

## Continuity despite change: Kenya's new constitution and executive power

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What explains the continuation of strong executive power despite the introduction of new formal constraints on presidents? This article focuses on the elites working within the state agencies that execute presidential power, who benefit materially from their authority and have incentives to defy formal constraints placed on their own power. To evaluate this claim, I examine Kenya's 2010 constitution, which intended to reduce the power of Kenya's "imperial presidency" through formal constraints on the executive. As implementation has progressed, however, the executive bureaucracy – the Provincial Administration (PA) – has not changed in size, structure, or function, contrary to the explicit goals of the constitution's drafters. Using original interview and archival evidence, I find that the persistence of this agency – and by extension strong executive power – is due to PA administrators' attempts to protect their material interests. This article shows that formal rule change may be insufficient to spur democratization in the face of entrenched authoritarian bureaucracies with strong incentives to maintain their pre-existing interests.

**Keywords:** constitution; Kenya; executive power; bureaucracy; competitive authoritarianism; institutional strength

### Introduction

Since the third wave of democratization in the early 1990s, more than 25 countries in sub-Saharan Africa have radically amended their existing constitution or adopted a new one.<sup>1</sup> These new constitutions represent a symbolic turn towards democracy and initiate formal measures to break with authoritarian pasts. Many of these constitutions explicitly aim to reduce executive power. Before democratization, "big man" presidents in Africa wielded control over state resources without accountability to the legislature, judiciary, or civil society.<sup>2</sup> However, more than two decades after the beginning of democratization, enforcement of new formal constraints on executives is weak and many continue to wield unchecked

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power.<sup>3</sup> What explains this continuation of strong executive power despite democratization and the adoption of *de jure* constraints on executives?

In this article I examine why formal rule changes have failed to constrain executive power that is wielded through state agencies. Coercive state agencies such as the army, the executive bureaucracy, and the internal security apparatus can implement the president's orders without going through more democratic channels, such as a national legislature. Unchanged from the days of authoritarian rule, these agencies continue to help contemporary presidents extend their reach across the country through undemocratic means. Elites in these agencies benefit materially from the continued authority of their bureaucracy. When these elites can leverage their agency's unique role in addressing a pressing national concern – what I call a “legitimizing issue” – they can succeed in resisting new rules and foiling meaningful change.

To illustrate this theoretical point, I analyse Kenya's 2010 constitution using over 50 interviews and never-before utilized archival material.<sup>4</sup> This document has been described as having the “potential to transform Kenyan politics”<sup>5</sup> because it places significant formal constraints on Kenya's “imperial presidency”.<sup>6</sup> Yet I present evidence that Kenya's new constitution will not limit executive power as originally intended because underlying state institutions – foremost being the executive bureaucracy – continue to provide the president with tools to undermine democratization.

Before the new constitution, Kenyan rulers utilized the Provincial Administration (PA) – a large, centralized, and highly capable body – to suppress regime opponents, rig elections, and control civilian protests throughout the country.<sup>7</sup> Kenya's 2010 constitution mandated a restructuring of the PA in accord with the country's new devolved government. In a seemingly bold move towards greater democratization after ratification, Kenya scrapped the PA and crafted a new governance system, the National Administration (NA). But the NA has emerged as an entity almost identical to the PA in terms of structure, functions, and personnel. Indeed, interviews with senior NA officials stress the lack of significant change between these two systems and point to the agency's continued role in enforcing executive orders without oversight. In understanding this continuity after the new constitution, I find strong evidence that NA elites have resisted enforcing constitutional provisions by exaggerating internal security threats. This has perpetuated the NA's growth and centralization, ensuring the continuation of both material benefits to NA officers and strong executive power for Kenya's president.

This article contributes to our understanding of current Kenyan politics. Uhuru Kenyatta became the country's fourth president on 4 March 2013, after a close and bitterly fought election against Raila Odinga. As Kenya enters a new political era, many look to the constitution as a way to constrain executive power and prevent further destabilizing violence. Yet, at the time of writing, there are signs that indicate his presidency will not be a clean break from Kenya's undemocratic past. Just

months after his victory, Kenyatta used the executive bureaucracy to undermine the country's new devolved system of government.<sup>8</sup>

More broadly, stalled democratization among many third-wave countries calls for a re-evaluation of the role of institutional design in regime change. The enforcement of new formal rules that increase political plurality in former authoritarian countries has often been weak. While existing research has focused on the inability of weak institutions to enforce change,<sup>9</sup> the argument I present makes us reconsider how the pre-existing strength of inherited authoritarian institutions can lead to non-enforcement through a different mechanism: resistance. In this way, this article contributes to the studies on regime durability, democratization, and institutional change.

This article proceeds as follows: I review the persistence of strong executive power despite democratization. Next I present my theory on the role of bureaucratic elites in perpetuating executive power, then I give background information on the Kenyan case, before turning to an analysis of Kenya's 2010 constitution.

### **Regime transition and executive power**

Many countries in sub-Saharan Africa underwent regime change after the Cold War. Before the 1990s, African regimes had long been categorized as neopatrimonial. Leaders governed through personal patronage instead of formal rules, buying loyalty from bureaucratic elites through material inducements within the civil service.<sup>10</sup> In return, bureaucratic elites followed the executive's orders, bypassing formal institutional channels.<sup>11</sup> After the end of the Cold War, however, Western donors began to tie foreign aid to economic and political reforms; between 1989 and 1991, 21 African countries adopted reforms aimed at increasing political competition.<sup>12</sup> These countries simultaneously adopted new formal rules to constrain their presidents, such as term limits and agenda-setting rules. In addition, new constitutions have aimed to limit presidential control over state institutions.

Despite these formal changes, executive power is still strong on the sub-continent. Indeed, there has been a rise in competitive authoritarianism as a hybrid regime type among third-wave democratizers.<sup>13</sup> In these regimes, presidents use their control over the media, government institutions, and state resources to stack the deck in their favour during elections, often in direct conflict with provisions in the country's new democratic constitution. This has had devastating effects for democratization on the sub-continent. For example, facing a hotly-contested run-off in 2008, Zimbabwe's President Mugabe ordered government forces to suppress the opposition, killing more than 100 opposition supporters, injuring thousands, and displacing up to 200,000.<sup>14</sup>

Existing explanations on the continuation of strong executive power despite formal constraints focus on presidential resistance, which leads to more gradual institutional change than new rules originally intended.<sup>15</sup> Presidents across the developing world often adopt "window-dressing institutions" as a response to international demands or civilian protests without the intention to enforce these

changes.<sup>16</sup> For example, while most sub-Saharan countries have imposed term limits for presidents, 11 executives have attempted to alter the constitution to allow for a third term, and almost two-thirds have succeeded.<sup>17</sup>

