

BARNSTONE *v.* UNIVERSITY OF HOUSTON *ET AL.*

ON APPLICATION TO VACATE ORDER

No. A-978. Decided May 12, 1980

Application to vacate the Court of Appeals' order vacating, on a specified condition, the District Court's order compelling respondents to broadcast a certain television program, is denied.

MR. JUSTICE POWELL, Circuit Justice.

On May 9, 1980, the District Court for the Southern District of Texas entered a temporary restraining order compelling respondents to broadcast "The Death of a Princess," a television program to be distributed by the Public Broadcasting Service, on May 12, 1980, at 8 p. m. Today, the Court of Appeals for the Fifth Circuit vacated the District Court order on condition that the respondents "tape and preserve the program in issue." Applicant seeks relief from the Court of Appeals order. The respondents oppose the application, and represent that "The Death of a Princess" will be preserved on videotape for later airing should the applicant obtain a permanent injunction. The Public Broadcasting Service has filed an *amicus* brief also asking that the application of the applicant be denied.

Although applicant requests that the Court grant certiorari and reverse the judgment of the Court of Appeals, in purpose and effect applicant is requesting that the order of that court be vacated, thereby reinstating the temporary restraining order of the District Court. Such a request normally comes to me as Circuit Justice. Although I may have considered referring this to the entire Court, a quorum is not present. I therefore exercise my authority as Circuit Justice to rule on applicant's application.

Upon consideration of the papers, I deny the application.

I have consulted informally with each of my Brethren who was present at the Court when these papers arrived late this

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afternoon. Although no other Justice has participated in the drafting of this order, I am authorized to state that each of the three whom I consulted would vote to deny this application. Of course, this action should not be taken as expressing a view on the merits of the questions raised in this case. See *Graves v. Barnes*, 405 U. S. 1201, 1204 (1972) (Powell, J., in chambers).