

NATIONAL REVIEW ONLINE

Cato Chairman Issues New Statement

By Patrick Brennan

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The chairman of the Cato Institute's board, Bob Levy, has issued a response to Charles Koch's [statement](#) last Thursday about their ongoing battle over the think tank. The full version can be found [here](#) at the "Save Cato" section of the institute's website. Some of the key points:

While the Kochs assert that they aren't engaging in a hostile takeover, but the assertion of their legal shareholders' rights, Levy responds:

But actions speak louder than words. The Kochs' takeover attempt has included packing Cato's board of directors with individuals, almost all of whom are financially entangled with the Kochs and have no history of libertarian advocacy. . . .

You be the judge. Imagine that [Charles Koch](#) prevails in his lawsuit against Cato, and that he and his brother then "own" two-thirds of Cato's stock. Would an Institute whose board of directors is appointed by the Kochs be viewed as a credible source of non-partisan, non-aligned, independent commentary on vital public policy questions? Or would the think tank now known as Cato cease to exist because its 35-year unimpeachable reputation is critically damaged by the (unfortunately accurate) perception that Cato is literally "owned by the Kochs"?

One should note that it isn't accurate to claim that the Kochs' proposed boardmembers, such as Kevin Gentry, "have no history of libertarian advocacy." Gentry, for instance, has spent years raising hundreds of millions of dollars for libertarian causes, including the Kochs' Mercatus Center and the Institute for Humane Studies, but also for *Reason* and Cato (and won an award for his work from the State Policy Network in 2007). Some of the Kochs' other appointments are even more orthodox: Ted Olson has been a staunch advocate for the libertarian case for gay marriage for years, in concert with Cato, while Andrew Napolitano's libertarian credentials are unimpeachable. The Cato partisans' true contention is not that the Koch appointees don't have sufficiently libertarian resumes; it's that they would like to have a self-perpetuating board of directors who all hold strictly orthodox libertarian views, which they consider the de facto situation for the past 35 years.

Levy then goes on to dispute the Kochs' assertions laid out in their statement. In response to the suggestion that "My brother David and I have every intent to ensure Cato continues [its work](#) on the full spectrum of libertarian issues for which it has become known," Levy questions the libertarian credentials of some of the Koch board appointees so far, pointing out their libertarian heresies and their Koch connections.

More interestingly, Levy explains the earlier negotiations about "alternative corporate structures," which the Kochs claim to have proposed, among other things:

As for alternative structures, the Kochs proposed two eight-person boards, one selected by them and one selected by Cato's current board. After their initial selection, the two boards would function as one, but each of the two components would elect their own successors. In other words, the Kochs wanted to control not the three board seats they held at the time, but eight seats — an outcome even less acceptable to Cato than the standstill that had already been rejected. For more than a decade, Ed Crane had tried to persuade the Kochs to restructure the Institute's governance, thereby removing the threat to Cato's autonomy that 50 percent Koch control entailed. The Kochs' "alternative" was another version of the same unsustainable 50/50 scheme.

The only real alternative was proposed by Cato: Abandon the shareholder structure and implement a member-elected board with the directors themselves serving as members — a governance arrangement favored by the Internal Revenue Service and practiced by most nonprofits (including Cato for more than 30 years). In return, the Kochs would be assured that their key stated objective — preserving original donor intent — would be satisfied. Charles and David Koch would have veto power over any material change in the Institute's mission, sale of the Institute's assets, merger, or other combination. Moreover, Ed Crane agreed to an immediate search for his successor; and the Kochs would have veto power over the person selected.

Revealingly, Crane's offer to leave wasn't enough for the Kochs; they demanded control of the Institute's board in addition to its president.

Here, Levy explains precisely what I [reported](#) last week: The Cato partisans are not particularly interested in resolving the issue as a legal question about the shareholder agreement (though later in the statement Levy offers a legal defense of why Niskanen's widow can inherit his shares), but instead would like to transform Cato into an organization with a wholly different legal structure, controlled entirely by a strongly libertarian board. They are correct to note that this is a much more common practice than Cato's current structure, and essentially correct that this is how Cato has operated *in practice* for the past 30 years (though one could certainly question some board members' libertarian credentials too), but it would require entirely rewriting Cato's bylaws, contra the founders' — the Kochs' — wishes.

One can find more [here](#) on the legal questions underlying the conflict, where there might be some more weaknesses in Cato's case: For one, they seem to have retracted an admission that Niskanen's shares have to be offered back to Cato, arguing instead that

“The Agreement could be construed to require that at some point, the Estate’s stock must be tendered to the Institute for possible purchase” and that “the Agreement does not require that Cato purchase the offered stock.” Secondly, he also notes that Niskanen’s estate, represented by his widow Kathryn Washburn, has no legal relationship with Cato, and could assume separate legal counsel of its own.