Continuity Despite Change: Kenya’s New Constitution and Unchanging Executive Power

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Abstract

What explains the continuation of strong executive power despite formal constraints on presidents? I stress the incentives of elites working within the state agencies that execute presidential power. These elites benefit materially from their authority and thus have incentives to defy formal constraints placed on their agency. To evaluate this claim, I examine Kenya’s 2010 constitution. This document 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 functions, 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’ attempt to protect their material interests. This article, then, contributes to the fields of democratization and regime change by showing that formal rule change is insufficient in the face of entrenched authoritarian bureaucracies with strong incentives to their maintain pre-existing interests.

Keywords: constitution, Kenya, executive power, bureaucracy, competitive authoritarianism, institutional strength.

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1 Introduction

Since the third-wave of democratization in the early 1990s, more than twenty-five countries in sub-Saharan Africa have radically amended their existing constitution or adopted a new one. These new constitutions represent a symbolic turn towards democracy and initiate formal measures to break from their authoritarian pasts. Indeed, many of these constitutions explicitly aim to reduce executive power; before democratization, “big man” presidents wielded control over state resources and patronage without accountability to the legislature, judiciary or civil society. However, more than two decades after the beginning of democratization, enforcement of formal constraints is weak and many African executives continue to wield strong executive power. What explains this continuation of strong executive power despite democratization and the adoption of formal constraints on their power?

In this article, I examine why formal rule changes have failed to constrain executive power 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. Unchanged from the days of authoritarian rule, these agencies continue to help contemporary presidents extend their reach across the country through undemocratic means. Bureaucratic elites benefit materially from the continued authority of their institution. When these elites can leverage a legitimating issue and their agency’s unique role in providing it, such as the need for security from internal threats, they can succeed in resisting new rules and foiling meaningful change.

To illustrate this theoretical point I analyze Kenya’s 2010 constitution using over 50 interviews and never-before utilized archival material. This document has been described as having the “potential to transform Kenyan politics” because it places significant formal constraints on Kenya’s “imperial president.” Yet, I present evidence that Kenya’s new constitution will not limit executive power as originally intended because underlying state institutions – foremost among them...
being the executive bureaucracy – continue to provide the president with tools to undermine further 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. To limit executive powers, 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 as an implementer of executive prerogative. In understanding this continuity despite a new constitution, I find strong evidence that Ministry 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 their material benefits and strong executive power.

This article intends to contribute to our understanding of current Kenyan politics. Uhuru Kenyatta became the country’s fourth president on March 4 2013, after a close and bitterly-fought election against Raila Odinga. Uhuru’s presidency, however, is already marred by his upcoming trial at the International Criminal Court (ICC) for his alleged involvement in the 2007 post-election violence. As Kenya enters a new political era, many look to the constitution as a way to constrain executive power and prevent further destabilizing violence.

More broadly, the stalling of democratization among many third-wave countries leads us to re-evaluate the role of institutional design in regime change. The enforcement of formal rules in former authoritarian countries has been weak. While existing research has focused on the inability of weak institutions to enforce change, the argument I present makes us reconsider how the strength of state institutions can lead to non-enforcement through a different mechanism – resis-
tance. In this way, this paper contributes to the studies on regime durability, democratization, and institutional change.

This paper proceeds as follows. I review the persistence of strong executive power despite democratization. I next 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 on the executive bureaucracy.

2 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 public service. In return, bureaucratic elites followed an executive’s orders, bypassing formal institutional channels. After the end of the Cold War, however, Western donors began to tie foreign aid to economic and political reforms. Indeed, as part of the third-wave of democratization, between 1989-1991, 21 African countries adopted political reforms aimed at increasing political competition.

These countries simultaneously adopted formal rules to constrain their presidents, such as term limits and agenda setting rules. New constitutions have aimed to limit a president’s control over state institutions. Despite these formal changes, however, executive power is still strong. Since 1990, Africa’s average Polity IV executive constraints measure has only seen a modest increase. Figure 1 demonstrates the region’s stalled transition to democracy.

