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HIV Testing Requirement for Immigrants and Visitors to the United States: Time to Reconsider?

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Introduction

As the United States expands its leadership and commitment to fight HIV/AIDS both inside and outside its borders, it may be time to reconsider current HIV testing requirements for prospective immigrants. Is the exclusion law serving U.S. interests in promoting public health at home and helping staunch the spread of HIV/AIDS worldwide? Currently, the benefits of the policy are uncertain and undemonstrated. Are there nonfinancial costs associated with current policy? This paper argues for a thoughtful reexamination of costs and benefits associated with the requirement and options for adjustments if warranted.

In May 1987, the U.S Department of Health and Human Services (DHHS) announced that Acquired Immuno-Deficiency Syndrome (AIDS) was to be added to the list of excludable diseases for prospective immigrants—that is, diseases for which noncitizens seeking visas for U.S. entry could be kept out of the United States. Later that year, after limited debate, Congress passed overwhelmingly a bill replacing AIDS with Human Immunodeficiency Virus (HIV) infection on the list of excludable diseases. The new law in effect mandated an HIV blood test for all persons over 14 years of age applying for an immigrant visa to enter the United States. Actual HIV testing began in December 1987.

In 1990, Congress changed the category of excludable diseases from "dangerous contagious diseases" to "communicable diseases of public health significance" and gave to the secretary of the DHHS authority to decide which diseases were to be included on the list. Soon thereafter, then-DHHS Secretary Louis Sullivan announced his department's intent to remove HIV/AIDS from the exclusion list. A public controversy ensued, and the effort failed.

A provision in the 1993 National Institutes of Health Revitalization Act, explicitly codified the inclusion of HIV on the list of "communicable diseases of public health significance" for purposes of exclusion, regardless of any public health or other DHHS determination. U.S. Senate debate on the HIV/AIDS aspects of this bill was contentious.

Under both the 1987 and 1993 legislation, U.S immigration authorities can also require HIV testing of temporary visitors such as tourists, students, and business travelers, if AIDS or HIV infection is suspected (for example, if anti-HIV or anti-AIDS medications are found during a customs inspection). These testing requirements remain in effect in 2003.

Since this issue first surfaced in 1987, there has been a dramatic evolution in the scope and geographic impact of the global pandemic. Today, there is far greater appreciation of the pandemic's dynamics, the factors that drive its spread, the role that poverty, stigma, and discrimination play in thwarting prevention efforts, and the reality that the global pandemic is still only in its early stages.

Consensus is now emerging in the United States on the centrality of U.S. leadership in global efforts to combat the disease. In the last two years, Congress has brought forward bills to provide large

increases in resources to fight global HIV/AIDS. In his 2003 State of the Union address, President Bush announced an ambitious $15-billion proposal for quickly stepping up the U.S. contribution to global HIV/AIDS control. Plans for new programs are being drawn up to address prevention, care, and treatment both through the new Global Fund for AIDS, TB, and Malaria, and through U.S. bilateral activities in many countries.

The United States clearly expects that its own resource commitments to HIV/AIDS control efforts will be matched by inputs from other industrialized nations and in part by increased commitment of resources by developing countries that are acutely affected by the pandemic. At the same time, the United States is acknowledging administrative and other barriers within its own government: President Bush recently proposed the establishment of a fully empowered AIDS coordinator, with direct access to the president and the secretaries of state and health and human services. It is reasonable and timely, therefore, to ask whether the immigrant HIV testing requirement helps or hinders U.S. leadership on global HIV/AIDS.

Applicability and Waiver Provisions of the Requirements

The current requirements apply to "any alien who is determined to have a communicable disease of public health significance." In practice, however, the HIV testing requirement has been focused predominantly on immigrant visa applicants rather than on temporary visitors such as students, tourists, and business travelers. Waiver provisions are clearly more stringent for immigrant visa applicants than for persons in other categories. Testing and waiver requirements also apply to people already resident in the United States who apply for adjustment of immigration status.

Waivers for HIV-infected applicants for permanent U.S. immigration are granted at the discretion of the U.S. attorney general only when the immigrant visa applicant is able to demonstrate that:

- The danger to the public health created by admission is minimal; *and*
- The possibility of HIV spread by admission is minimal; *and*
- No government agency will incur any cost as result of the illness without its prior consent.

Waivers for nonimmigrant visitors are less complicated and are granted more routinely to persons who:

- do not have symptoms of AIDS; *and*
- will not pose a danger to the public health; *and*
- have sufficient resources to cover medical expenses in case of illness.

In addition, blanket short-term waivers for the duration of a specific conference or other event of public interest have been issued on occasion to HIV-infected persons wishing to attend those events, provided that they are not acutely ill.

