

Electoral Fraud and the Erosion of Democratic Gains in Kenya¹

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Despite voters' attempts to use elections as mechanisms of accountability, weak institutional environments in emerging democracies do not always succeed at providing its supply. Indeed, a number of institutional deficiencies affect the lives of citizens in developing countries, from poor rule of law and ineffective courts to corrupt police and security forces. As we have seen in previous chapters, in equilibrium democratic elections should allow citizens to improve government performance by allowing them to sanction errant leaders and vote for politicians that promise to enact reforms.

In this chapter, I examine a specific institutional failure with respect to Kenya's 2007 election that severely vitiated the accountability mechanism elections are designed to promote. The Electoral Commission of Kenya (ECK), responsible for running the elections and counting the votes, proved open to manipulation and subsequently the presidential results announced were fraudulent. This sparked protest and violence that spread throughout the country and did not abate until the signing of the National Accord in late February 2008 under the auspices of former UN Secretary General Kofi Annan, who had been trying to mediate the conflict between President Kibaki's PNU and opposition challenger Raila Odinga's ODM since January. By the end of the violence, nearly 1,500 people had died, countless others injured, and nearly 700,000 displaced from their homes (Commission to Investigate Post-Election Violence 2008; South Consulting 2009). Since the signing of the agreement, Kenya has been ruled by a power-sharing arrangement that kept President Kibaki in office and created the position of Prime Minister for Odinga, with their respective parties joining a Grand Coalition. Fraud and post-election violence

produced the most concentrated threat to stability in Kenya's post-colonial history and severely eroded the democratic gains of the previous two decades.

Shadows of doubt fell over the ECK's handling of the elections when electoral commissioners, including Chairman Samuel Kivuitu, announced contradictory or incomplete results from some areas, and blamed the delay of results on local officials who could not be reached (Bengali 2008). Protests began on December 29th even before Kivuitu certified Kibaki's re-election on December 30th, as observers witnessing the chaotic count lodged allegations of rigging (European Union 2008; Independent Review Commission 2008; Kenyans for Peace, Truth, and Justice 2008). As a result of its incompetent management of elections following recommendation from the Independent Review Commission (IREC) tasked with investigating the elections as part of the National Accord, Parliament disbanded the ECK and has sought further electoral reform ahead of 2012.

Why and how did fraud occur in Kenya's 2007 election? This chapter explores the causes and political consequences of electoral fraud, a subject vastly under-studied in political science yet important towards understanding threats to democratic accountability and consolidation. The next chapter focuses on fraud's outcomes: protest and violence. The question of electoral management in emerging democracies is important for a number of reasons. First, if elections are a *sine qua non* for democracy, their free and fair conduct is necessary to allow citizens to use elections as mechanisms of accountability. Fraud thus compounds the social choice problems that already exist in aggregating preferences into outcomes that arise from extant challenges in translating vote shares into seat shares (Lehouq 2002), and may allow poorly performing politicians to retain office. This certainly took place with the "re-election" of Kibaki given his performance ratings discussed in Chapter 3, and as this chapter will demonstrate, levels of fraud

were of the magnitude to alter who should have won. Second, the international community devotes significant resources and large amounts of money to support electoral management, monitoring missions, and donors frequently require free and fair elections as a prerequisite for development assistance (Bjornlund 2004; Chand 1997; Laakso 2002). However, whether this assistance actually produces better elections is another question and international actors may in fact support electoral malpractice through their ill-conceived and executed involvement in such practices, as was the case with the US's role in Kenya's election with respect to the USAID/IRI/UCSD exit poll. International actors also face numerous difficulties in trying to settle post-fraud electoral disputes, a subject to which I turn in the last chapter. Third, rigging is a near permanent feature in democratizing countries and frequently results in post-election protest and violence that produce local and regional crises, of the kind seen recently in Kenya, Ethiopia, Nigeria, Iran, Afghanistan, and Zimbabwe. Therefore understanding its cause will hold important implications for local, regional, and international security.