Other explanations focus on the weakness of other actors to check the president. Weakly enforced constraints may occur when the actors who create formal rules lack the capacity or incentives to make them binding.<sup>18</sup> Other times, presidents co-opt government and opposition leaders; leaders silenced through material inducements have less incentive to enforce parchment institutions.<sup>19</sup> Returning to executive term limits, Senegal's President Abdoulaye Wade ran for a third-term in 2012 despite civilian and parliamentary protest after the Constitutional Court – appeased by “hefty” salaries and 4×4 vehicles – cleared his petition.<sup>20</sup>

A major limitation of existing research, however, is that it overlooks the administrators working within the agencies that wield executive power. While presidential actions underlie the continuation of strong executive power, this explanation is not alone sufficient to explain its perpetuation. Executives “cannot do their own dirty work” and they need state agencies “to execute their commands”.<sup>21</sup> Many leaders would like to exercise strong executive power, yet not all do. In explaining variation in the enforcement of executive constraints, I build on scholarship that recognizes the impact that bureaucratic elites have on regime trajectories and develop a more complete understanding of the continuation of strong executive power despite formal constraints, by focusing on the state bureaucracies that execute a leader's commands.<sup>22</sup>

### **Theory: the role of elites within the state**

Executive power is wielded through the state. It is not measured by what an executive himself can accomplish, but by the strength of the state agencies that execute his orders. This depends on an agency's organizational efficacy in carrying out tasks, administering programmes, and implementing its decisions across the country. Strong coercive state agencies such as the army, the executive bureaucracy, and the internal security apparatus are especially beneficial to a president.<sup>23</sup> Indeed, under both the neopatriomonal authoritarian regimes of the past and the competitive authoritarian regimes of the present, strong coercive state agencies have used repressive tactics to help their president maintain political power, such as silencing political opponents and suppressing civil society.

To help guarantee that administrators within these agencies comply with orders, the president often ensures that bureaucratic elites benefit materially from their positions.<sup>24</sup> These government jobs are often well paid and stable, and elites can also indirectly benefit by using their authority to extract rents from the population. For example, administrators can demand fees to conduct regular bureaucratic tasks such as registering lands or persons, or demand bribes to not use their authority to arrest citizens arbitrarily. The president often shields the actions of these elites – whether those actions are to enrich themselves or to repress the population – from other branches of government. This creates a

symbiotic relationship, where both the president and administrators prefer that the coercive state institution remains strong.

To break the cycle of authoritarian rule, external actors (e.g., civil society, the legislature, or the international community) often demand formal constraints on executive power. External actors push for new rules to constrain the coercive state agencies that most strongly executed repressive presidential orders in the past. These formal constraints attempt to do one of two things: (1) limit the executive's control over coercive state institutions, or (2) reduce the size and capacity of these institutions. The first strategy eliminates the president's ability to execute orders unchecked, making the institution accountable to the legislature or a more decentralized tier of government. The second strategy attempts to weaken the agency itself. A weaker, less encompassing agency is not capable of implementing a president's orders; for example, a smaller agency may not have the capacity to rig elections throughout the entire country.<sup>25</sup> This is often done through budget cuts, internal reorganization, or by reducing the scope of the institution's jurisdiction.

Formal change to executive power does not guarantee enforcement of these new rules, however.<sup>26</sup> In situations where those who craft rules are not those with "real" power, or there is a "layering" of new rules atop strong existing institutional arrangements, it is unlikely that the new rules will result in meaningful change.<sup>27</sup> I distinguish between a bureaucracy that has the capacity to comply with new rules and chooses not to and a bureaucracy that does not have the capacity to implement the changes in the first place. I focus on the former: those agencies with the capacity to resist new formal rules. These agencies were likely to have been strong enough to execute repressive presidential orders in the past, and provided an impetus for the new formal rules in the first place.

I contend that bureaucratic elites oppose institutional change when new rules threaten to undermine their interests, including agency influence, organizational culture and personal material benefits.<sup>28</sup> While institutional change is not necessarily designed to directly target bureaucrats, institutional change aimed at limiting executive power is likely to threaten the interests of bureaucratic elites working within strong coercive state agencies. For example, institutional change that aims to reduce the size and capacity of a bureaucracy threatens the agency's scope, resources, and individual personnel.

Under what conditions can we expect bureaucratic elites who oppose institutional change to succeed in resisting enforcement of these new rules? International and domestic actors watch over the implementation of new formal rules, putting bureaucratic elites in a precarious situation if they blatantly ignore new rules. Instead, bureaucracies that are able to focus public attention on what I term a "legitimizing issue" have a greater capacity to resist formal rule change, even in the face of external pressure. By "legitimizing issue," I mean that political elites and the population believe, or can be persuaded, that an agency is the sole provider of solutions to a pressing, national problem. By claiming to serve the legitimizing issue, agencies have more autonomy in determining their internal affairs and can resist interference from outside actors such as the legislature and civil

society.<sup>29</sup> Bureaucratic elites can refer to their unique specialization to deflect demands to change, regardless of whether their actions are directed solely for that purpose. For example, because national security is often viewed as a paramount goal, coercive state institutions have the ability to “sabotage” reforms aimed at their agency by asserting their security role.<sup>30</sup>

### **Kenya and the provincial administration**

Kenya provides an ideal case to explore this theory. Kenya transitioned from one-party rule to multi-party elections in 1991 and adopted a new constitution in 2010. This constitution calls for a massive reduction in executive power, in part through its provisions on the PA. In this section, I first examine how the PA served executives before the passage of the new constitution. I then present evidence about how bureaucratic elites benefited from their authority before discussing the use of internal security as a legitimating issue for the PA.

At first glance the PA seems to function as a country-wide administration and governance system. Before 2010, the PA was a core component of the Kenyan state, performing integral administrative and security tasks. The PA was housed under the Ministry of State for Provincial Administration and Internal Security and tasked with “development coordination over and above the maintenance of law and order”.<sup>31</sup> Local PA officials coordinated central government policies and development programmes by bringing together relevant bureaucrats, funders, and community members. They arbitrated in local affairs ranging from land conflicts to marriage disputes. Additionally, they were in charge of maintaining and coordinating security within their jurisdiction.<sup>32</sup>

The Ministry of the PA, a core ministry within the Office of the President (OP) and directly under the president’s supervision, was the “arm of the executive” intended to serve “the government of the day”.<sup>33</sup> This structure had the necessary (even intended) consequence of making the PA both politicized and powerful. Field administrators within the PA were the president’s representatives at each of Kenya’s six tiers of government,<sup>34</sup> with each tier headed by a centrally appointed administrator that was the chief executive within his jurisdiction. The entire PA comprised direct or indirect presidential appointees. Provincial Commissioners (PCs) and District Commissioners (DCs) were politically appointed by the president. District Officers (DOs), Chiefs, and Assistant Chiefs were appointed by the Ministry’s Permanent Secretary, who himself was a presidential appointee. [Figure 1](#) delineates the PA’s structure.