Changing Times May Warrant Policy Reassessment

There has been little public discussion of this HIV testing requirement in the United States in a decade. As understanding of the dynamics of HIV/AIDS and the centrality of U.S. leadership grow, questions arise regarding the relative benefits and costs of the exclusionary legislation. Today, the United States is moving to exert expanded scientific, public health, financial, moral, and political leadership in global efforts to control the spread of HIV and to mitigate the impact of HIV/AIDS in developing countries. In this context, the U.S. government should examine obstacles to leadership and, when feasible, address them.

Since the HIV testing requirement for immigrant visa applicants was first put in place in 1987, facts and perceptions surrounding HIV/AIDS have changed. Some of these changes are relevant to a reexamination of the testing requirement now in place.

- Today, there is far greater certainty about the nontransmissibility of HIV by casual contact.
- Highly Active Antiretroviral Treatment (HAART) and other effective and expensive treatments for AIDS and related opportunistic infections are now widely available in the United States and other industrialized countries.
- Most U.S. state health departments now routinely require reporting of persons found to be infected with HIV.

- A marked shift has occurred in the global distribution of HIV infections. The greatest HIV burden is now in developing countries, with a "second wave" beginning in China, India, and Russia, among others. More specifically, although U.S. numbers continue to increase, the United States is no longer near the top of the list of countries with large HIV burdens, either in absolute numbers or in proportions of population infected. Fewer than 1 million U.S. citizens are estimated to be HIV-positive; the global total is more than 42 million.
- More is known about infection patterns among immigrants. For example, a recent review of data from a group of HIV-infected immigrants concluded that, based on their age upon arrival and the length of their residence, most had probably become HIV-infected *after* arrival in the United States.
- As effective measures to treat AIDS, tuberculosis, and other HIV-related opportunistic infections become available, public health experts have increasingly recognized the critical centrality of testing and knowing one's HIV status to prevention and treatment efforts.
- Discrimination and marginalization are increasingly recognized as key factors that drive the spread of HIV infection, discourage individuals from being tested or seeking treatment, and thwart efforts to care for those already infected.

Given the changing HIV/AIDS circumstances, both in the United States and worldwide, and the uncertainty of benefits flowing from the current exclusionary legislation, it is reasonable to ask whether the legislation is having the impact it was intended to have and whether evolving public health and policy goals of the United States are well served by the application of the current version of the testing requirement. Could U.S. leadership in global HIV/AIDS control be further enhanced by modifying or removing the HIV testing requirement?

Issues Stipulated in the Present Analysis

Several issues and arguments that have been raised in discussions of HIV testing for prospective immigrants will not be addressed in this analysis. These include:

Stances taken by governments of other countries: The fact that some countries have taken stances on immigrant HIV testing similar to the United States, while others have taken different stances, has been raised by both proponents and opponents of the current U.S. HIV testing requirement. This analysis accepts that under existing international law, sovereign states are responsible for making their own decisions regarding which persons are permitted to immigrate and which persons are not.

Human rights: Some observers have claimed that exclusion of persons on the basis of HIV infection (or for refusal to be tested) constitutes a violation under the Universal Declaration of Human Rights (UDHR). Others maintain that the United States is not a signatory to any agreement that restricts its ability to deny entry to HIV-infected noncitizens under international law. It is accepted for this analysis that every country retains the right to determine who among noncitizens is granted access and that the current U.S. HIV testing requirement and exclusion does not constitute a violation under UDHR.

Comparative rights of U.S. citizens vs. noncitizens: In the same vein, this analysis acknowledges that there are clear precedents that persons who are not U.S. citizens may not automatically have claims equivalent to those of U.S. citizens either on U.S. resources or on the protections provided by the U.S. Constitution.

Reporting of HIV-infected immigrants already in the United States to state health departments: A concern expressed in some public discussion has been that immigrants already in the United States who are found to be HIV-infected when applying for naturalization will have their names reported to U.S. state health departments. This analysis accepts that routine public health reporting of persons identified as HIV-infected, as mandated in most states, is a reasonable public health measure, whether or not the infected persons are U.S. citizens.

Consequences of false-positive and false-negative HIV tests. Although it is true that false-positive and false-negative HIV test results can have serious adverse consequences, the risk of these occurrences is likely to be no greater in visa applicant testing than in other HIV testing situations.

Arguments for and against Exclusion of Persons Infected with HIV

Proponents of exclusion of HIV-infected applicants for immigrant visas emphasize two arguments:

- *Public Health*: Exclusion of HIV-infected noncitizens protects U.S. citizens from HIV transmission from noncitizen immigrants.
- *Costs:* Exclusion of HIV-infected noncitizens prevents them from becoming a medical and financial burden on the U.S. health care system.