Artificially altering votes may not always prove necessary, successful, or attractive. However, because fraud is hard to prove definitively, it appeals to incumbents who face potentially losing power and opposition members who might gain it. Fraud thus results from a credible commitment problem between the government and opposition: the uncertainty of outcomes in the shadow of elections pushes both sides to cheat, especially in light of institutional deficiencies such as an independent and efficacious electoral commission that provides a third party check against malfeasance. But given differences in relative power, the strategies and mechanisms of rigging available to incumbents and challengers are not the same. Incumbents will try and manipulate the legal framework of elections as well as the count, which they do by controlling at least a majority share in the legislature and electoral commission. Opposition

members are able to rig as well, even lacking the incumbent's state-controlled resources, by performing local versions of retail fraud, including ballot stuffing or burning especially in areas of strong candidate support. These differences lead to observable implications that I explore on the methods and locations of rigging.

In Kenya specifically, the predicted closeness of the presidential race before the election may have contributed to an irresistible temptation on all sides – both the government/Party of National Unity (PNU) and the main opposition/Orange Democratic Movement (ODM) — to participate in fraud.² Given a close race, how do incumbents and challengers alter results? Although the credibility of allegations made by any side in a contest is obviously suspect, statistical techniques and standards of evidence can be used to demonstrate the presence and extent of fraud.

In this chapter, I first review background to electoral fraud, including the various methodologies that scholars have used to measure it. Second, I present a theory with incumbents and opposition parties that shows how fraud arises from credible commitment problems of close elections and weak third-party institutional enforcement. The theory produces a number of observable implications on the existence, methods and locations of rigging. Next, I explore the observable implications of the model using two novel quantitative datasets that I have constructed, including the exit poll and elections forensics. I supplement the theoretical predictions and forensic analysis with a qualitative narrative that describes the actors involved and their strategies and methods of rigging. Last, I conclude the chapter by discussing the implications of international observers and the role they played in Kenya's election, when the

² The final and well-publicized public opinion poll released by the Steadman Group declared the race “too close to call,” two weeks before the election, with ODM garnering 45% of the intended vote while PNU registered 43% (Cheeseman 2008). This narrow margin suggested the importance of turnout and left the contest essentially a toss-up. See also Figure 1.

European Union proved instrumental in raising the issue of fraud whereas the US helped secure Kibaki's victory, before turning to the subject of the post-election crisis in the next chapter.

I. Electoral Fraud

Following Riker (1982), Lehoucq (2003) terms voting as a classic social choice problem of how best to translate preferences into outcomes as people cast ballots and votes are transposed into seat shares. Unsurprisingly, the rules structuring voting are likely to remain controversial to at least some actors, whether over guidelines of how seats are allocated (for example, winner-take-all versus proportional representation) or more specific aspects of management and vote counting (for example, whether legislatures or commissions ought to certify winners). But egregious electoral mismanagement and manipulation go further and compound these problems by blocking the preferences of citizens and producing destabilizing outcomes like protest and violence, as well as undermining democratic institutions and threatening elections as means of allowing principals to properly sanction agents. As a result, electoral fraud emasculates efforts at democratization and reverses democratic gains by threatening to curtail political and economic progress.

Despite its deleterious effects, fraud remains under-studied in political science, especially in relationship to the voting that precedes it and its damaging post-election effects. Academic perspectives on the causes and nature of rigging remain under-theorized and data collection from "third wave" democracies such as those in Africa proves difficult. Moreover, it is not always clear what fraud is or how to measure it. "Fraud" could include artificial attempts to bloat registries, infractions with respect to electoral laws, classic "stuffing and burning" of ballots, vote-buying, or undue influence over electoral commissions (Alvarez, Hall, and Hyde 2008; Lehoucq 2003).