The PA was a large and well-trained force. PA officers of rank DO and above were part of Kenya’s cadre of trained administrators.<sup>35</sup> Trained administrators were either posted in Nairobi at the headquarters of one of the line ministries, such as the Ministry of Finance, or they worked in the field as a member of the PA. The bulk of these administrators, however, worked within the PA, making it the most powerful bureaucracy in the Kenyan state. I make this claim on the basis of an examination of Administrative Officer Returns which state the

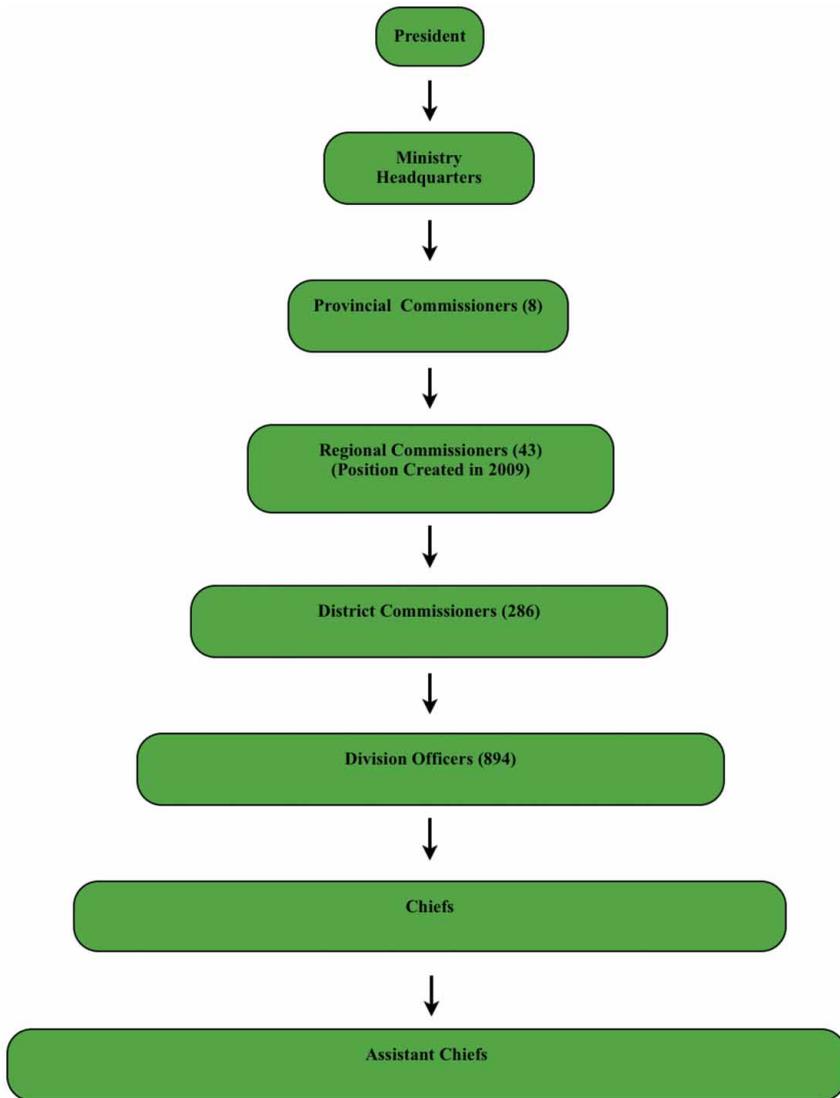


Figure 1. Structure of provincial administration by 2010.

name, rank, and station of all PA field officers. By December 2011, of the 1187 trained administrators 92.5% were deployed to the field as either a DO, DC, or PC. In addition, because the PA was directly under the president, administrators were accountable to him, and their actions were often unchecked by the legislature and the courts.

The politicization and power of this agency made it the predominant tool of executive power since independence. President Kenyatta (1963–1978) used the PA to firmly establish his power, preferring the PA to other state organs largely because of its ability to quickly implement executive orders and ability to suppress opposition movements.<sup>36</sup> He filled its top ranks with family members and co-ethnics, thereby ensuring loyalty. For example, his brother-in-law Mbiyu Koinange served as the first Minister for PA, and Mbiyu's brother Karuga served as a PC for ten years. Kenyatta was in contact with PCs on an almost daily basis and had these administrators channel resources to favoured areas, primarily parts of southern Central Province and those represented by loyal members of parliament (MPs).<sup>37</sup>

The PA was also integral to keeping President Moi (1978–2002) in power, including after the beginning of multi-party rule. Like Kenyatta, Moi ensured the PA's politicization by filling its ranks with co-ethnic Kalenjin administrators.<sup>38</sup> During the pre-democracy period, Moi used the PA's intelligence capabilities to monitor and suppress civil society.<sup>39</sup> Shortly after the end of the Cold War, Western donor countries increased pressure on President Moi to enact political reforms. He formally removed the ban on opposition parties in December 1991, paving the way for the country's transition to multi-party elections.

Despite this transition, in the post-democratization era Kenya has been classified as a competitive authoritarian regime, in large part due to the actions of the PA.<sup>40</sup> Moi deployed the PA to skew the playing field and win re-election in 1992 and 1997. Chiefs and assistant chiefs were often appointed from the youth wing of the ruling party and expected to deliver votes for preferred candidates. DCs denied opposition members the necessary paperwork to file as a candidate and shut down their rallies.<sup>41</sup> PA officers directed the police to intimidate opposition candidates and their supporters. On election day, DCs were responsible for ballot-stuffing at the district-level.<sup>42</sup> In the aftermath of the elections, it is alleged that PA members coordinated ethnic violence in key voting areas. The official Akiwumi Report, which investigated electoral misconduct surrounding the 1992 election, directly implicated the PA, saying its failure to keep order resulted from explicit and implicit orders from above.<sup>43</sup>

In 2002, opposition candidates campaigned on a democratization platform that included abolishing, or at least significantly reforming the PA. Many assumed that the PA would be greatly downsized or eliminated altogether after the PA's unofficial, yet largest, role in suppressing democracy seemingly ended when President Moi stepped down in 2002.<sup>44</sup>

Yet President Mwai Kibaki (2002–2013) also politicized and strengthened the PA. To begin with, Kibaki replaced administrators with his own personal selections. Using Administrative Officer Returns, I find that by December 2003, just one year after taking office, Kibaki had rotated 68 of the 71 DCs from their stations along with the country's eight PCs. Of these administrators, six of the eight PCs, and 25 of the 71 DCs were retired and replaced. Many of the replacements hailed from Kibaki's Kikuyu ethnic group. Kikuyus are Kenya's largest ethnic group, but according to the 2009 census, comprise only 17% of the population.

Of the 113 DCs serving in 2007, an estimated 31 (27%) were Kikuyu. Kikuyu administrators were strategically placed to administer politically salient parts of the country.<sup>45</sup> Nairobi’s past two PCs have been Kikuyu, along with DCs in parts of the country with significant migrant Kikuyu communities such as Coast and Rift Valley Provinces.