Opponents of exclusion emphasize that:

- There is insufficient data regarding the economic costs of allowing entry to HIV-positive immigrants, and HIV/AIDS is unfairly singled out from among other costly diseases. For example, some have suggested that cardiovascular disease among immigrants is associated with a far larger potential economic burden to the United States than the HIV-related burden. (On the other hand, it is not clear how the recent advent of HAART and other expensive interventions has shifted the balance on this economic issue.)
- Other parts of U.S. immigration law already require that immigrants demonstrate that they will not become a public charge, thereby eliminating any additional economic burden that HIV-positive immigrants might impose.

Opponents also point out several potential public health and individual risks associated with the testing requirement:

- Prospective immigrants and visitors who are tested outside the United States may be placed at risk from this U.S.-mandated HIV test requirement because of breaches in confidentiality, potential post-test discrimination in their home countries, or physical risks of HIV, hepatitis, and other diseases transmitted by reuse of needles and syringes used in the HIV testing process.
- Current exclusion legislation may provide a false sense of security to U.S. citizens about their risk of HIV infection. U.S. citizens face a far larger risk of acquiring HIV from the approximately 900,000 HIV-infected U.S. citizens—one-third of whom do not know their HIV status—and the 40,000 U.S. citizens newly infected every year than from infected noncitizens.
- Immigrants already living in the United States, who suspect they may be HIV-positive, may be reluctant to seek testing or care, for fear of expulsion.
- Finally, the passage and continued existence of the legislation was—and still is—viewed in some quarters, both inside and outside the United States, as evidence of a discriminatory bias. Regardless of its accuracy, this perception likely weakens or impedes U.S. global leadership. Many observers attribute the few developing-country successes in HIV/AIDS control (e.g., Uganda, Thailand) to national leadership that addressed forthrightly issues of marginalization and discrimination. A continuing perception of HIV/AIDS discrimination by the U.S. government may undercut the U.S. ability to lead global HIV/AIDS control efforts. For example, no major global HIV/AIDS conference has been held in the United States since 1990, when a boycott was threatened (and only narrowly avoided) for the Global AIDS Conference in San Francisco because of the U.S. testing requirement. In 1992, sponsors moved the Global HIV/AIDS Conference scheduled for Boston outside the United States, because of the immigrant/visitor testing requirement.

Taking a Fresh Look at Costs and Benefits

Since the HIV testing requirement was first introduced, information and perceptions have changed markedly about the biology, behavioral science, and political implications of HIV infection of individuals; the extent and spread of HIV pandemics within specific countries; and approaches to HIV/AIDS mitigation. In addition, the level of U.S. political commitment and the magnitude of U.S. resources directed toward global HIV/AIDS control efforts have also changed dramatically since the law was last amended in 1993.

The U.S. government stance should reflect these changing realities and circumstances in order to facilitate America's national commitment to global HIV/AIDS control efforts. A determination of the merits of the immigrant HIV testing requirement cannot be made without adequate data on the

requirement's impacts. What is needed is robust and applied research on the benefits and costs of the current U.S. testing requirement. Congress could instigate and support such research by empowering a congressional commission, requesting an executive branch or General Accounting Office inquiry, or commissioning a study by the National Academy of Sciences or other independent advisory body.

Applied research could center on the following issues:

Disease risk to U.S. citizens: Are there clear benefits in terms of disease risk to U.S. citizens from excluding HIV-infected persons? Are there possible harms? To date, limited information is publicly available in the United States to quantify either the public health benefits or costs of the legislation since passage.

Financial costs: Do clear financial or other public benefits flow from the exclusion of HIV-infected immigrant visa applicants? There is currently little available data to prove or disprove potential economic benefits. Has the availability and cost of HAART and other costly HIV/AIDS intervention technology affected the equation? Can appropriate public health goals be achieved in the absence of an automatic exclusion of HIV-infected immigrant visa applicants?

Risks to global efforts: What are the impacts of the current legislation on the U.S. global leadership position in HIV/AIDS control efforts?

After a thorough review and discussion of the issues around HIV testing of immigrant visa applicants, legislators and policymakers would have four likely options:

1. To leave the current HIV testing requirement unchanged from its current form;
2. To eliminate entirely the HIV testing requirement;
3. To modify the current requirement in a way that provides at one time equivalent protection for the United States, but with fewer costs. One way would be to separate the HIV testing requirement from the automatic immigration exclusion to which it is currently linked. For example, HIV-infected persons could be granted visa waivers on the condition that they have a U.S. sponsor that accepts the public charge aspects of HIV-infection and AIDS and that relevant state and local health departments are notified of their arrival. (This arrangement is similar to what is done with tuberculosis testing among immigrants and refugees under some circumstances.)
4. To defer an immediate decision about the future of the HIV testing requirement but to base future changes on data-based public deliberation that occurs after gathering information to more specifically identify the financial and public health costs and benefits of the current requirement.

Regardless of the outcome, the additional public deliberation and the gathering of additional data are likely to result in a more defensible U.S. government position than currently exists.