African elections in particular have not been examined closely, even though many countries produce dubious contests. Allegations of fraud are consistently lodged against Robert Mugabe in successive electoral rounds in Zimbabwe (Makumbe 2002, 2006), as well as in Ethiopia (Abbink 2006; Harbeson 2005) and Nigeria (Berber and Scacco 2009; Collier and Vicente 2008; Herskovits 2007). It took eighteen months of adjudication following Nigeria's problematic election in 2007 to arrive at a final court decision that left President Yar'Adua in office (Ige and Usigbe 2008).

The difficulty in studying fraud has produced variegated methodologies to measure its nature and extent. One standard technique is to study allegations of fraud made to legislatures and courts. Lehoucq and Molina's (2002) eminent study of fraud in Costa Rica draws upon petitions lodged against parties to Congress in the period 1901-1946. This helps them to create a unique dataset of 1,300 individual accusations geographically and longitudinally dispersed to test hypotheses about the impact of social structure and institutions on the incidence and nature of electoral malpractice. This technique has also proved important for the study of US elections in the 19th century (Bensel 2003).

But appeals to legislative or judicial institutions by contestants in many countries are not likely to prove fruitful, as legislatures are partisan and courts lack autonomy and capacity. As Harbeson (2005) notes in Ethiopia, nearly 300 opposition petitions were made following problems in many of Ethiopia's constituencies in 2005. The commission tossed out about 165 of the cases, and investigated the rest. Subsequently, they decided to rerun 31 races, 20 of which produced new winners, all of which favored the ruling party. While courts have decided disputes in local parliamentary cases in Kenya, appealing to the courts would not have been an effective strategy for the opposition ODM as judges had been mostly staffed by PNU, were perceived as

biased, and showed continued failure to act swiftly in adjudication of any cases, least of all election petitions.

The presence of international observers may also contribute towards quantifying the level and impact of artificial vote productions and subtractions. For Armenia's 2003 election, Hyde (2007, 2008) performs a field experiment in which observers are randomly assigned to polling stations. She estimates the effects of international observers by comparing polling stations where observers visited to those where they did not, and finds that international observers reduced fraud by about 6% in the polling stations they frequented during the first round of voting.

Unfortunately, the ECK does not provide polling station level results that would allow the comparison of stations with observers and those without to measure any reductions in rigging from the presence of observers. The European Union—the largest international mission— only visited 752 (of 27,555) polling stations, while the Kenyan Domestic Election Observation Forum (KEDOF) had 17,000 monitors (European Union 2008), but their work was mismanaged and subsequently they failed to publicly release a final report on their activities.

Other scholars have pursued “elections forensics”, or “methods... based on statistical tools and are intended to examine elections after the fact” and meant to “[focus] on the recorded votes, asking whether there are significant anomalies” (Mebane 2008; 162). This focuses specific attention on “outliers” or areas where totals do not accord with assumptions of voting behavior either based on previous results or totals from similar areas. As an example; Myagkov, Ordeshook, and Shaikin (2008, 2009) study county-level vote totals using econometric analysis of outliers to estimate levels of fraud in Russia with data from 1995-2004. They find that party agents may inflate vote totals even when the winner is not in doubt before an election. Ansari, Berman, and Rintoul (2009) use official returns to examine outliers by focusing on previous

turnouts and voting behavior in Iran, comparing results from 2005 to those contested in 2009. They find suspicious turnout scenarios; including those where actual votes exceed registered voters, as well as implausible vote swings towards President Mahmud Ahmadinejad. Below, I utilize specific forensic techniques to measuring fraud in Kenya.