Under President Kibaki, the ministry steadily increased in size. Budget estimates from the Ministry of Finance document a 36% increase in funds for the Ministry of PA at the expense of other ministries. The size of the PA expanded from 594 administrators in 2002 to almost 1100 in 2011 (see Figure 2). Moreover, the percentage of trained administrators working within the PA as opposed to line ministries steadily expanded, rising from 89.6% in 2005 to 92.5% in 2011.<sup>46</sup> The majority of Kenya’s trained bureaucrats worked, and still work, within the executive bureaucracy at the expense of Kenya’s other ministries.

Similar to previous leaders, the PA’s chain-of-command structure and its reach throughout the country has benefited President Kibaki and those close to him. Chiefs and assistant chiefs compile information on campaigning and electoral activity and relay this to their superiors. This information gathering is carried out most diligently in constituencies with MPs who are senior government ministers. For example, a senior DC recounted serving in a district with a cabinet minister. During this posting, the DC provided the minister with campaign support

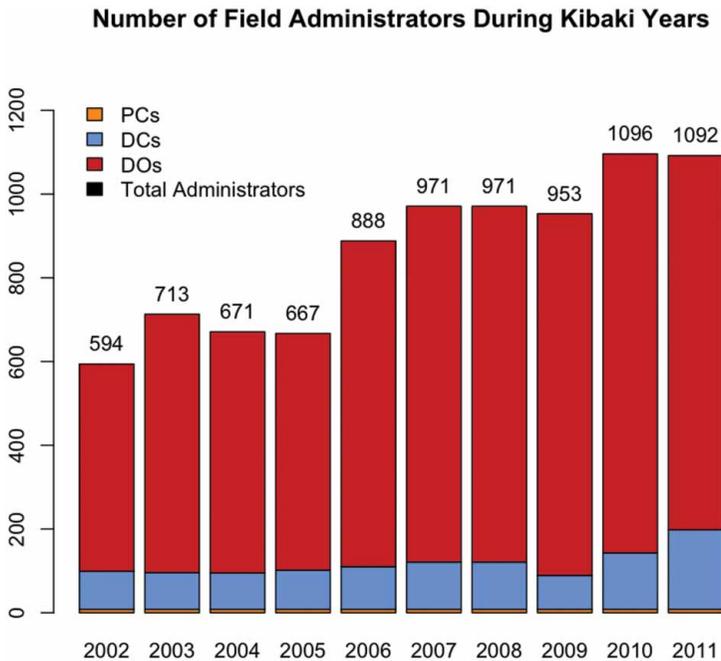


Figure 2. Number of field administrators during Kibaki years.

because “[the minister] can get the opinion of the PC [or] Permanent Secretary [of PA] . . . he can even go to His Excellency [the president] demanding the sacking of a DC who is not working for his interests”.<sup>47</sup> The PA allows for easy mobilization to ensure “popular” support for government policies and politicians; when a minister is scheduled to give a speech, open a new project, or conduct a rally in an area, he routinely contacts the DC who will then contact his subordinates to mobilize residents to attend. These administrators will sometimes forcibly mobilize civilians by loading them onto buses and transporting them to a rally.<sup>48</sup>

More infamously, the PA played a significant role in Kibaki’s 2007 re-election campaign against Luo rival Raila Odinga and his Kalenjin running mate, William Ruto. First, in the run-up to the election, Kikuyu administrators were posted to swing areas, the implication being that Kikuyu administrators would use their authority to help ensure a Kibaki victory.<sup>49</sup> Administrators of Kalenjin and Luo ethnicity were shifted primarily to “safe” districts that supported President Kibaki.<sup>50</sup> Second, there are allegations that the PA played a role in the 2007 post-election violence where an estimated 1000 people were killed, and 200,000 were displaced.<sup>51</sup> Many administrators cited the “political leadership” in explaining why they did not arrest or prosecute known individuals who incited, funded, and promoted the violence.<sup>52</sup>

### **Material benefits for PA officers**

In addition to benefiting presidents, the structure of the PA left considerable power, resources, and prestige to individual field administrators. Numerous administrators described serving as a DC as being a “king” of one’s own district. This is compounded by the system of presidential appointments; accountable only to their superiors, bureaucratic elites can engage in corruption without oversight from actors outside the executive branch. PA officials were notorious for abusing their positions to enrich themselves. For example, a 2001 letter from a local constituent in Kericho District complained that the community had been

terribly terrorized, embarrassed and enslaved by the . . . [C]hief. On several occasions he has been terrorizing the residents with Administrative Police . . . while claiming to be [o]n official duties of arresting [illicit alcohol brew] dealers [and conducting] kangaroo courts to fine culprits. If you don’t part with something he demands, the Administrative Police are on hand to handcuff you and threaten you with severe punishment. You . . . remain in his camp for two days and finally you must pay.<sup>53</sup>

The end of the complaint letter included a list of community residents who had collectively been “robbed” by the chief of 58,000 Kenyan shillings (around US\$700).<sup>54</sup> This corruption continued throughout the Kibaki years, despite his support of the Kenya Governance, Justice, Law and Order Sector Reform (2003). For example, a 2004 letter written by area locals in Kakamega District claimed that the assistant chief

has used his office to kill the community's self-help projects by using the funds and materials collected by people on his personal work. One example is [a local] cattle dip – the foundation was dug, money was collected and people carried stones to the site. The money ended up in his bottomless pockets and he carried the stones to his home and used them in flooring his house . . . [He] used his office to ruin the education of our daughters by making them drop out of school due to early pregnancies. A few examples [of daughters] are as follows . . . .<sup>55</sup>

The higher up the chain of command, the more lucrative was the corruption. DO and DC positions in the central highlands, parts of Rift Valley, and Nairobi, for example, were enriching because of the high value of land in these densely populated areas. Administrators oversaw title deeds and land disputes, allowing them to easily identify and “grab” empty plots. Far-flung semi-arid districts were valued because of their poaching potential, while districts that lie on an international border were lucrative for their smuggling bribes.<sup>56</sup>

While many political elites and citizens criticized the PA for the agency's politicization and corruption, many Kenyans still saw the PA as necessary to protect their security. Similar to other internal security apparatuses,<sup>57</sup> the PA used national security as a legitimating issue to defend their use of power.

