More Details on the Increasingly Bitter Koch/Cato Lawsuit and Feud

Matt Welch | March 7, 2012

As mentioned here last week, controversial libertarian philanthropists Charles and David Koch are suing the country's largest libertarian think tank, the Cato Institute, in a dispute over ownership shares. Cato PresidentEd Crane, who is one of the defendants, has described the suit as an attempted "hostile takeover," an "effort by the Kochs to turn the Cato Institute into some sort of auxiliary for the G.O.P"; the Kochs counter that they intend no such takeover and are instead fighting for the sanctity of contract and rule of law.

The case has brought forth a torrent of commentary in and around the libertarian universe (the bestdistillation/compilation of which can be found at Skip Oliva's constantly updating blog). Before linking to some of that I'll list here some factual advances of the story since last week.

The New York Times Tuesday reported more on the "personal acrimony" between Crane and the Kochs:

Mr. Crane, the Cato president, was once close to Charles Koch, sharing libertarian beliefs and traveling with him to China and the Soviet Union as they joined to form Cato in the mid-1970s, officials said. But the two had a falling out, and the Kochs tried to have Mr. Crane removed as president some years ago, the officials said.

Exacerbating tensions was an article in 2010 in The New Yorker magazine, in which an unnamed Cato Institute official was quoted comparing Charles Koch and his "market-based management" philosophies to an "emperor" with no clothes. The quote was said to infuriate Mr. Koch.

Charles and David Koch have rarely attended Cato board meetings in recent years, and Cato officials have rarely been invited to the family's regular galas for influential conservatives. As the relationship with the institute has deteriorated, their donations have declined as well.

Since Cato was formed, the Kochs have donated about $30 million, officials said, but the bulk came in its first decade; by last year, the Kochs gave no money at all.

On Saturday, Cato Senior Fellow Jerry Taylor told *The Volokh Conspiracy*'s Jonathan H. Adler about how the feud has played out on Cato's board:

Last year, they used their shares to place two of their operatives – Kevin Gentry and Nancy Pfotenhauer – on our board against the wishes of every single board member save for David Koch. Last Thursday, they used their shares to force another four new board members on us (the most that their shares would allow at any given meeting); Charles Koch, Ted Olson (hired council for Koch Industries), Preston Marshall (the largest shareholder of Koch Industries save for Charles and David), and Andrew Napolitano (a frequent speaker at Koch-sponsored events). Those four – who had not previously been involved with Cato either financially or organizationally – were likewise opposed by every member of our board save for Gentry, Pfotenhauer, and David Koch. To make room for these Koch operatives, we were forced to remove four long-time, active board members, two of whom were our biggest donors. At this moment, the Kochs now control seven of our 16 board seats, two short of outright control.

Cato Board Chairman Bob Levy gave an updated list of board members to an inquiring Skip Oliva, who determined that the four ousted board members were John C. Malone, Lewis Randall, Donald G. Smith and William Dunn, the latter of whom sits on the Reason Foundation's Board of Trustees (as does David Koch), and was until recently our board chairman. As you may expect, various employees of *Reason*(including me) have various professional and personal relationships with most of the people under discussion on both sides of the dispute; many of my hyperlinks under people's names in this post are to their *Reason* archive.

Levy also gave this anecdote to former *Reason*er David Weigel over at *Slate*:

In early November, David Koch met with Bob Levy, chairman of Cato's board of directors, at Dulles International Airport. They were joined by Richard Fink, Koch's chief adviser, and Kevin Gentry, a vice president of Charles Koch's charitable foundation who'd been put on Cato's board of directors. (Former Americans for Prosperity President Nancy Pfotenhauer had joined the board after the same meeting.)

"They said that a principle goal was to defeat Barack Obama," remembered Levy. "The way David [Koch] put it was, 'We would like you to provide intellectual ammunition that we can then use at Americans for Prosperity and our allied organizations.' AFP and others would apply Cato's work to advance their electoral goals."

Levy asked them: "What gives you the impression that [Cato isn't] providing intellectual ammunition?" He says now: "I never got a satisfactory answer. The only answer that makes sense was that Cato needed to be more responsive to their needs. We would take closer marching orders. That's totally contrary to what we perceive the function of Cato be."

