

Comments from Charles W. Tyler, Consultant for ACUS
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I would like to draw your attention to one nuance in the current preamble. This relates to one issue that we have discussed at both committee meetings--namely, what evidence there is that courts will give some weight to severability clauses contained in administrative rules.

The current preamble cites *MD/DC/DE Broadcasters v. FCC*, 253 F.3d 732, 734 (D.C. Cir. 2001) as an example of a case where a court did not defer to a severability clause. This case is tricky to characterize for our purposes, and I don't think the preamble quite captures what we should say about that case (if anything). Let me explain:

In *MD/DC/DE Broadcasters*, the D.C. Circuit considered the constitutionality of an FCC rule regarding the equal employment opportunity policies of broadcasters. To ensure that minority and women candidates knew about available job opportunities with broadcast stations, the FCC rule required broadcasters that sought licenses from the FCC to make "a good faith effort to disseminate widely any information about job openings." To "afford[] broadcasters flexibility in designing their EEO programs," the rule allowed broadcasters to select one of two options for accomplishing that goal. Under Option A, licensees had to "undertake four approved recruitment initiatives in each two-year period." The FCC did not require licensees who selected Option A to report the race and gender of job applicants. Under Option B, licensees could design their own outreach programs but had to report the race and gender of each job applicant and how the applicant was referred to the station. The D.C. Circuit held that Option B required race-based discrimination and that it did not survive strict scrutiny. Finally, the court found that Option B was inseverable from the remainder of the rule and set aside the entire rule.

In its petition for rehearing, the FCC asked the court to reinstate Option A. The court refused. The court observed that the FCC had two goals in promulgating the rule, but that Options A and B would each achieve only one of those goals. The FCC's statement of basis and purpose stated "that Option A could satisfy the goal of achieving broad outreach" and "that Option B was added in order to afford broadcasters flexibility." The court concluded that severing Option B and leaving in place Option A "would leave in force a rule that, in view of the Commission's own stated goals, would be arbitrary and capricious" because the remainder would achieve only one of the stated goals.

To summarize, the remainder of the rule was invalidated, not because the court was not sure what the agency intended, and not because the court was not sure whether the remainder would function sensibly, but because, in the court's view, the remainder was unlawful. I think everyone agrees that a court is not permitted to leave in place the remainder of a rule when the court can see clearly that the

remainder is itself illegal. So *MD/DC/DE Broadcasters* is indeed a case where the agency had included a severability clause in the regulation but the court did not follow that clause. But I don't think that the case is best characterized as an example where the court did not defer to the severability clause. Rather, it is a case where the court had no choice but to invalidate the rule in toto because, in its view, the remainder of the rule was unlawful.

This is significant because *MD/DC/DE Broadcasters* is the only case of which I am aware that could arguably be characterized as a case where a court declined to defer to a severability clause in an administrative rule.

I look forward to seeing everyone again this week.

Chas