Instead of further democratization and a reduction in executive power over time, there has been a rise in competitive authoritarianism as a hybrid regime type among third-wave democratizers.
In these regimes, presidents use their executive power over the media, government institutions, and state resources to stack the deck in their favor during elections and prolong their rule, often in direct conflict with provisions in the country’s new democratic constitution. This strong executive power has had devastating effects for democratization on the sub-continent. For example, facing a hotly-contested run-off in 2008, President Robert Mugabe ordered a violent government suppression of the opposition, killing more than 100 opposition supporters, injuring thousands, and displacing up to 200,000.¹³

What explains the continuation of strong executive power despite formal constraints? Existing explanations focus on how presidents resist complying with formal constraints, leading to more gradual institutional change than new rules originally intended.¹⁴ Presidents across the developing world often adopt “window-dressing institutions” as a response to international demands or civilian protests without intention to enforce these changes.¹⁵ For example, although Gabon’s 1991 constitution created a variety of checks and balances, President Omar Bongo not only disassembled many of these institutions soon after ratification, but he increased repression of civil society by banning strikes and demonstrations.¹⁶ While most sub-Saharan countries have imposed term limits for presidents, in the 11 countries where executives have attempted to alter the constitution to allow for a third term, almost two-thirds have succeeded.¹⁷

Other explanations focus on the weakness of other actors to check the president. Weakly enforced constraints may be the unintended result of actors who create formal rules, but lack the capacity or incentives to make them binding.¹⁸ For example, many presidents co-opt government and opposition leaders.¹⁹ By silencing these figures through material inducements, traditional veto players have less incentive to enforce parchment institutions. 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 4x4 vehicles – cleared his petition.²⁰

A major limitation of existing research, however, is that it fails to incorporate an understanding
of the administrators working within the agencies that wield executive power. Presidential action underlies the continuation of strong executive power, however this explanation is not sufficient to explain the perpetuation of strong executive power – executives “can not do their own dirty work” and they need state agencies “to execute their commands.” Indeed, many leaders would like to exercise strong executive power, yet not all do. In explaining variation in the enforcement of executive constraints, I build off past scholarship that recognizes the causal force that bureaucratic elites have on regime trajectories. Because executive power is sustained only if administrators execute the president’s commands, I analyze the incentives and capacities of state bureaucracies to build a more complete understanding of the continuation of strong executive power despite formal constraints.

3 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 how strong the state agencies that execute his orders are. I define strength on the basis of an agency’s organizational coherence and efficacy to carry out tasks, administer programs, and implement its decisions across the country. A president at the helm of strong coercive state agencies – such as the army, the executive bureaucracy, and the internal security apparatus – can direct administrators to execute his will throughout the country. Indeed, under both the neopatri-monial authoritarian regimes of the past and the competitive authoritarian regimes of the present, strong coercive state agencies have carried out repressive tactics to help a president maintain political power, such as silencing political opponents and repressing on civil society.

To help guarantee that administrators within these agencies comply with orders to repress, the president often ensures that elites benefit materially from their position. These government jobs are often well paid and stable. Moreover, a president allows these bureaucratic elites to indirectly benefit from their position. Elites can use the authority stemming from their position 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.\textsuperscript{25} 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 the continuation of the coercive state institution.

This equilibrium is jolted when external actors demand changes. To break the cycle of authoritarian rule, external actors (e.g., civil society, the legislature, and the international community) often demand formal constraints on executive power. External actors are likely to push new rules that 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; for example, the president cannot order coercive state institutions to repress if they are accountable to the legislature or decentralized to another 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.\textsuperscript{26} This is often done through budget cuts, internal reorganization or reducing the scope of the institution.

Formal institutional change to limit executive power does not guarantee enforcement of these new rules.\textsuperscript{27} 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.\textsuperscript{28} As such, 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 – agencies with the capacity to resist new formal rules as they were likely to have been strong enough to execute
repressive presidential orders, and an impetus for the formal rules in the first place.

