



## Koch v. Cato

BY [TED FRANK](#) ON MARCH 7, 2012 10:14 AM

The Koch brothers have sued the Cato Institute to enforce a shareholder agreement, though if you believe the Koch Foundation's [statement to alumni](#), Cato forced their hand by proceeding with an attempt to transfer shares instead of agreeing to a standstill or arbitration. (Of course, we don't know what preconditions went along with the standstill or arbitration request, so it may have been reasonable for Cato to do so; if the dispute was sufficiently public that fundraising was being affected, that's a reason to want to resolve this quickly and refuse a standstill, though that would also imply the best way to resolve the dispute would be to agree to private arbitration.) At a minimum, can we agree that it's not "unseemly" for the Kochs to be suing a widow for injunctive relief when the alternative would be to waive legal rights?

My conflict-of-interest disclosure: I have lots of friends who work for Cato and seem to like Ed Crane personally; I have lots of friends who used to work for Cato; my friends [overwhelmingly side against the Kochs](#) on this. I have lots of friends who have gotten money or employment from one Koch entity or the other. Koch entities have probably provided a tiny fraction of the funding of non-Koch entities I've worked for, though no one has ever affirmatively told me this. In private legal practice representing a farming collective that alleged Koch Pipeline was overcharging them, I devised the legal theory that eventually cost the Kochs tens of millions of dollars when the Surface Transportation Board adopted my interpretation of the Interstate Commerce Commission Termination Act, affirmed in 255 F.3d 816, and spent a lot of time in an un-air-conditioned Wichita warehouse looking for smoking guns or in Wichita hotel conference rooms deposing Koch Pipeline witnesses. Similarly, over a decade ago, I briefly represented Bill Koch in one of his many lawsuits or planned lawsuits against his wealthier and more politically active brothers, though I was pretty far down the totem pole on that one. Many years ago, I applied to work for Koch Industries, was subjected to the weirdest telephone interview in my life, and was turned down for a job. I've asked the Koch Foundation for grants for the Center for Class Action Fairness several times and they said no each time, and have done so in such a way that I'm sufficiently offended that CCAF won't be asking them for money again. So I essentially have lots of reasons to dislike the Kochtopus, but, I'm nevertheless frequently falsely accused of being one of their puppets by the type of people who think that shouting about the Koch bogeyman substitutes for reasoning.

[Skip Oliva](#) has all the links you could ever want. [Will Wilkinson](#) and [Patrick Brennan](#) have the most nuanced discussion, but see the comments to Wilkinson's post taking issue with some of his arguments.

The one piece of good news from this dispute is that it demonstrates the degree to which Jane Mayer's New Yorker story was Obama campaign fiction. Unfortunately, that's not going to be the takeaway message.

For example, [James Grimmelman](#) suggests that the dispute negates the libertarian trust in [contracts](#). He's attacking a strawman caricature: every "sensible-shoes" libertarian I know, up to and including Richard Epstein, recognizes that contractual language cannot substitute

for trust in partners. Indeed, this truism is a great deal of what animates Ronald Coase's "The Nature of the Firm."

Part of the problem here is that Ed Crane is pursuing a strategy that maximizes the chance that Ed Crane will stay in power without having to ever answer to the Kochs again, but at the expense of the Cato Institute. If the dispute is long and protracted, **Cato will starve as funding sits on the sidelines** and people wary of Crane's allegations are unwilling to do work affiliated with Cato; meanwhile, the bad-mouthing of the Kochs prevents the Kochs from exercising their contractual rights without damaging Cato's reputation. Crane's strategy has made compromise impossible, because he has announced that the Kochs are incompatible with Cato, so there is now no resolution that the Kochs can agree to short of surrender without realizing Crane's self-fulfilling prophecy of a tarnishing of Cato. That metaphorical dousing of the building with gasoline means that now the only outcome that "saves" Cato without significant damage to Cato is if the Kochs cave quickly. Even if Crane backs down from the precipice, he's done irreversible damage, because anything other than total victory by Crane—even a compromise by the Kochs to give Niskanen's shares to a mutually agreeable fourth shareholder and let Crane have life tenure—will now be perceived by the public as an agreement to Koch puppetry.

This may well be the optimal strategy for Cato if Crane correctly believes that the Kochs will damage Cato's independence. Whether that belief is true depends on whether the Koch nominations for the board of people offensive to libertarians reflected malevolence or a sloppy failure of lower-level Koch officials in trying to find board members who could be counted upon to protect the Kochs' interests in maintaining the primacy shareholder agreement against an admitted effort by Cato officials to freeze out the Kochs. (A frequent mistake in any analysis of large entities is assuming that agents are always perfectly executing the preferences of their principals, and it's very hard to imagine that Koch personally diverted attention from his sprawling business interests to hand-pick John Hinderaker to the board of directors nomination slate.) If Crane is making his allegations in good faith, one can reasonably then ask why, if the Kochs were so potentially destructive to the movement, Cato tolerated the sword of Damocles for so many decades instead of starting anew or warning its donors of the risk; the schadenfreude of Murray Rothbard fans is the sanest thing I've seen from that camp in years. It's thus difficult not to infer a certain level of disingenuousness in Cato's current litigation position. That position seems to be calculated to maximize the benefit to Ed Crane (either as head of Cato or head of a future hypothetical Cato-in-Exile), rather than Cato and the libertarian movement: Wilkinson is correct that Crane's public position has insulted the scholars at IHS and Mercatus, not to mention every other donor-supported think-tank. (And even Cato. If we can't trust the Kochs not to summon scholars to the top floor, as **Julian Sanchez puts it**, why can we trust Crane and the existing board not to call scholars upstairs? It's not like Cato scholars have tenure or that Cato hasn't dismissed anyone in the last few years.)

(A more charitable interpretation of Crane's position is that explained by **Brennan**: Cato believes its legitimacy stems entirely from its hard-core libertarian board of directors, and doesn't wish to change that. If so, one wishes that was the argument being made rather than the one that caters to unfair and offensive left-wing stereotypes.)

For better or worse, Crane's strategy has forced the situation into a game of chicken where what would be best for the movement is if the Kochs agree to a humiliating retreat from their legal rights. That seems an unlikely outcome: if unfair political attacks and threats of IRS audits from the Obama administration (which seems to suffer from Koch derangement syndrome far more than the Kochs suffer from Obama derangement syndrome) haven't deterred the Kochs, bad publicity from Ed Crane won't. The social deadweight loss all around makes me very sad: the world is a better place with a happy and independent and well-funded Cato Institute, and with libertarians training their sights on the dangers to personal

and economic liberty rather than internecine squabbles. Like Jonah Goldberg, I want both sides to win.