NATIONAL REVIEW ONLINE

MARCH 6, 2012 12:00 P.M.

Cato the Censored

Would Koch control doom the Cato Institute?

By Patrick Brennan

No one knows quite how the Koch brothers' recent lawsuit to take shareholder control of the Cato Institute will end, but it seems fair to say that it will seriously wound both parties, and thus, the libertarian cause.

Charles Koch founded Cato in 1977, in conjunction with the institute's current president, Ed Crane, and supplied the seed money (since then, the Kochs have provided approximately 8 percent of Cato's donations). In 1985, when Cato moved to Washington, a shareholder's agreement was drawn up, allocating shares equally to four men: Charles Koch (who later left the institute); Ed Crane; economist William Niskanen; and George Pearson, a Koch ally who later transferred his shares to the Kochs. Thus, the Kochs currently control half of Cato's shares. But Niskanen passed away in October, and his wife essentially now controls his shares. The Kochs have filed a suit in Kansas to the effect that these shares should have reverted to Cato or been offered to the shareholders — giving the Kochs majority control of the institute.

Koch supporters seem far more confident in the legal standing of their argument than Crane's and Cato's do. As unusual as Cato's legal structure is, Niskanen made no mention in his will of what should be done with his shares, and it seems that therefore they must revert to Cato or be offered to the other shareholders.

In fact, the chairman of Cato's board, Bob Levy, and others seem to admit implicitly that their legal case is shaky, or, at least, not really based on the existing shareholders' agreement, by admitting that they would like to change the nature of the agreement, or scrap it entirely. Levy explains to NATIONAL REVIEW ONLINE that "the way forward is to abandon this shareholder structure, substitute a structure where the institute is controlled by members, the way just about every non-profit in the world is, and those members would be the board of directors themselves, so that we have a self-perpetuating board."

Levy concedes that "if the Kochs feel the need for their original, back in 1977, donor intent to be preserved, we have made proposals toward that end, such that they would have veto power over things like a material change in the institute's mission." Levy accepts that Charles Koch's foundational support and original donor intentions do matter, but suggests that the existing agreement doesn't reflect the important views of today's donors (the Kochs have not donated to Cato since 2010). Wes Edwards, deputy general counsel of Koch Companies Public Sector LLC, explains that "the founders of the Cato Institute reached an agreement and agreed to be bound by it. That is all we are seeking here — that the parties stand by what they agreed to when they founded Cato." The Kochs argue that their negotiations, which they conducted on the basis of theshareholder agreement, were continually rebuffed; indeed, Cato does not seem interested in resolving the issue within the context of the shareholder agreement.

Thus, Koch supporters suggest that Crane and Cato's efforts will require waging a personalized war, relying as much on the court of public opinion as possible. They cite the rejection of their suggested standstill order, which would have postponed the issue until 2013, as evidence that Cato and Crane would like to fight the battle during the 2012 election season, when liberal demonization of the Kochs is most intense.

While that contention may be a stretch, Levy seems to admit the personal nature of the battle; he suggested to me that the fundamental issue was not the existing legal agreement, but the fact that the current shareholders, rather than Cato's directors, hold the reins: "It's strictly a matter of control. It wouldn't matter whether we called these folks shareholders, or whether we called them members. What matters is who they are. If this was a membership organization, but the members were the same people who are now our shareholders, there would still be this concern about control over our activities."

Especially since the Kochs have been hands-off shareholders so far, this is de facto how Cato has been run: Decisions are made by the board of directors, all of whom have apparently always been strict, true-believer libertarians. In fact, one Cato scholar explains that, if Cato's credo is "be as radical as you can while still remaining relevant," the members of the board are known for pushing scholars in the radical direction, rather than constraining them for the sake of relevance. Koch control, they fear, would mean that the directors would start emphasizing the relevant over the radical. If the existing shareholders agreement allows that, Levy, Crane, and others seem intent on altering the contract, despite, as Wes Edwards notes, the idea that contracts are a "key principle of libertarianism."