I contend that bureaucratic elites oppose institutional change when new rules threaten to undermine their interests. Bureaucratic elites have a range of interests including agency influence, organizational culture and personal material benefits. Elites that estimate the expected effect of institutional change on their interests to be negative will oppose these changes. While institutional change is not predisposed to negatively affect bureaucrats, institutional change aimed at limiting executive power is likely to dampen the interests of bureaucratic elites working within strong coercive state agencies. For example, institutional change that aims to reduce the size and capacity of the bureaucracy promises to limit the agency’s scope, resources, and personnel.

Under what conditions can we expect bureaucratic elites who oppose institutional change to succeed in resisting enforcement of these new rules? Especially within former authoritarian countries, 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. I posit that bureaucracies with scope over a legitimating issue have the ability to resist formal rule change even in the face of external pressure. Legitimating issues are compelling, national dilemmas within the agency’s scope. When political elites and the population believe that the agency is the sole provider of solutions to a pressing, national problem, the agency can resist interference from outside actors such as the legislature and civil society. By claiming to serve the legitimating issue, agencies have more autonomy in determining internal affairs. Bureaucratic elites can refer to their unique specialization and intimate knowledge of the issue to deflect demands to change, regardless of whether or not 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.
4 Kenya & 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 to executive power in part through its provisions on the Provincial Administration (PA). In this section, I first examine how the PA helped executive power before passage of the new constitution. I also present evidence about how bureaucratic elites benefitted from their authority. I then discuss internal security as a legitimating issue for the PA.

4.1 Executive Power through 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.”32 PA officials coordinated central government policies and development programs 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.33

This bureaucracy, however, was directly under the control of the president, allowing for its politicization and power. The Ministry was within the Office of the President (OP) and was the “arm of the executive” intended to serve “the government of the day.”34 Field administrators within the PA were the president’s representatives at each of Kenya’s six tiers of government,35 with each tier headed by a centrally-appointed administrator that was the chief executive within his jurisdiction. The entire PA was comprised of 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 2 delineates the PA’s structure.

[Figure 2 about here.]

The PA was a large and well-trained force. PA officers of rank DO and above are a part of Kenya’s cadre of trained administrators. Trained administrators are either posted in Nairobi at the headquarters of one of the more than 35 line ministries such as the Ministry of Finance or Water where they complete administrative, budgeting and management tasks, or they work 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 names, rank, and station of all 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 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 regime, preferring the PA to other state organs largely because of its ability to quickly implement executive orders and to bypass parliament and the judiciary. He filled its top ranks with family members and co-ethnics, ensuring their loyalty to him. 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 favored areas, primarily parts of southern Central Province and those represented by loyal Members of Parliament (MPs).

The PA was also integral to keeping President Moi (1978-2002) in power, even after the beginning of multi-party rule. Like Kenyatta, Moi ensured the PA’s politicization by filling its ranks with his own co-ethnics, Kalenjin administrators. During the pre-democracy period, Moi used
the PA to punish recalcitrant MPs, while also using the PA’s intelligence capabilities to monitor civil society.\textsuperscript{40} Shortly after the end of the Cold War, Western donor countries increased pressure on President Moi to enact political reforms and by December 1991, Moi formally removed the ban on opposition parties, paving the way for the country’s transition to multi-party elections.

Despite this transition, Kenya in the post-democratization era has been classified as a competitive authoritarian regime, in large part due to the actions of the PA.\textsuperscript{41} 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 often would deny opposition members the necessary paperwork to file as a candidate and shut down their rallies.\textsuperscript{42} They would direct the police to intimidate opposition candidates and their supporters. On election day, DCs were responsible for ballot-stuffing at the district-level.\textsuperscript{43} 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 for not keeping order because of explicit and implicit orders from above.\textsuperscript{44}

In 2002, opposition candidates campaigned on a platform of democratization that included abolishing, or at least greatly reforming, the PA. Many assumed that the PA would be greatly downsized or be eliminated altogether as the PA’s unofficial, yet largest role in suppressing democracy seemingly ended when President Moi stepped down in 2002.\textsuperscript{45}

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, Kibaki 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 these replacements hail from Kibaki’s Kikuyu ethnic group. Kikuyu’s 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 administrators were strategically placed to administer politically salient parts of the country. Nairobi’s past two PCs have been Kikuyu, along with DCs in parts of the country with significant migrant Kikuyu communities such as within Coast and Rift Valley Provinces.