One such forensic technique is the application of “Benford’s Law”, which holds that while digits in a number should occur with equal frequency, experiments show that when asked to generate a series of numbers, human subjects tend to produce patterns to the digits they create (Mebane 2008). Mebane (2008) examines the second to last digit in returns from the various US elections, but finds little evidence of irregularities. When comparing returns from elections in Sweden and Nigeria, Berber and Scacco (2009) find that the digit results from Sweden conform to a distribution that is analogous to the digits having been produced at random in an election without allegations of fraud. In a race with wide-spread accusations, Nigeria’s 2004 election, they find consistent biases in the digits produced, suggesting artificial production of returns. This method is once again difficult to employ in Kenya given that the level at which vote totals were initially recorded—polling stations—are not made public; and would only help locate problem totals but not allow us to quantify them to study whether they matter towards the result.

Specifically, a few prior studies of Kenya’s 2007 election have produced a variety of important insights that motivate the present analysis. Chief among these is the report produced by the Independent Review Commission (IREC). In it, the investigative body enumerates numerous mistakes in the management and operations of the ECK. It finds problems with everything from the voter’s registry to the structure and rules governing the ECK. However, IREC argues that the problem with this election was not about its management alone, but also involved the complicity of the Kenyan public. “Though the ECK is primarily responsible for the

flaws in the 2007 general elections, Kenyan society has long condoned, if not actively connived at, perversion of the electoral process” (IREC 2008: 10). However, their assertion blaming “Kenyan society” is unsubstantiated and unsupported, and Chapters 3-5 of this study present a host of arguments and data that suggest otherwise.

IREC also examines results from 19 of 210 constituencies in which it discovers a wide variety of errors that it attributes to problems of data entry and aggregation. This is a disturbing trend that the commission ascribes to simple math errors, but may also show deliberate malfeasance. Unfortunately, the 19 constituencies they choose to study were not scientifically selected but rather chosen purposively, so results drawn from that sample cannot be projected to the population of constituencies. Therefore, the conclusions of IREC tell us very little about the scope or breadth of fraud for all 210 constituencies, although their findings are troubling.

Other journalistic and qualitative investigations have relayed various aspects to how the counting of ballots took place and why suspicions arose with respect to rigging. Throup (2008) argues that early announcements from ODM strongholds contributed to the expectation that ODM was headed for victory over PNU, even though PNU strongholds were not announced until later. But this of course begs the question of why the ECK held results from PNU strongholds (and my results show this may be consistent with rigging). Other accounts focus precisely on those constituencies that were announced late by the ECK. Bengali (2008) reports that observers inside of the ECK’s headquarters claim that massive systematic fraud happened inside the commission, and that there was false aggregation and subtraction of votes during the certification process. *The Standard on Sunday* (2008) also recounts the activities of various commissioners who added votes to Kibaki’s total in his home region of Central Province after initial results suggested a likely victory for Odinga.

All told, while some anecdotal and qualitative data exists to suggest Kenya's 2007 count was problematic, there has been little forensic investigation into the results; comparisons with independent sources of data; quantification of how much rigging occurred, by whom, and if enough to have affected the winner; and the strategies employed by incumbent and opposition parties.

II. Theory³

Formal models developed to understand bargaining and conflict in international relations (Fearon 1995, 1998; Powell; Lake and Rothchild 1998) shed important light on whether and how sides cheat in elections as well as help to develop a host of observable implications that should hold if the insights of the model work in predicted ways. Crucially, I analogize elections between competing political factions as akin to the lottery that nations play in war. With respect to war, states have some probability of winning or losing and they must consider their relative strength before the lottery and their expected utility for fighting or not fighting. They decide whether to risk war or settle on whatever distribution of power occurs given relative differences in strength prior to war.

Unlike wars, elections in democracies (whether transitioning or consolidated) are not rare or unscheduled events but rather occur frequently, in consistent intervals, and with set timetables or known rules that govern expectations about timing. In a democratic regime, incumbents and at least one opposition party must agree to have elections and in turn abide by certain rules to achieve a fair outcome. Elections are a gamble that all sides competing in it recognize could increase or decrease their post-election relative share of power.

³ Note to WGAPE: I plan to formalize this in the future but wanted to begin by laying out the analogy and logic behind the model here.

