

Kochs Sue Cato over Board-Packing

By [Patrick Brennan](#)

April 10, 2012 12:54 P.M.

The Koch brothers have fired the next salvo in their ongoing dispute with Ed Crane and Bob Levy of the [Cato Institute](#) over control of that institution. The newest petition, accuses Crane and Levy of essentially a “board-packing” scheme, which involved adding four members to Cato’s board at the most recent meeting, on March 22. Most important, Koch supporters contend that Levy and Crane’s actions belie their proposed narrative of a hostile, Koch-initiated takeover, since the Cato faction is attempting dramatic steps of its own, though presumably they would defend them as necessary defensive tactics. Charles Koch, Ted Olson, and Andrew Napolitano have filed affidavits in support of the suit.

The suit essentially contends that “the primary purpose of the scheme was to disenfranchise certain of Cato’s shareholders,” the Kochs, and argues that under Kansas law, the election should therefore be invalidated. The Kochs have therefore filed a motion asking for the status quo to be frozen throughout the length of the current litigation, “to prevent the improperly constituted Board from frustrating [the] Court’s ability to provide Charles and David Koch with the complete relief they seek.” The petition ([available here](#)) argues that:

Efforts to undermine the ability of shareholders to effect change through the ballot are subject to ‘enhanced judicial scrutiny’ under Kansas law. Absent a ‘compelling justification,’ such devices are deemed to constitute breaches of the fiduciary duty of loyalty and are rendered null and void as a result. No ‘compelling justification’ supports the Board-packing scheme. . . .

In addition to a breach of the duty of loyalty, the Board-packing scheme is a breach of the duty of care and is invalid for that reason as well. The scheme was adopted at a hastily called meeting, without prior notice of the specific proposal, after Levy had

signaled that no such proposal would be offered, and exclusively with the votes of Crane/Levy-aligned directors. . . . Those individuals did not fulfill their responsibilities with the seriousness and level of care that Kansas requires of directors.

In support of the motion, affidavits have been filed by Charles Koch (available [here](#)), former [solicitor general](#) Ted Olson ([here](#)), and prominent former judge Andrew Napolitano ([here](#)), explaining why they consider both the process and the intent of the board-packing scheme to have been unacceptable. Koch supporters note that the Cato faction appears perfectly happy to wage this legal battle as publicly and loudly as possible, while they actually attempted to file this most recent suit under seal, but the court prevented them from doing so.

The board approved the new members in a 9–7 motion, with Cato board president Bob Levy saying, “these Board members are solid libertarians who have been generous supporters of the Cato Institute. We very much appreciate their support and are delighted to have them actively involved in Cato’s governance.” The four are all former members of the board (and the Kochs actually voted for two of them, John Malone and Donald Smith in an earlier election).