Under President Kibaki’s, the Ministry steadily increased in size. Approved Recurrent Budget Estimates document a 36% increase in funds at the expense of other offices in OP, including staffing in line ministries. Figure 3 documents PA spending since Kibaki’s presidency adjusted to 2010 USD. The size of the PA expanded from 594 administrators in 2002, to almost 1100 in 2011 (see Figure 4). 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. While a three percent rise is not alarming, it is clear that the majority of Kenya’s trained bureaucrats worked, and still work within the executive bureaucracy.

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 held by 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 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.” 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 contact his subordinates to mobilize residents to attend. And
if need be, these administrators will forcibly mobilize civilians by loading them onto buses and transporting them to a rally.\textsuperscript{48}

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.\textsuperscript{49} Administrators of Kalenjin and Luo ethnicity were shifted primarily to “safe” districts that supported President Kibaki.\textsuperscript{50} Second, there are allegations that the PA played a role in the 2007 post-election violence where an estimated 1,000 people were killed, and 200,000 were displaced.\textsuperscript{51} Many administrators cited the “political leadership” in explaining why they did not arrest or prosecute known individuals who incited, funded, and promoted the violence.\textsuperscript{52}

### 4.2 Material Benefits for PA Officers

In addition to benefitting presidents, the structure of the PA left considerable power, resources, and prestige to individual field administrators. Numerous administrators described being a DC as “king” of one’s own district. This is compounded by the system of presidential appointments; accountable only to their superiors and ultimately the president, bureaucratic elites can engage in corruption unfettered by 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.
The end of the complaint letter included a list of community residents that had been “robbed” by the Chief in question of 58000 Kenyan Shillings collectively (around 700 USD). This corruption continued throughout the Kibaki years, despite his passage 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 ....

Higher up in the chain of command, the corruption was more lucrative. DO and DC positions in the central highlands, parts of Rift Valley and around Nairobi, for example, were especially 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.

4.3 Internal Security: A Legitimating Issue

While many political elites and citizens criticize the PA for the agency’s politicization and corruption, many Kenyans still see the PA as necessary to protect their security. Similar to other internal security apparatuses, the PA uses national security as a legitimating issue to shape their agency.

Kenya’s security issues stem from ethnic violence and Islamist terrorism. There exists a constant amount of low-intensity, inter-community ethnic violence within Kenya, predominately among pastoral communities. Cattle-rustling, or cattle-raiding by one ethnic community or clan of another, has long been prominent among Kenya’s pastoral groups. In addition, there have been
election was ultimately peaceful, there were attacks against election officials and threats against di-
asporsa communities in the months leading up to the polls. Regarding Islamist threats, Nairobi was
the site of the 1998 U.S. embassy bombings by Al-Qaeda. Especially after September 11, 2001,
the United States has worked closely with Kenya to thwart Islamist Jihadism in the Horn of Africa.
Kenya declared war on the Somalia Islamist group Al-Shaabab in 2011, and since then, Kenya has
been the target of around two dozen low-level grenade attacks. This war is largely a spill-over
of the conflict in Somalia. Since Somalia’s civil war began in 1991, many Somalis have crossed
over into Kenya as refugees. According to the UNHCR website, the Daadab refugee camps (Ifo,
Dagahaley, Hagadera) in Garissa County hold an estimated 500,000, making it the largest refugee
camp in the world.