Rather than model the decision to hold elections, I will instead assume for simplicity's sake that both political parties agree to a race (other scholars such as Hyde, and Beaulieu and Hyde have studied why parties make the agreement to hold elections). Given that the lottery (election) will occur and therefore either side can lose, parties must calculate their expected utility of losing against their ability to prevent that through perhaps unfair means. The problem of elections, like war, is therefore one of credible commitment: if both sides believe they can win or lose, they have incentives to try and maximize gains relative to losses. Therefore, neither side can credibly commit *not* to cheat.

Two particular variables potentially alleviate or compound this problem. The first is the *perceived closeness of the race*. As the race becomes closer between incumbents and challengers, the marginal cost of fraud falls relative to the loss of power in policy-making in the post-electoral period, so the more likely both sides are to rig. As the race becomes wider between parties, the marginal cost of cheating increases and so they are less likely to rig. Therefore, similar to problems of bargaining in war, the role of information and uncertainty looms large. As reliable polling data becomes wide-spread even in poor countries, parties will be able to better assess their chances of winning.

The second is the existence of an *independent third party* to provide a credible check against results. Models in international relations show that third party agents can be crucial for overcoming commitment problems (Walter 1997; Lake and Rothchild 1998), as neutral actors exogenous to a conflict can better guarantee credibility than disputants. Lacking a third party check on results decreases the marginal cost of fraud further as it decreases the likelihood that parties will be caught or punished. Even if neither parties are responsible for *de jure* electoral management and instead a commission runs and tallies the vote, if this commission lacks

independence than it fails as a third party as any information it conveys regarding the election's is likely to be seen as non-credible.

It therefore seems as though electoral malfeasance should be rather common given the credible commitment problem that arises when parties agree to elections. However, fraud is variable not only across cases but within case and rigging is not a foregone conclusion even given the chance of losing an election. Even though a post-election winner and loser shifts the relative balance of power, that does not mean that either side will necessarily engage in fraud to either increase their share of power or stave off a loss of power. There are three reasons for this. First, problems of information can adjust whether or not incumbents or opposition parties are viable. Parties that perceive themselves to be non-viable are less likely to rig. But parties that believe they are shoo-ins are also less likely to rig since they believe they will win.⁴ Second, fraud can be costly if independent monitors (whether electoral commissions or international observers) locate it and are able to sanction parties who have committed it. Similar to the “audience cost” aspect of international bargaining where citizens may punish bellicose leaders, political supporters may also punish leaders by rejecting undemocratic ways of achieving power. As a corollary, fraud can also prove costly because it produces unintended and violent domestic outcomes such as protest and violence from angry citizens who view the race as illegitimate that one or both parties may want to avoid. Third, the existence and strength of certain democratic institutions may help alleviate the need to cheat. The more post-election policymaking is seen as winner-take-all and majoritarian (like Kenya), the more likely all sides will view losing power in completely negative terms. However, if institutions like proportional representation allow for some level of participation for electoral losers that outweighs what they would gain from rigging,

⁴ Bjornlund, Bratton, and Gibson's story of the 1991 election in Zambia demonstrates this point where Kenneth Kaunda thought he would win and therefore did not rig, but he lost overwhelmingly.

fraud is less likely to appear attractive.⁵ For these reasons, some elections are clean even in highly competitive environments.

A credible commitment model of electoral fraud produces a number of observable implications with respect to the existence, methods, and locations of rigging.

- 1) *As parties perceive races to become closer, the likelihood of rigging increases.*
- 2) *If elections lack an independent third party to manage the election, the likelihood of rigging increases.*
- 3) *If rigging occurs, both parties are likely to rig in their homelands.*
- 4) *If rigging occurs, incumbents are likely to rig at the commission.*

This chapter uses data from Kenya that allows for an initial probe into these observable implications. In the future, I plan a case comparison of the variation in Kenya and Ghana's electoral commission, as well as a large-n cross-national study of commissions and rigging that will allow for more rigorous tests of these propositions.

