

MOBAY CHEMICAL CORP. *v.* COSTLE, ADMINISTRATOR,  
UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF MISSOURI

No. 78-308. Decided January 8, 1979

Appeal from a three-judge District Court's judgment rejecting appellant's constitutional attack on § 3 of the Federal Insecticide, Fungicide, and Rodenticide Act, governing registration of pesticides, is dismissed for want of jurisdiction, where it appears that the attack was, as a legal matter, on agency practice, not on the statute, and, thus, that the three-judge court was improperly convened.

PER CURIAM.

Appellant contends that the use of one submitter's data, filed prior to 1970, in the consideration of another person's application for registration of pesticides under § 3 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as added by the Federal Environmental Pesticide Control Act of 1972, 86 Stat. 979, and as amended, 89 Stat. 755, 7 U. S. C. § 136a, effects a taking for private use and without compensation in violation of the Fifth Amendment to the Constitution and that the Act is to that extent invalid. A three-judge court was convened under former 28 U. S. C. § 2282 (1970 ed.) and proceeded to reject these contentions. Appellant seeks to appeal directly to this Court. Having examined the Act and the papers before us, however, we are convinced that whatever may be true with respect to data submitted after January 1, 1970, the FIFRA, as amended, does not at all address the issues of the conditions under which pre-1970 data may be used in considering another application. It neither authorizes, forbids, nor requires the existing agency practice with respect to pre-1970 data. As a legal matter, then, appellant's attack is on agency practice,

not on the statute. The three-judge court was thus improperly convened, *William Jameson & Co. v. Morgenthau*, 307 U. S. 171, 173-174 (1939), and this Court does not have jurisdiction to entertain a direct appeal from the judgment in such case. See 28 U. S. C. § 1253; *Norton v. Mathews*, 427 U. S. 524, 528-530 (1976). The appeal is accordingly dismissed for want of jurisdiction.

*So ordered.*

MR. JUSTICE BLACKMUN, dissenting.

I am of the view that the 1975 amendments to FIFRA specifically address the practices of the EPA and permit and ratify them. The constitutionality of the statute is therefore necessarily drawn into question in this lawsuit. See *Flast v. Cohen*, 392 U. S. 83, 88-91, and n. 3 (1968). I therefore conclude that the three-judge District Court was properly convened. On the merits, I would affirm the judgment of the District Court.