The PA was the most prominent agency with jurisdiction over internal security threats. The PA
was tasked with promoting “law and order” and as the Ministry’s name suggests, was responsible
for ensuring internal security. While other agencies are also tasked with maintaining internal se-
curity, PA officials were in charge of coordinating and dispatching these other security agencies
within their jurisdiction. The Administrative Police Act (2003) requires these security officers “to
assist [any chief or sub-chief] in the exercise of his lawful duties ... when called upon”\textsuperscript{56} Within
Rift Valley Province, for example, chiefs were ideally assigned between 2-5 APs depending on the
size of their jurisdiction and past insecurity.\textsuperscript{57}

PA officials publicized their role in providing and maintaining security. All PA officials were
required to hold bi-weekly \textit{barazas} – or community meetings – within their jurisdiction where
attendance in even rural areas can reach into the hundreds. Administrators at all tiers claimed that
“security issues” were always prominently discussed at their \textit{barazas}, even within peaceful and
homogenous jurisdictions.\textsuperscript{58} Additionally, 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 association between the PA and internal security was strong 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.\(^5\) Despite the role of the PA in electoral
violence, many Kenyans rely on the PA to stop security threats. One rural 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 on the location, his location.”\(^6\) This association
is present among political elites as well. One MP in Central Province discussed his current string of
correspondences with his DC; as soon as his constituents began complaining about the disruptive
behavior of local youths, he put pressure on the DC to “fix the situation.”\(^6\)

5 Explaining Continuity Despite Change

In this section, I first 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 the issue of internal security to resist changes to their agency.

5.1 Kenya’s 2010 Constitution

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 7-year anniversary of Saba Saba (meaning July 7) – the date of the 1990 Nairobi protests
that demanded democracy – nine civilians were killed as they protested for a new constitution.
One week later on July 14, 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 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 amendments that pertained to executive constraints. This revised “Wako” Draft was voted on in the 2005 referendum, and failed receiving only 42% of the vote.\textsuperscript{62}

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 constitution. The most contentious issue for Kenyans was the nature of the executive, with 95% of comments touching on this subject.\textsuperscript{63} 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 August 2010.

On paper, the new constitution significantly changes the workings and structure of government. Kenya’s 2010 constitution created two distinct tiers of government: the national-level and the county-level. The constitution abolished the country’s eight provinces; Kenya now has 47 counties. Each county is run by a popularly-elected governor responsible for executing 14 constitutionally-defined functions, including county trade development and regulation, county agriculture and county planning and development.\textsuperscript{64} To help the counties administer their tasks, they collectively receive 15% of government revenue.\textsuperscript{65} While many core functions were delegated to the county-level, Kenyans still need significant interaction with the national government. The constitution tasks the national government with 35 functions including security and police services.\textsuperscript{66}
The new constitution attempted to reduce executive power by both limiting executive control and by reducing the size and scope of the PA. The constitution states that the PA needed to be restructured to “respect the system of devolved government.” The CoE argued that the “Provincial Administration 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 and less extensive system comprised of locally-elected administrators. The constitution stipulated that the Administrative Police should report to the newly-created National Police Service Commission, bypassing the PA. Indeed, 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. Additionally, the new constitution stipulated that parliament shall legislate any additional provisions regarding Kenya’s new governmental structure. This provision took away the right to structure state institutions from the president and the agency itself, and instead placed it with the legislature. The constitution’s requirement of legislative approval of presidential appointments also promised to eliminate the politicization of the country’s executive bureaucracy.

Beginning in 2011, parliament debated legislation related to the PA that seemed to follow the constitution’s spirit of weakening executive power. Early within 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 sub-national 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 necessitated a new administrative post of County Commissioner (CC) at the county-level. 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 weaken executive power as the population envisioned.
5.2 The “New” NA

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 use this legitimating issue to push their preferences for a large and centralized agency. While Kenya’s ethnic tensions and geopolitical needs require specialized attention to security by an administrative body, the constitution did 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.

