

## PROPOSED REVISIONS TO CODE OF CONDUCT FOR U.S. JUDGES

### Public Comments

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I am writing to address the specific phrase, “invidious discrimination”.

Putting aside the question whether a judge’s membership in groups should be a matter of code regulation at all, or instead left as a matter for recusal, when appropriate, I wish to commend the drafters for proposing to use the term “invidious”. This is far more preferable than the common alternative of listing specific categories of discrimination, such as race, creed, sex, etc.

Attempting to spell out the particular kinds of forbidden discrimination is inadvisable for several reasons. First, such a list will inevitably be incomplete. The category of impermissible associations should not be limited by the foreseeability or linguistic comprehensiveness of the drafters’ list. The alternative of repeated, subsequent amendments of “the list” is unsatisfactory for practical reasons.

Second, such a list will generate needless controversy. Should sexual orientation or “gender identity” be on the list? What about previous criminal record? Veteran status? Etc. No enumerated list will be pleasing to all, and controversies over particular listings may hamper adoption or enforcement of the provision.

Third, such a list fails, absent cumbersome elaboration, to reflect the varying situations in which “discrimination” is legitimate. For example, selection on the basis of religion will be unobjectionable in far more circumstances than selection on the basis of race. Likewise, the level of justification required (rational, substantial, or compelling) to uphold discrimination will depend on the criteria used to discriminate. Lumping the various categories together is thus potentially confusing or misleading.

By contrast, the term “invidious” presupposes that the discrimination is not justifiable under the relevant standard, whatever that standard may be. Thus, there is no need to spell out the differing standards, address the differing circumstances, or debate the differing potential applications of the provision. The term “invidious” is concise, flexible in light of circumstances, and likely to be unobjectionable on its face.