**For Release Wednesday, September 22, 2021**

**Capitol View
Commentary by J.L. Schmidt**

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**Vaccine Mandate Doesn’t Play Well**

You might want to write this on the calendar, I agree with Nebraska Governor Pete Ricketts that President Joe Biden’s sweeping new vaccine requirement is overreaching and should be challenged in court.

Yes, I am fully vaccinated and still wear a mask. I have had Covid and the monoclonal antibodies that kept me out of the hospital. I prefer the science over the politics. I lost three friends to the dreaded disease. Covid is real.

While I wish everybody would just get the damn shot, I do support the planned pushback by Nebraska’s attorney general and his colleagues in other states who believe the federal government is overstepping its authority by mandating that all employers with more than 100 workers require them to be vaccinated or test for the virus weekly. That’s about 80 million Americans. Likewise, about 17 million workers at health facilities that receive federal Medicare or Medicaid will have to be fully vaccinated.

“This is really going to create huge problems for all small businesses and for our American workers. And again, you shouldn’t have to make the choice of keeping your job or getting a jab in the arm,” Ricketts said.

To his credit, Ricketts has encouraged people to get vaccinated and wear masks but has resisted mandates to do either. The seven-day rolling average of new cases in Nebraska has risen considerably in recent weeks because of the highly contagious delta variant of the virus.

Ricketts calls the Biden action "a stunning violation of personal freedom and abuse of the federal government's power. This plan isn't about public health — this is about government control and taking away personal liberties," the governor said in a news release. "Americans, not the federal government, are responsible for taking charge of their personal health. "It is not the role of the federal government to mandate their choices."

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Interestingly, more than 100 years ago the U.S. Supreme Court spoke to the constitutionality of a vaccine mandate. The 1904 case involved Swedish immigrant Henning Jacobson, a 50-year-old minister who had suffered a bad reaction to vaccine as an infant in Sweden and struggled for years with an angry rash. Since he was now an American citizen living in Cambridge, Massachusetts, he felt that he had the full protections of the U.S. Constitution.

So, when the Cambridge board of health decided that all adults must be vaccinated for smallpox, Jacobson sought refuge in the Constitution’s promise that no state shall “deprive any person of life, liberty or property without due process of law.” His challenge made it to the high court.

In deciding the matter on a 7-2 ruling, the court’s majority wrote that one man’s liberty cannot deprive his neighbors of their own liberty — in this case by allowing the spread of disease. “There are manifold restraints to which every person is necessarily subject for the common good,” read the majority opinion.

“On any other basis, organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy.”

Jacobson’s claim should sound familiar to vaccine skeptics who say they have the personal liberty under the U.S. Constitution to decide for themselves whether to take the shot. It’s the same argument about freedom from government interference that Ricketts and other Republican governors are making. The question of whether that freedom includes refusing a legally mandated Covid-19 vaccine has yet to come before the Supreme Court — or any court. But if it does, the 117-year-old case would be the standing legal precedent.

While we’re dealing with a different medical landscape and the politics of a divided nation, today’s justices would have to consider the words of Justice John Marshall Harlan from 1904 who concluded “Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his

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person or his property, regardless of the injury that may be done to others.”
 Legal experts say Biden’s new vaccine intervention for private businesses marks a dramatic step that is within his authority. Given the multiple threats of lawsuits from GOP governors and the Republican National Committee, expect some delays. It will likely be weeks before the rule is written and several weeks more before companies will be required to comply.

 Then, there’s the matter of enforcing it.

 But hey, you can help. You are free to wear a mask, get vaccinated, and wash your hands.

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*J.L. Schmidt has been covering Nebraska government and politics since 1979. He has been a registered Independent for more than 20 years.*