Aside from conventional internal security issues such as assault and theft, Kenya suffers from ethnic violence and regional terrorism. There is a near constant amount of low-intensity, inter-community ethnic violence within Kenya. Cattle-raiding by one ethnic community from another has long been prominent among Kenya's pastoral groups. In addition, there have been three waves of election-related violence in the country: in 1992, 1997, and 2007. In the run-up to the 2013 election, the Mombasa Republican Council (MRC) violently advocated for Coast Province's secession; they attacked election officials and made threats against internal migrant communities in the months leading up to the polls, and on election day a group of 200 MRC supporters instigated an attack that killed 13 people. Regarding terrorism, Nairobi was the site of the 1998 US embassy bombings by Al-Qaeda. Especially after 11 September 2001, the US has worked closely with Kenya to thwart Jihadism in the Horn of Africa. Kenya declared war on the Somalia group Al-Shaabab in 2011. Since then, Kenya has been the target of around two dozen low-level grenade attacks, largely a spillover from the conflict in Somalia.<sup>58</sup> More recently, Al-Shaabab militants stormed Westgate Mall – a highly trafficked mall in Nairobi – killing more than 60 people and leaving 200 others wounded.

The PA was tasked with promoting “law and order” and was the most prominent agency responsible for ensuring internal security. While other agencies such as the army and the police are also tasked with maintaining internal security, PA officials were in charge of coordinating and dispatching these other security agencies within their jurisdiction. For instance, the Administrative Police (AP) are required “to assist [any chief or assistant chief] in the exercise of his lawful duties . . . when called upon”.<sup>59</sup> Within the Rift Valley Province, for example, chiefs were ideally assigned between two and five APs for their location.<sup>60</sup>

PA officials publicized their role in providing and maintaining security. All PA officials were required to hold bi-weekly community meetings (*barazas*) within their jurisdiction. Attendance, even in rural areas, reached hundreds. Administrators at all tiers claimed that “security issues” were prominently discussed at their *barazas*, even if their jurisdiction was peaceful and ethnically homogenous.<sup>61</sup> In addition, the ministry tried to publicize their actions in the fight against Al-Shaabab. For example, in July 2012 the ministry engaged in a public shake-up of top PA officials, announcing these new postings at a well-covered press conference. The acting internal security minister described these measures as “aimed at restoring our security . . . we are doing everything possible to ensure the country is safe. We will continue fighting the Al-Shabaab militants”.<sup>62</sup>

As a result of both Kenya’s internal security threats and PA officials publicizing their role, there was a strong association between the PA and internal security among Kenyans. Security in Kenya was and continues to be a national concern. According to the past three Afrobarometer surveys (2005, 2008, 2011), 16–20% of the population cites “crime and security” as one of the top three issues that citizens want the government to address.<sup>63</sup> Despite the role of the PA in electoral violence, many Kenyans rely on the PA to stop local crime and security threats more generally. One resident in Machakos District discussed the role of his chief:

he is supposed to know. [He has] to monitor, who did you meet, what were you discussing, how was it? In case a crime comes up the chief must be blamed because he is supposed to have data on everybody in the location, *his location*.<sup>64</sup>

This association is present among political elites as well. One MP in Central Province discussed his flow of correspondence with his DC; as soon as his constituents began complaining about the disruptive behaviour of local youths which threatened local security, he put pressure on the DC to “fix the situation”.<sup>65</sup>

### **Explaining continuity despite change**

In this section, I provide information about the 2010 constitution, highlighting provisions related to executive power. I then argue that ministry officials who would have been negatively affected by enforcement of the provisions aimed at restructuring the executive bureaucracy have leveraged internal security as a legitimating issue to resist changes to their agency.

The struggle for Kenya’s new constitution began years before 2010. Civil society agitated for a new constitution beginning in the 1990s, but President Moi responded to these protests with force. On the 1997 anniversary of Saba Saba, the 1990 Nairobi protests that demanded democracy, nine civilians were killed as they protested for a new constitution. One week later, thousands of students in Nairobi clashed with police for the same cause. Later that year, parliament passed the Constitution of Kenya Review Act. This act created the Constitution of Kenya Review Commission (CKRC), tasked with gathering comments from

political elites and civilians to produce a draft constitution. Before parliament could consider the CKRC's draft in late 2002, however, President Moi dissolved parliament.

Kenya attempted constitutional reform again under President Kibaki's first term. The National Constitutional Conference finished the "Bomas" draft constitution in early 2004. This draft included provisions that threatened to limit executive power, such as a dual executive and a devolved government structure. In the months that followed, President Kibaki and allies in parliament diluted a number of the provisions that pertained to executive constraints. This revised "Wako" draft<sup>66</sup> was voted on in a national referendum in 2005 and failed, receiving only 42% of the vote.<sup>67</sup>

Constitutional reform was revived in the wake of the 2007 post-election violence. After producing a "Harmonized Draft Constitution" using the earlier CKRC, Bomas, and Wako drafts, the Committee of Experts on Constitutional Review (CoE) collected comments from civilians and political elites to eventually produce a final draft. The most contentious issue for Kenyans was the nature of the executive, with 95% of public comments touching on this subject.<sup>68</sup> To specifically guard against an "imperial presidency", the final draft demanded significant constraints on the president, including devolution of power away from the central government and a restructuring of the PA. This new constitution passed with 68% of the vote in the August 2010 referendum.

The new constitution attempts to reduce executive power by both limiting executive control and by reducing the size and scope of the PA. The constitution includes a requirement that the PA be restructured to "respect the system of devolved government".<sup>69</sup> The CoE argued that the "PA in its current form is incompatible with, and may impede, the implementation of the system of devolution" and had initially opted for the dissolution of the PA completely, recommending in its stead a smaller, less extensive system comprised of locally elected administrators.<sup>70</sup> Additionally, the new constitution stipulates that parliament shall *legislate* any additional provisions regarding Kenya's new governmental structure.<sup>71</sup> This provision takes away the right to structure state institutions from the president, and instead places it with the legislature. The constitution's requirement of legislative approval of presidential appointments<sup>72</sup> also hopes to eliminate the politicization of the country's executive bureaucracy.

The constitution takes security issues away from the executive bureaucracy completely, citing the Kenya Defence Forces, the National Intelligence Service, and the National Police Service as the bodies responsible for national security.<sup>73</sup> The constitution also stipulates that the Administrative Police should now report to the inspector general of police, within the newly created National Police Service Commission, thereby bypassing the PA.<sup>74</sup>

On paper the new constitution also significantly changes the structure of the Kenyan state. Kenya's 2010 constitution creates a more devolved government structure with two distinct tiers of government: the national level and the county level. The constitution abolished the country's eight provinces, replacing them

with 47 counties. Each county is run by a popularly elected governor responsible for executing 14 constitutionally defined functions, including oversight of county agriculture and development projects.<sup>75</sup> To help county governments administer these tasks, they collectively receive at least 15% of government revenue.<sup>76</sup> This devolved government structure is intended to weaken executives by spreading power to 47 local executives (governors) instead of power concentrated solely with the president.

