempt to force private companies to make vaccination or weekly testing a condition of employment. His order violates fundamental principles of federalism and the separation of powers. It is also a violation of the statutes governing federal rulemaking. And it employs a self-defeating argument that vaccines aren't really all that helpful in protecting us from serious or deadly cases.

Let's start with the constitutional case. The federal government is one of enumerated powers. By contrast, state governments possess a generalized "police power" that permits (but does not require) the use of coercion to accomplish certain public ends. It is a long-established principle that states or the localities they create can require vaccinations in certain situations, such as children enrolling in schools (including private ones). The federal government lacks such power. Even President Biden said in the past that a federal vaccine mandate would be neither necessary nor proper.

To justify his sudden change of heart, Biden is arguing that the federal statutes establishing the Occupational Safety and Health Administration (OSHA) are broad enough to allow an order that companies with more than 100 employees must fire workers who neither get vaccinated nor agree to weekly testing. More specifically, the president is calling for OSHA to issue an emergency temporary standard, thus bypassing the standard process of hearings and external comments that accompany federal rulemaking.

Cato Institute scholar Walter Olson pointed out after Biden's announcement that several such standards have been struck down by federal courts as overly broad claims of unilateral executive authority. "If the administration prevails on this issue," wrote George Mason University law professor Ilya Somin, "it would set a dangerous precedent, and undermine the constitutional separation of powers."

It also relies on the idea that unvaccinated workers pose a grave risk to their vaccinated coworkers. This is an unwise and counterproductive claim. Holdouts are already highly skeptical of what politicians say about the vaccines — and for good reason. During the 2020 presidential campaign, both Kamala Harris and Joe Biden expressed doubts about the safety and efficacy of the vaccines, in an obvious and cynical sop to a Democratic base susceptible to anti-Trump conspiracy theories.

Now, as president and vice president, they say the vaccines are safe and effective. They're right. But why should skeptics believe them, if Biden is also saying that being vaccinated isn't a substantial defense against being hospitalized or killed by the virus? The reason people should get vaccinated is that it will reduce their chances of a COVID infection and dramatically reduce their chances of suffering or dying from a serious bout of the disease. Period.

"The risks of getting any version of the virus remain small for the vaccinated," the New York Times reported last week, "and the risks of getting badly sick remain minuscule." I believe this is true. In arguing for his mandate, Biden contradicted that truth.