III. Data

Background to the Election

Before probing these observable implications against various kinds of data, this section provides some background to fraud in Kenya's 2007 general election. While opposition members frequently feared and claimed rigging as former President Daniel arap Moi was returned to office in the first two multi-party elections of 1992 and 1997, a divided opposition against his KANU ticket guaranteed his victory with or without serious electoral malfeasance (Throup and Hornsby 1997; Kanyinga, Okello, and Akech 2010). Successful party turnover occurred in 2002 when

⁵ This argument borrows from Fearon's (1998) insights into the effects that majoritarian or proportional representation have on the likelihood of whether a minority ethnic group rebels.

Mwai Kibaki's NARC coalition defeated KANU and Moi's chosen successor, Uhuru Kenyatta. Given that Moi and KANU bowed out without rigging or protest, observers became convinced that the ECK was indeed capable of running free and fair elections, especially under its Chairman Samuel Kivuitu. But the massive support and projection of victory for Kibaki and his widely popular NARC coalition in 2002 never put that election in doubt. Kibaki took 62% of that vote to Uhuru Kenyatta's 31% (Electoral Commission of Kenya 2002).

The 2007 pre-election period proved much closer and therefore more contentious. Given the closeness of the race and fear that PNU would manipulate the ECK, ODM raised various accusations before election day claiming PNU would attempt to prevent a legitimate ODM victory, in particular, by rigging Raila Odinga out of his Langata parliamentary seat (effectively disqualifying him for the presidency) (*Standard on Sunday* 2008).

Kivuitu's success in 2002 convinced observers and the international community that the 2007 would remain clean. In an October 2007 meeting I had with IRI's country director Kenneth Flottman and USAID's Kenya democracy and governance advisor, Sheryl Stumbras, Stumbras communicated that while USAID's interest in assisting with the USAID/IRI/UCSD exit poll was first as an independent check against the results, she had absolute confidence in Kivuitu's ability to resist pressure from either side. In a statement to the *East African* newspaper ten days before the election, US Ambassador Michael Ranneberger declared that he expected a "free, fair, and transparent" race (Ombuor 2007). However, evidence at this time pointed to the possibility of malfeasance. A few weeks before the polls, Kibaki replaced 19 of 22 commissioners at the ECK. ODM protested loudly and said they were PNU stalwarts, but they could do little.

Although voting itself remained mostly calm and peaceful on the day of the 2007 election, confusion and delay over the announcement of electoral returns by the ECK created a

sense of unease, unrest, and eventually violence. The count began after polls closed on the evening of December 27th, and by the next night (approximately 9:37pm), ECK Chairman Samuel Kivuitu began to communicate potential problems at his press briefing, stating: “I hear there is a communication problem that phone lines have been blocked, even in my office right now I cannot ring out but I can receive.” In early results on the 27th and 28th, Odinga maintained a consistent lead. But results reported in the morning newspapers on the 29th showed that President Mwai Kibaki was closing the gap with Odinga and the race became a toss-up. Moreover, continued and inexplicable delays in the reporting of complete and certified results began to degrade the credibility of the ECK and Kivuitu, and as a result, isolated protests began in Nairobi and elsewhere on the morning of the 29th. By 6pm that night, Kivuitu cut short the reporting of any further ballots and declared that representatives from both parties would participate in an audit of results from all 210 constituencies.

At about the same time, the various media outlets stopped relaying results. This concerned observers both because media outlets had been relaying the official results from the ECK, but also their own results as they reported from the constituency counts. Eventually, the media houses claimed that they had lost of their data from a system error and have never released complete results.⁶ Kivuitu announced that he had received results from 180 constituencies; but as Odinga’s lead diminished to 38,002, ODM continued to assert irregularities. The European Union Observer Mission highlighted specific problems in the constituency totals from Molo and Kieni constituencies, where totals had been crossed out with new numbers inexplicably inserted.