While the constitution devolves significant authority to county governments, it contains provisions which PA elites ultimately relied on to wield minimal change to their bureaucracy. The national government – albeit not the PA – still maintains jurisdiction over police services<sup>77</sup> and national security, defined as “the protection against internal and external threats”.<sup>78</sup> In addition, the constitution places residual functions – all functions not explicitly stated in the constitution – with the national government.<sup>79</sup>

Beginning in 2011, parliament debated legislation related to the PA that seemed to follow the constitution’s spirit of weakening executive power. Early in the transition period, the PA was scrapped entirely and replaced with a new national government administrative system, the National Administration (NA). The NA posts an administrator to each administrative tier of government, absorbing DCs, DOs, chiefs, and assistant chiefs. While Kenya’s new national government structure abolishes the province level (and by definition PCs), the NA creates a new administrative post of County Commissioner (CC) at the county level alongside the new elected county governors. Additionally, parliament attempted to delineate the relationship between the national and country governments. At first, the 2012 County Governments Bill specified that NA officials should report directly to the county governor and not the president. This was to ensure that the NA would “respect the system of devolved government” that the constitution mandated and would weaken executive power as the population envisioned.<sup>80</sup>

Despite these formal changes, I present evidence that ministry elites have taken the lead in shaping the new NA into an entity almost identical to the former PA. Ministry elites have worked with President Kibaki to maintain the PA’s exclusive scope over internal security and used this legitimating issue to push their preferences for a large and centralized agency. While Kenya’s ethnic tensions and geopolitical needs require specialized attention by an administrative body, the new constitution does not give the executive bureaucracy this jurisdiction. Instead, I contend that the ministry has exaggerated the country’s internal security threats and their unique ability in protecting the country to secure their personal interests.

Relying on constitutional provisions that define internal security as a function of the national government, the ministry has continued to use security as a legitimating issue to protect the size and the scope of the new NA. The ministry has resisted enforcing provisions in the new constitution about legislative approval of appointments. In May 2012, Kibaki and the ministry made official the 47 appointments for CCs. This was done without legislative approval, continuing the system of unchecked presidential appointments. The first batch of CCs are

all former administrators from the PA. After the ministry dispatched the first batch of CCs, six civil society organizations filed a petition arguing that this appointment was unconstitutional in part because the president did not consult with Prime Minister Raila Odinga. In June 2012, the High Court declared the appointments unconstitutional, but the ministry ordered CCs to continue reporting to work. In explaining the ministry's position, top officials argue that they do not need approval regarding these appointments as they are a national security matter and strictly under the executive.<sup>81</sup> The former permanent secretary of the PA has appealed the case, and the Court of Appeals has decided in favour of the president and the ministry.

Besides this, senior officials in the ministry created a new administrative position between the county and national level. A secretary within the ministry argued that it is not practical or sustainable for 47 CCs to report directly to the principal secretary.<sup>82</sup> Instead, the country is now divided into six regions. As of the time of writing, each region is run by a former PC, now termed regional coordinators, mirroring the country's former eight provinces and PCs.<sup>83</sup> Figure 3 shows the structure of the NA in practice.

Seemingly in response to internal security threats, NA administrators have continued to stress the need for a centralized internal security apparatus. The organization's centralization and direct accountability to the president as opposed to a fragmented administration system that conforms to the structure of devolved government as ordered by the constitution has been painted as the most efficient way to thwart security threats. A current CC argued that:

[W]e have issues of cohesion as a nation. We are still very fragile. We still have serious ethnic issues that flare up from time to time. It will be hard to control. That is why we went for a unitary system where the president is in charge of security himself. The buck stops with him.<sup>84</sup>

Despite constitutional language mandating that the executive bureaucracy should change to conform with the structure of devolved government, Kenya's executive bureaucracy has worked closely with President Kibaki to maintain a centralized structure contrary to the goals of devolved government. After consultation with ministry officials, President Kibaki vetoed the first version of 2012 County Governments Bill claiming that it was "unconstitutional" because transferring control over the NA to county governors would have amounted to transferring security – a function of the national government – to the county governments. In explaining President Kibaki's actions, a former secretary within the ministry said that:

The president's [veto] was based on the fact that the restructuring of PA is not by Parliament . . . . These officers coordinate security. They are coordinating peace and conflict – [these] remain national government issues – so why do you take them and coordinate at the county? . . . . [W]e are saying – if someone is a federal official, he cannot be summoned by the state. So that is why we are saying if you have a

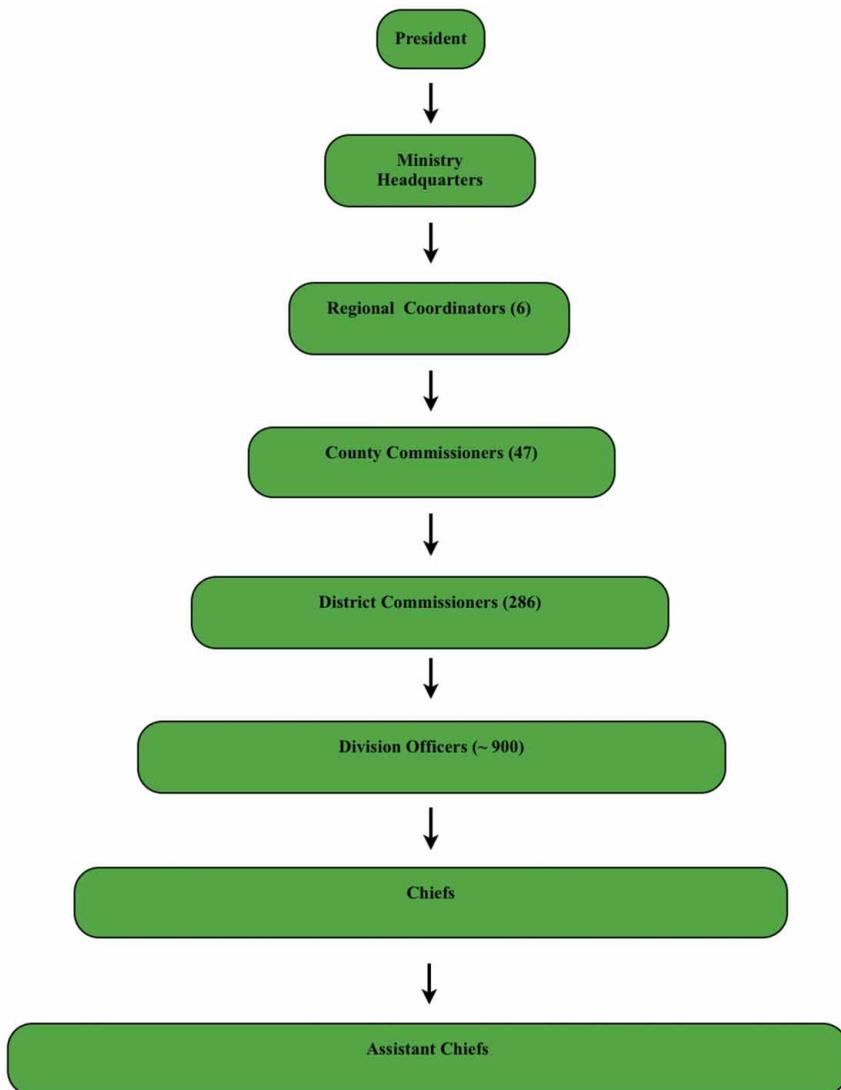


Figure 3. Structure of national administration as of October 2013.