More in this vein from Jerry Taylor:

Just before the last shareholders meeting, the Koch brothers also nominated –but were unable to elect – eight additional individuals for our board. Those nominees included the executive vice president of Koch Industries, a staff lawyer for Koch Industries, a staff lawyer for the Charles Koch Foundation, a former Director of Federal Affairs for Koch Industries, a former Executive Director of the National Republican Senatorial Committee (and who was, incidentally, a McCain bundler), and a lifelong Wichita friend of Charles Koch. Aside from those functionaries, they also nominated a couple of people with public profiles that make the jaw drop:

* John Hinderaker of the Powerline blog, whose firm counts Koch Industries as a client. Hinderaker has written, "It must be very strange to be President Bush. A man of extraordinary vision and brilliance approaching to genius, he can't get anyone to notice. He is like a great painter or musician who is ahead of his time, and who unveils one masterpiece after another to a reception that, when not bored, is hostile." Hinderaker supports the Patriot Act and the Iraq War and calls himself a neocon.

* Tony Woodlief, who has been president of two Koch-created nonprofits and vice president of the Charles Koch Foundation. Woodlief has blogged about "the rotten heart of libertarianism," calling it "a flawed and failed religion posing as a philosophy of governance" while complaining about libertarians "toking up" at political meetings.

Woodlief responds in part here:
I don't know much about this Cato business. I do of course know Koch. I know people there well enough to find laughable the notion that they are somehow opposed to liberty, or that they could ever imagine Cato is essential to some secret partisan or corporate agenda and must therefore be taken over.

And like everyone, I know about Cato. I know many people smarter than me who work there, and I appreciate very much their efforts for decades to make mainstream many valuable ideas that once would have been relegated to the fringe. I don't agree with all of them, and I think libertarianism, to be an intellectually cohesive philosophy, needs critique and work. Fortunately, I've always found the people I know who work for Cato to welcome the kind of spirited debate that tends to make idea-generating organizations healthier.

But I suppose right now the point is to circle the wagons, craft a narrative of conspiracy, and paint whatever side one is not on as intransigent and small-minded. None of which will have any bearing on the final legal decisions, but all of which is to the great delight of those who despise liberty and would love to see Cato torn down.

And Woodlief has a more substantive post about the case here.
Former Catoite Will Wilkinson, while saying "it seems clear enough that the Kochs are trying to take over by stacking the board," pronounced the "hand-wringing" over its new members to be "overwrought":
It's worth noting that David Koch has been on the Cato board for years, the whole time I was employed there and more, and I don't remember anyone *once* suggesting he was an ideological or strategic danger to Cato's mission. But suddenly he's an existential threat! Cato and Cato's chairman Bob Levy didn't seem to have a huge problem with Ted Olson, a Solicitor General under G.W. Bush, when he was at Cato arguing for gay marriage on constitutional grounds. Andrew Napolitano is a stout libertarian who put a ton of Cato guys on Freedom Watch, his recently cancelled show on Fox Business. Cato executive VP David Boaz seems to get along pretty well, ideologically and otherwise, with Napolitano in this recent clip. Nancy Pfotenhauer, a former G.W. Bush and John McCain campaign operative, strikes me as a classic right-leaning fusionist, of which there are not a few at Cato. That she was married for a while to Cato senior fellow Dan Mitchell I think suggests that she does not inhabit an ideological/institutional universe foreign to Cato, as does the fact that the Independent Women's Forum, of which Pfotenhauer was for years the president, is currently run by Cato alum Carrie Lukas. Kevin Gentry is a hard-core Virginia Republican Party operative with whom I worked back when I was at the Institute for Humane Studies and the Mercatus Center. He's a fundraiser. [...]
The way Cato has so eagerly jumped on the Koch-bashing bandwagon in its hour of crisis strikes me as both transparently opportunistic and damaging to the broader libertarian movement. Charles Koch is the chairman of the board at the Institute for Humane Studies which as far as I can see has not become a whit less libertarian in orientation over the past several years. When I worked there, Charles Koch was also chairman of the Mercatus Center's board and he's on the board currently (but I can't tell from the Mercatus website who the chair is, if they have one.) A number of Mercatus' policy staff once worked at Cato and they don't seem to have changed their ideological orientation at all. Is Cato's management *now* arguing that Mercatus' scholars labor under a cloud of partisanship which threatens the independence and integrity of their work? Is Cato's management arguing that IHS's libertarian principles are now suddenly threatened by Charles Koch's money and

leadership? Cato has worked closely with IHS for decades, and has long been a proud host each summer of a number of IHS Charles G. Koch Summer Fellows. Cato's worries about Charles Koch's baleful un-libertarian influence are *completely* new to me! That CGK is a partisan threat to an independent libertarian perspective is now a very popular idea at Cato that coincides exactly and suspiciously with the onset of CGK's attempt to capture control of the institution he co-founded.