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 gazetted and made official the 47 appointments for CCs. This was done without legislative approval, continuing the system of unchecked presidential appointments. I find that 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.74 The former Permanent Secretary has appealed the case, and the Court of Appeals has not made a decision.

Besides this, senior officials in the Ministry are strongly considering the creation of a new administrative position in-between the county and national-level to be created in the near future. A Secretary within the Ministry argued that it is not practical or sustainable for 47 CCs to report directly to the Principal Secretary,75 and instead, the country will be divided into 6-10 regions or
areas with an appointed commissioner for each, mirroring the country’s former eight provinces and PCs. As one senior administrator put it, the changes are “just semantics.” Figure 5 shows the structure of the NA.

[Figure 5 about here.]

Seemingly in response to internal security threats, administrators have continued to stress the need of a centralized body. 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 flair 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.77

Despite constitutional language mandating that the executive bureaucracy change to conform with the structure of devolved government, Kenya’s executive bureaucracy has worked closely with President Kibaki to maintains a centralized structure in conflict with devolved government. After consultation with Ministry officials, President Kibaki rejected 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 DC who is a member of the national government, the governor cannot wake [him] up and start directing him.78
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 perineal 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.79

While security has been used as a legitimating issue, I argue that it was not the sole driver behind the lack of change. The PA presumably has the capacity to effectively ensure internal security through a devolved system. Instead, I argue that many Ministry elites were worried about the effects of the devolved structure on their personal interests. 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 are accountable locally would have increased monitoring over these officials. One CC described having the NA report to the governor as “wishful thinking,” a power play by MPs (many of whom were poised to run for a gubernatorial seat) to ensure that the administration worked for the county leader.80 A reduction in the responsibilities and authority away from a centralized administration structure to the governors and other elected county officials would result in field administrators having fewer and less lucrative realms to engage in corruption. In addition, a running narrative during my interviews with administrators was concern for their job after implementation; a smaller Ministry would heavy entail 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.”

Above I have argued that Ministry elites have defied provisions in Kenya’s 2010 constitution
to ensure a large and centralized executive bureaucracy that continues to protect their interests. An alternative explanation 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. Indeed, 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 is largely absent from the internal planning meetings that have shaped the new NA. Instead, Ministry elites claim that he is “hands-off” and has let the Ministry handle internal organization issues.81

A logical extension of the 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 ethnic turnover in top PA positions upon selection, a Raila defeat over fellow-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. This extension suggests that perhaps non-material incentives are driving these reforms, a strong possibility given the role of ethnicity in African neopatrimonial regimes. The evidence I present cannot explicitly address this extension, however, as time progresses, scholarship may be better equipped to address this issue.

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 their power.82 Presidential
appointees look to continue, meaning that administrators tie their job to the president and will be more likely to comply with his orders. Thus, even though rule-makers intended to curb the powers of the PA, the state institution that carries out executive orders, this institution has continued in an almost identical manner as before.

6 Conclusion

I have argued that Ministry incentives have shaped the NA into a centralized agency almost identical to the PA that looks to continue 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 driver 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 Uhuru’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 pre-independence era – has come up short precisely because of the strength of the state institutions it sought to change.

This analysis, then, uncovers the inability of formal constraints alone to constrain executive power and highlights the need to fundamentally 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.
Notes