DC who is a member of the national government, the governor cannot wake [him] up and start directing him.<sup>85</sup>

President Kibaki was advised by the ministry to demand legislation in which NA field administrators would continue the direct reporting line to the president through ministry headquarters as opposed to the county governor. Indeed, a

former assistant minister in the ministry claimed that the NA had a unique role in providing internal security:

I would not recommend the governor lead security. We are already experiencing [2013] pre-election violence in certain parts of this country. People are jostling for positions and there is indication that our communities are polarized. Particularly where you have continuous or perennial community conflict over pasture/cattle boundaries and many other things. You get a governor from one community he will be viewed as someone who cannot be fair in arbitration . . . there should be a reporting line [between NA officers] to the cabinet secretary. And the CC will have to deal with central government.<sup>86</sup>

Threats to internal security were not the sole drivers behind the lack of change between the NA and the PA. The PA presumably had the capacity to effectively ensure internal security through a devolved system based at the county level. Instead, many ministry elites were worried about the effects of the devolved structure on their personal interests. Materially, the constitution's proposed changes to the PA would have reduced the corruption potential for administrators. A devolved or weaker executive bureaucracy system in which administrators report to the governor or were accountable locally would have increased monitoring over these officials. For instance, a governor who has an electoral incentive to reduce corruption in his county is likely to check the actions of a rent-seeking CC. A reduction in the responsibilities and authority away from a centralized administration structure to other county officials would result in field administrators having fewer and less lucrative realms to engage in corruption. PA officers in the past demanded rents to comply with administrative tasks they had executive authority to complete. By giving this executive authority to other county officials, PA officers cannot credibly demand a bribe and this potential for corruption transfers to the county officials.

In addition, a running narrative during my interviews with administrators was the concern for their job after implementation. A smaller ministry would entail heavy job cuts. The former assistant minister recounted conversations around the ministry in 2012, saying that: "the current PCs – they don't like it. It will get rid of their jobs".<sup>87</sup> Thus the driving rationale for the NA's similarity to the PA is protection of their material interests; the Ministry's discussion of internal security threats serves more as a legitimating issue than as the real force behind this unwillingness to change.

An alternative explanation to explain the PA's continuity despite formal change is that President Kibaki has spearheaded these reforms to ensure strong executive power, much like other presidents on the sub-continent. He may have benefitted from this maintenance of pre-existing executive power in his last 30 months in office and had no political incentive to intervene and prevent senior ministry officials from maintaining their strong position. One could argue that President Kibaki and bureaucratic elites had aligned incentives to see the creation of a strong and centralized NA. While this is plausible, I could not find evidence that President

Kibaki took a strong role in shaping the executive bureaucracy after 2010. Interviews with senior officials reveal that he was largely absent from the internal planning meetings that have shaped the new NA.<sup>88</sup> Instead, ministry elites claim that he was “hands-off” and has let the ministry handle internal organization issues; the former secretary for PA claimed that since the new constitution was passed, Kibaki has not given any real input and that ministry elites are indeed the driving force behind the NA’s structure.<sup>89</sup>

Rather, a more convincing alternative explanation that is in line with my theory is that ministry elites – many of whom are Kikuyu – have sought the retention of a strong executive bureaucracy to help ensure a Kikuyu electoral victory in 2013. Indeed, given the past turnover of top PA positions upon selection of a president who is from a different ethnic community than the previous president, an electoral victory for the Luo Raila Odinga over the Kikuyu Uhuru Kenyatta would have likely resulted in the dismissal of many Kikuyus and their replacement by Luo officers. This would suggest that senior Kikuyu officers tied their jobs not only to a strong and centralized executive bureaucracy, but to one headed by a co-ethnic, a strong possibility given the role of ethnicity in African neopatrimonial regimes. The evidence I present cannot explicitly address whether the NA rigged the 2013 election, although there is evidence that this recent vote was marred by irregularities and that NA officers were expected to suppress the vote of some ethnic communities.<sup>90</sup>

The retention of the executive bureaucracy’s centralized structure and large size strongly suggests that the NA will continue to be a politicized and powerful body used by future presidents. The NA will enable strong executive power despite formal constraints on executive power under the new constitution. In the weeks following the election, the newly elected governors openly discussed the role the CCs will play in hampering devolution and checking governors’ power.<sup>91</sup> Presidential appointees seem like they will continue, meaning that administrators tie their job to the president and will be more likely to comply with executive orders without oversight from parliament. Thus, even though rule-makers *intended* to curb the powers of the PA as the state institution that carries out executive orders, this institution has continued in an almost identical manner as before.

## Conclusion

I have argued that ministry incentives have shaped the NA into a centralized agency almost identical to the PA that envisages continuing unchecked executive power despite formal constraints embodied in the country’s 2010 constitution. In justifying this continuation, the ministry cites security threats as a need for a strong and centralized organization. While these actions may make Kenya safer, I argue that security is not the underlying driving force of these reforms. Instead, reluctant to give up the material benefits associated with their authority, elites within the executive bureaucracy have exaggerated security threats to justify the continued growth of their institution.

Although it has only been three years since the constitution's ratification, there is little indication that the NA will function differently from the PA. The NA places significant authority in President Kenyatta's hands despite constitutional checks on presidential power and devolution of power. The new constitution that hoped to wipe away the history of a strong authoritarian state – a state built through decades of government repression reaching back to the colonial period – has come up short precisely because of the strength of the state institutions it sought to change.

This analysis shows the inability of formal constraints alone to constrain executive power and highlights the need to re-examine the discernible effects of rule change on state institutions. Formal rules drafted in newly democratized or competitive authoritarian regimes have the potential to be subverted by the agencies that these formal rules hope to restrain in the first place.

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### Notes

1. Gathii, "Popular Authorship and Constitution Making."
2. Prempeh, "Presidents Untamed."
3. van Cranenburgh, "Big Men Rule."
4. I conducted these interviews from September 2011–July 2012 throughout Kenya. The majority were with elites in the Provincial Administration (PA) involved in implementation.
5. Kramon and Posner, "Kenya's New Constitution."
6. Barkan and Mutua, "Turning the Corner in Kenya."
7. Branch, Cheeseman, and Gardner, *Our Turn to Eat*; Throup and Hornsby, *Multi-Party Politics in Kenya*; Widner, *The Rise of a Party-State in Kenya*.
8. See Njagih, "President Uhuru Kenyatta Accused of Love-Hate Signals on Devolution."
9. See Levitsky and Murillo, "Variation in Institutional Strength."
10. Bratton and van de Walle, *Democratic Experiments in Africa*.
11. Ibid.
12. Bratton and van de Walle, "Popular Protest and Political Reform in Africa."
13. For research on hybrid regimes within sub-Saharan Africa, see Lynch and Crawford, "Democratization in Africa 1990–2010."
14. Bratton and Masunungure, "Zimbabwe's Long Agony."
15. Mahoney and Thelen, "A Theory of Gradual Institutional Change."
16. See Bratton and Van de Walle, "Popular Protest and Political Reform in Africa"; Levitsky and Murillo, "Variation in Institutional Strength."