The libertarians' problem with Koch control is not that the Kochs will push the think tank in an unacceptable ideological direction, though some Cato supporters are still wary that the Kochs would emphasize economic policy at the expense of civil-liberties issues. The greater concern is that Cato would be forced into more partisan political advocacy and activism; one suggestion is that that Cato has not done enough to oppose President Obama's reelection (as an example, last week, two Cato scholars weighed infor *U.S. News and World Report* that President Obama shouldn't be blamed for rising gas prices).

Koch representatives note that the Kochs have close control over a range of less partisan entities, such as the Institute for Humane Studies and theMercatus Center (though such groups have indeed come under attack for their putative Koch control). Cato supporters contend, however, that the Kochs plan to use the Cato Institute in a different way: "to become an intellectual ammo-shop for American for Prosperity and other allied organizations," as one Cato supporter put it, using the Cato brand to provide those groups with added intellectual and ideological legitimacy.

But fundamentally, Cato’s concern is that the institute’s legitimacy will be dramatically reduced by closer affiliation with and majority control by the Kochs, and this concern appears to be well-founded.

Cato has already begun to experience the difficulties of being a Koch-controlled organization: One Cato scholar described to me that he had begun work on a major book with another prominent expert in his field, to be published by the Cato Institute. But as soon as the story broke on Thursday, the unaffiliated scholar began to express reservations, and, at the very least, has asked that they delay work until the case has been resolved and Cato’s new status is established. One Cato scholar, Julian Sanchez, has already declared that he will quit if the Kochs triumph. Furthermore, Bob Levy explains that some of Cato’s largest individual donors have declared that “we will not give a single dollar until we know the Kochs do not have more of a say over Cato.” Levy argues, in fact, that Cato rejected the above-mentioned standstill agreement in order to resolve the dispute as soon as possible, because the issue threatens Cato’s very status as a functional organization. Ed Crane, like Cato the Younger, would not remain much longer at the institute if the Kochs’ become its Caesars; he will most likely leave or be removed as president, taking many of the institute’s scholars and donors with him.

Levy suggests that Koch control is unacceptable because “Cato has to be totally independent of corporate and political interests.” Of course, all donors have agendas, funding must come from somewhere, and the Kochs are not categorically more “corporate and political” than other people. But perception is everything, and there is surely almost no more damaging “corporatist” and partisan-Republican label today than that of the Koch brothers. As Levy explains, even if the Kochs bring no untoward influence, “the perception itself would be enough to destroy our credibility, and credibility is the essence of operating as a think tank.”

However, some Cato supporters do indeed feel that Koch control would mean substantial and harmful changes, citing the Kochs’ efforts to “pack the board.” Of the four newly Koch-appointed board members, Catoites have argued that two of them in particular, Nancy Pfotenhauer and Kevin Gentry, have partisan political connections in Washington, are closely affiliated with the Kochs, and are, worst of all, not doctrinaire libertarians. (That said, a range of Cato directors and scholars have committed some of the same heresies of which they accuse Pfotenhauer and Gentry, such as supporting the Iraq War). They suggest that the Kochs’ board moves so far evince a strong desire to make Cato more partisan and more political. However, there have always been concerns that Cato is too much of an ivory-tower libertarian group, which one might contend could be substantially more relevant and politically effective if it were endowed with more board members such as Gentry and Pfotenhauer.

The concerns about Pfotenhauer and Gentry’s partisan connections and questionable libertarian commitments might sound like paranoia, until one considers Cato’s current structure, and what its leaders would like it to be. Levy and others suggest that Cato’s independent reputation derives from the ideological commitment of its directors and the year-to-year support of strongly libertarian donors, and the fact that Cato is, in practice, structured around that connection. It is an open question as to whether this is the most efficient way to organize a think tank, or even the best way to advance libertarian ideas. But it has granted Cato real intellectual legitimacy, which they believe they must preserve by stonewalling the Kochs’ efforts and strengthen by restructuring the institute itself.

It is indisputable that, if Cato were to come under the control of the Left's favorite bogeymen — regardless of their intentions — it would threaten the institution's public image. But the fundamental question of control is legal, not political, and it remains to be seen if the original shareholders' agreement allows the Kochs to gain control of the institute. Cato's libertarians, meanwhile, are desperate to prevent it by any means necessary.

— Patrick Brennan is a 2011 William F. Buckley Fellow at the National Review Institute.