1 Gathii, “Popular Authorship and Constitution Making.”
2 Prempeh, “Presidents Untamed.”
3 van Cranenburgh, “‘Big Men Rule.”
5 Barkan & Mutua, “Turning the Corner in Kenya.”
7 See Levitsky and Murillo, “Variation in Institutional Strength.”
8 Bratton & van de Walle, *Democratic Experiments in Africa.*
9 Ibid.
10 Ibid.
11 Bratton & Van de Walle, “Popular Protest and Political Reform in Africa.”
12 For research on hybrid regimes within sub-Saharan Africa, see Lynch & Crawford, “Democratization in Africa 1990 – 2010.”
13 Bratton & Masunungure, “Zimbabwe’s Long Agony.”
14 Mahoney & Thelen “A Theory of Gradual Institutional Change.”
15 See Bratton & Van de Walle, “Popular Protest and Political Reform in Africa”; Levitsky and Murillo, “Variation in Institutional Strength.”
16 See Bratton & Van de Walle, “Popular Protest and Political Reform in Africa”; Levitsky and Murillo, “Variation in Institutional Strength.”
18 Levitsky and Murillo, “Variation in Institutional Strength.”
19 Arriola, “Patronage and Political Stability in Africa.”
21 Slater, *Ordering Power,* 82.
23 I use the terms “administrators,” “bureaucratic elites,” and “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 & Way, *Competitive Authoritarianism.*
25 For example, see Reno, *Corruption and State Politics in Sierra Leone.*
26 Slater & Fenner, “State Power and Staying Power.”
27 Levitsky and Murillo, “Variation in Institutional Strength.”
29 See Peters *The Politics of Bureaucracy.*
30 In defining a legitimating issue, I borrow from Carpenter (2001)’s concept of political legitimacy.
31 Weitzer, *Transforming Settler Communities,* 20.
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.

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.


Ibid.

Lynch, *I Say to You.*

Author interviews, Kenya, September 2011 - July 2012.

Levitsky & Way, *Competitive Authoritarianism.*


Ibid.


In fact, the 2002 draft constitution had proposed to abolish the PA. Cottrell & Ghai, “Constitution Making and Democratization in Kenya (2000 – 2005).”

The large increase in personnel is driven in part by the increase in administrative units. See endnote 34.

Author interviews, Regional Commissioner, Nyanza Province, 12 March 2012.

Focus Group, Kibera Residents, Nairobi Province, 5 December 2011.

Author interviews, Kenya, September 2011 - July 2012.

Ibid.


Ibid, 455.


See Weitzer, *Transforming Settler States.*

See Administration Police Act, part 3.

Author interviews, DO, Rift Valley, 30 Jan 2012.

Author interviews, Kenya, September 2011 - July 2012.

I used the questions 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 questions and divided by the number of survey respondents. To put this statistic in perspective, in the past three rounds, crime and security was one of the top five most-cited concerns (and was the 2nd 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).

60 Author interviews, Resident, Machakos District, September 2011 - July 2012.
61 Author interviews, Kenya, September 2011 - July 2012.
64 Kenya Constitution, art. 186.
66 Kenya Constitution, art. 185.
67 Kenya Constitution, art. 262, §17.
68 Ibid.
69 Kenya Constitution, art. 234.
70 Kenya Constitution, art. 239.
71 Kenya Constitution, art. 255.
72 Kenya Constitution, art. 132, §2.
73 Alphonce Shindu, “House and Executive Clash Over County Law.” The Daily Nation (Nairobi) 28 February 2012.
74 Author interviews, Kenya, September 2011 - July 2012.
75 The new constitution changed the title “Permanent Secretary” to “Principal Secretary.”
76 Author interviews, Senior DC, 16 January 2012.
77 Author interviews, County Commissioner, 10 July 2012.
78 Author interviews, Ministry of PA Secretary, Nairobi Kenya, 17 July 2012.
79 Author interviews, Assistant Minister of PA, Nairobi Kenya, 27 February 2012.
80 Author interviews, County Commissioner, 10 July 2012.
81 Author interviews, Kenya, September 2011 - July 2012.
References


Figure 1: Polity IV Executive Constraints Score, Sub-Saharan Africa.
Figure 2: Structure of Provincial Administration by 2010.
Figure 3: Approved Recurrent Spending on Provincial Administration.
Figure 4: Number of Administrators working within PA.
President

Ministry Headquarters

Area Commissioners (6 - 10)

County Commissioners (47)

District Commissioners (286)

Division Officers (~ 900)

Chiefs

Assistant Chiefs

Figure 5: Structure of National Administration as of December 2012.