Shortly after 5pm the following day, December 30th, Kivuitu attempted to hold a press conference to announce the final results from remaining constituencies and therefore the

⁶ Kanyinga, Long, and Ndii (2010) study the differences between the KTN (Kenya Television Network) and ECK results and find a number of surprising discrepancies. None of the media houses to this day have released their completed data from the count.

presidential winner. Scuffles between ODM and General Services Unit (GSU) officials broke out, shutting down the press conference. ODM held their own press conference in which they highlighted discrepancies in the presidential count from select constituencies, but at about 5:30pm in an undisclosed location inside of ECK headquarters in Nairobi, Kivuitu announced Kibaki's re-election on the state-run Kenya Broadcasting Corporation (KBC) with a victory of 225,174 votes (see Table 1). Within an hour, KBC broadcast Kibaki's swearing in but many parts of the country had already erupted in protest and violence.

Table 1: 2007 Presidential Election Final ECK Results

	Kibaki	Odinga	Musyoka	Others
Nairobi	313,478 48%	288,922 44%	52,974 8%	1,845 0%
Coast	197,354 33%	353,773 59%	38,881 7%	5,909 1%
North-Eastern	97,263 50%	91,440 47%	4,498 2%	333 0%
Eastern	835,481 50%	83,575 5%	726,782 44%	13,229 1%
Central	1,741,086 97%	34,046 2%	11,702 1%	7,215 0%
Rift Valley	818,445 33%	1,580,880 65%	33,863 1%	12,300 1%
Western	312,300 32%	639,246 66%	6,729 1%	11,417 1%
Nyanza	262,627 17%	1,280,978 82%	4,470 0%	7,160 0%
Total	4,578,034 46%	4,352,860 44%	879,899 9%	59,408 1%

Source: Electoral Commission of Kenya (2008)

Table 1 presents the official ECK results from the election with both percentages and raw vote totals. The table in the Appendix lists those constituencies that were declared “problems” by either or both the ECK and ODM, with reasons given by ODM (as reported in *The Daily*

Nation). The constituencies listed here by the ECK were those declared problematic by Kivuitu on December 29th at 5pm.

Was it Rigged?

The warnings and objections raised by the ECK and ODM are no doubt cause for concern, but I do not restrict my forensic analysis of vote returns to “problem constituencies” alone. Rather, I use statistical techniques to look for a host of systematic discrepancies across all constituencies, focusing on certain outliers. Since accusations made by a political party may be motivated by the desire to appear aggrieved and cheated, I assume that cheating may have occurred in any of Kenya’s 210 constituencies, not just the ones highlighted by ODM. Moreover, even though PNU won the contest (whether fairly or not), that does not mean rigging must be limited to PNU only.

By itself, the admission by the ECK that 62 constituencies (30% of the total 210) incurred challenges in communication and relaying results is startling. The objections raised by ODM (48 constituencies, 23%) are more focused on constituencies where they believed they had evidence to show conflicting figures between various forms or other problems of documentation filled out by ECK officials, to encourage further analysis of those forms and figures produced by the ECK.

a. Exit Poll Evidence

Practitioners of electoral management commonly understand independent data sources to be the best check against actual returns in order to measure and combat fraud (Bjornlund 2004). These can include exit polls or parallel vote tabulations (PVTs). The USAID/IRI/UCSD exit poll conducted by Gibson and Long (2009) provided the only independent and objective check

against results for Kenya’s 2007 election. Although Reuters reported that the Nairobi-based Institute for Education Democracy (IED) had conducted an exit poll (Cawthorne and Kanina 2007), those results have never been confirmed or released. While the ECK declared Kibaki the winner without about 2% of the vote, the exit poll carries an unambiguous win for Odinga of 46.1% to 40.2%, a victory that falls outside of the poll’s margin of error.⁷

Table 2: ECK and Exit Poll Comparison of Odinga and Kibaki results (percentages)