17. Kramon and Posner, "Kenya's New Constitution."
18. Levitsky and Murillo, "Variation in Institutional Strength."
19. Arriola, "Patronage and Political Stability in Africa."
20. Kelly, "Senegal: What Will Turnover Bring?"
21. Slater, *Ordering Power*, 82.
22. See Nwajiaku, "The National Conferences in Benin and Togo Revisited;" Slater and Fenner, "State Power and Staying Power."
23. I use the terms "administrators," "bureaucratic elites," "elites" and "Ministry elites" interchangeably. I use the term "bureaucracy" and "agency" interchangeably.
24. Presidents can ensure cohesion in other ways as well, such as by recruiting co-ethnics. In cases where the regime came to power through a revolution, presidents can staff these coercive institutions with co-revolutionaries. See Levitsky and Way, *Competitive Authoritarianism*.
25. Slater and Fenner, "State Power and Staying Power."
26. Levitsky and Murillo, "Variation in Institutional Strength."
27. Ibid.; and Mahoney and Thelen, "A Theory of Gradual Institutional Change."
28. See Peters, *The Politics of Bureaucracy*.
29. In defining a legitimating issue, I build on Carpenter (2001)'s concept of political legitimacy.
30. Weitzer, *Transforming Settler States*, 20.
31. See the Ministry's website, <http://www.provincialadministration.go.ke/>
32. Ibid.
33. Ibid.
34. In 2009 the Ministry created a new tier of government, the region, in-between the province and district. The regions were necessitated after the 2007–2009 bout of district creation. In the run-up to Kibaki's re-election campaign, he created close to 100 new districts. Because each district is headed by a DC, district creation resulted in many more officers reporting directly to each PC. For example, within Rift Valley, the number of districts, and DCs, increased from 13 in 1991, to more than 60 today.
35. Each new batch of administrators is chosen after an extensive recruitment process involving a written exam and interview process. Once chosen, each cohort undergoes an extensive six-month administration and management course. These administrators differ from the majority of public sector civil servants such as teachers, police officers, and nurses. The Public Service Commission (PSC) determines the recruitment and deployment of these civil servants, whereas trained administrators are managed through the Ministry of Provincial Administration.
36. For example, see Mueller, "Government and Opposition" for the PA's role in suppressing the Kenya People's Union (KPU) in the late 1960s. For more general uses of the PA under Kenyatta, see Widner, *The Rise of a Party-State in Kenya*.
37. Ibid.
38. Lynch, *I Say to You*.
39. Author interviews, Kenya, September 2011–July 2012.
40. Levitsky and Way, *Competitive Authoritarianism*.
41. Throup and Hornsby, *Multi-Party Politics in Kenya*.
42. Ibid.
43. The Waki Commission, "The Waki Report."
44. In fact, the 2002 draft constitution had proposed to abolish the PA. Cottrell and Ghai, "Constitution Making and Democratization in Kenya (2000–2005)."
45. Hassan, "A State of Change."
46. The large increase in personnel is driven in part by the increase in administrative units. See *ibid.*
47. Author interview, Regional Commissioner, Nyanza Province, 12 March 2012.

48. Focus Group, Kibera Residents, Nairobi Province, 5 December 2011.
49. Author interviews, Kenya, September 2011–July 2012.
50. Ibid.
51. Waki Commission, “The Waki Report.”
52. Ibid., 455.
53. Complaint Letter to Kericho DC, 27 April 2001.
54. Ibid.
55. Complaint Letter to Harambee House, 12 January 2004.
56. Author interviews, Kenya, September 2011–July 2012.
57. See Weitzer, *Transforming Settler States*.
58. According to the UN High Commission for Refugees (UNHCR), more than 500,000 refugees have crossed over into Kenya since Somalia’s civil war began in 1991. Kenya’s refugee situation and the porous border more generally have increased national concern about increasing security against potential terrorist attacks.
59. See Administration Police Act, part 3.
60. Author interview, DO, Rift Valley, 30 January 2012.
61. Author interviews, Kenya, September 2011–July 2012.
62. Momanyi, “Garissa Attacks Inspire Major Shake-Up.”
63. I used the question that asked: “In your opinion, what are the most important problems facing this country that government should address?” Respondents could give up to three answers. I aggregated the three responses and divided by the number of survey respondents. To put this statistic into perspective, in the past three rounds, crime and security was one of the top five most-cited concerns (and was the second highest concern in 2008). The other four most-cited concerns were food shortage/famine, education, health, and economic matters (for which I aggregated unemployment, poverty/destitution, wages/income/salaries, and management of economy).
64. Author interview, Resident, Machakos District, September 2011–July 2012. Emphasis in original.
65. Author interviews, Kenya, September 2011–July 2012.
66. This draft was named after Amos Wako, the attorney general who helped write many of the amendments.
67. See Cottrell and Ghai, “Constitution Making and Democratization in Kenya (2000–2005)”; and Kramon and Posner, “Kenya’s New Constitution.”
68. Committee of Experts on Constitutional Review, *Final Report of the Committee of Experts on Constitutional Review*.
69. Kenya Constitution, art. 262.
70. Ibid.
71. Ibid., art. 255.
72. Ibid., art. 132.
73. Ibid., art. 239.
74. Ibid., art. 234.
75. Ibid., art. 186.
76. Ibid., art. 202.
77. Ibid., Fourth Schedule.
78. Ibid., art. 238.
79. Ibid., art. 186.
80. Shindu, “House and Executive Clash Over County Law.”
81. Author interviews, Kenya, September 2011–July 2012.
82. The new constitution changed the title “permanent secretary” to “principal secretary.”
83. Ombati, “County Police Commanders Summoned to Nairobi.”
84. Author interview, County Commissioner, 10 July 2012.
85. Author interview, Ministry of PA Secretary, Nairobi Kenya, 17 July 2012.

86. Author interview, Assistant Minister of PA, Nairobi Kenya, 27 February 2012.
87. Ibid.
88. Author interviews, Kenya, September 2011–July 2012.
89. Author interview, Secretary for PA, 17 July 2012.
90. For discussion of the voting irregularities, see Gettleman, “Voting Irregularities in Kenya Election.” For the role of the NA in suppressing votes, see Rugene and Gekara, “CORD Alleges Plot to Rig Poll.”
91. Sugow, “Governors, County Commissioners Row Intensifies.”

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