Most libertarian commentary on the matter has been much more pro-Cato/Crane and anti-Koch than Wilkinson's piece. Cato staffers have formed a popular Save Cato Facebook page, complete with list ofbullet points; and there have been a variety of lengthy essays on the subject, from the likes of Cato Executive Vice President David Boaz, (Reason.com columnist) Gene Healy, (former *Reason*er) Julian Sanchez, (former *Reason* intern) Jonathan Blanks, Jason Kuznicki, and Justin Logan. Other broadly sympathetic sentiments have come from Reason.com columnist Steve Chapman, Don Boudreaux, Ilya Somin, Charles Rowley, and many others. There has been a smattering of ambivalence or skepticism about Cato's legal/moral case, from the likes of Arnold Kling, Jonah Goldberg, Erick Erickson, Ted Frank (link is currently not working), and Jeff Bercovici. Haunting this whole discussion, obviously, isthe ghost of Murray Rothbard.
How do the Kochs explain their actions? Here's an excerpt from a letter that the Charles G. Koch Foundation sent to various alumni earlier this week:
Charles Koch and David Koch went to great lengths to avoid this dispute. Their efforts were numerous, sincere, and went literally up to the last minute.

The disagreement over the shareholders' agreement has been going on for years with Charles Koch and David Koch receiving several proposals from Cato's officers to dissolve the agreement. Charles and David consistently declined these proposals because they feel the shareholder structure is important to preserve donor intent. At the unfortunate passing of one of the four shareholders, Bill Niskanen, some issues came to the forefront with discussions about how his shares should rightfully be disposed.

Charles Koch and David Koch, mindful of how this dispute could be a distraction to Cato and its mission at this critical time, sought to resolve the issue, or alternatively, to table the issue for a year or longer.

* They proposed a standstill agreement to delay any discussion on the shareholders agreement, and to delay any shareholder meetings and maintain the current board of directors for one year or longer.

* They proposed third party mediation.
* They proposed alternative corporate structures for the other side to consider.

All of these efforts were rejected, and Cato's other shareholder [Ed Crane] demanded that a shareholders' meeting be held on March 1 where a new party (Ms. Washburn — Bill Niskanen's widow) would be named a shareholder and new directors would be named.

The court action, filed immediately before the shareholders' meeting, was a last resort to ask the court for help in confirming the meaning of the governing documents and the shareholders' agreement.

What about the alleged hostile political takeover of Cato?

Charles and David are absolutely committed to libertarian principles and the libertarian issues Cato works on. They merely want the integrity of the shares, the original structure that all parties agreed to, upheld and for Cato's officers and directors to act in a manner consistent with the principles the organization was founded on. As you know, a key principle of libertarianism is recognizing and respecting the rule of law. The founders of the Cato Institute reached an agreement and are bound by it. And that is what Charles Koch and David Koch are seeking here — that the parties stand by what they voluntarily agreed to when they founded Cato.

When former President George Bush said, "I've abandoned free-market principles to save the free-market system," we all know how disastrous the consequences were for free markets and the economy. Principles are not what you abandon in difficult times. Rather they serve as the foundation for action in challenging times. And like President Bush, if Cato's leaders are willing to abandon a key libertarian principles—adhering to voluntary agreements—when they feel it's convenient, the organization has lost its way as an advocate of these principles. Cato can't save libertarian principles by its leaders abandoning its principles any more than President Bush could save the free market by abandoning free market principles.

Charles Koch and David Koch believe in Cato, its mission, and its principles. As champions of the rule of law, voluntary agreements, and property rights, Charles and David believe that upholding the shareholder agreement is crucial to protecting Cato's principled mission in the future from the path of the Ford Foundation, Pew, and others that have strayed when they deviated from their founding principles.

The Kochs and Ed Crane (and many of Ed Crane's employees) seem headed for a massive fork in the road. Skip Oliva has some very preliminary thoughts about what a post-divorce post-Cato might look like, but regardless of the speculative future, the present looks to be contentious and painful. Bob Levy is telling reporters that some of Cato's biggest 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." Expect plenty of such talk, and escalating recriminations, long before the first day in court.