		<i>Total</i>	<i>North-eastern</i>	<i>Nairobi</i>	<i>Rift Valley</i>	<i>Coast</i>	<i>Western</i>	<i>Eastern</i>	<i>Central</i>	<i>Nyanza</i>
<u>Kibaki</u>	ECK	46.4	50.3	47.7	33.5	33.1	32.2	50.3	96.9	16.9
	Exit Poll	40.2	17	33.1	41.2	24.6	24.2	42.5	91.9	14.7
	<i>Difference</i>	6.2	33.3	14.6	-7.7	8.5	8	7.8	5	2.2
<u>Odinga</u>	ECK	44.1	47.2	44	64.7	59.4	65.8	5	1.9	82.3
	Exit Poll	46.1	76	54.6	54.6	67.2	72.7	7.2	2.5	83.4
	<i>Difference</i>	-2	-28.8	-10.6	10.1	-7.8	-6.9	-2.2	-0.6	-1.1
	<i>Margin of error +/-</i>	1.32	9.8	4.31	2.73	4.51	3.99	3.26	3.41	3.5

Source: Gibson and Long (2009).

The exit poll’s national total demonstrates an Odinga victory. I also disaggregate results by province and find important discrepancies across a number of locations, reproduced in Table 2. In seven out of eight provinces, the ECK awards more votes to Kibaki than the exit poll. The differences are not always subtle—while the exit poll gives Odinga a victory in Northeastern province of 76% to Kibaki’s 17%, the ECK declares Kibaki the winner there with 50.3% against Odinga’s 47.2%. Even factoring in sampling error from the poll, this difference is astounding. This accords with Kivuitu’s declaration during the count that many constituency returning officers were hard to reach in Northeastern.

⁷ For more information regarding the design of the poll, see previous chapters and Gibson and Long (2009).

When compared to the exit poll— a more valid and reliable source of data on how Kenyans voted – the ECK results are largely and consistently biased towards Kibaki. Aggregating differences between the official results and the exit poll, I find that Kibaki “gains” 355,843 net votes from the ECK’s tally compared to the exit poll while Odinga “loses” 57,951 net votes; for a total of 413,794 net dubious ballots. Given that Kibaki won by a margin of 255,174 ballots, this result is more than enough to have swung the election. Kibaki also gains more votes in 7 of 8 provinces, whereas Odinga gains more votes in Rift Valley province only (I explain how this might have been the case below).

The electoral rules in Kenya require that the winning presidential candidate receive the most nation-wide votes, in addition to at least 25% of the vote in five of eight provinces. Although the ECK results show that Kibaki met this requirement, the exit poll cannot confirm or deny this given that Kibaki’s totals fall below 25% in Northeastern, Western, and Nyanza, but still within the margin of error. Odinga meets the 25% requirement without question, passing the bar in all provinces except for Central and Eastern.

In total, the exit poll suggests the presence of rigging, in Kibaki’s favor, and to a large enough degree that the ECK declared the wrong winner.

b. Turnout

Suspiciously high voter turnout numbers in the presidential race caused grave concerns that “ballot stuffing” and retail fraud of some form or another may have occurred in candidate strongholds⁸, matching the predictions of the theory that both incumbent and opposition parties will rig locally since the costs of doing so are cheaper relative to other locations.

⁸ This includes Central Province for President Kibaki and the ethnically Luo parts of Nyanza Province for Raila Odinga.

Table 3: 2002 Presidential Turnout

Province	Rank	Percent Turnout ⁹	Standard Deviation ¹⁰
Central	1	67.13	5.5
Rift Valley	2	61.48	7.73
Eastern	3	61.29	6.37
Northeastern	4	58.70	5.93
Western	5	57.41	4.5
Nyanza	6	56.78	8.43
Coast	7	45.41	8.89
Nairobi	8	42.16	3

Source: Electoral Commission of Kenya (2002)

Although it is ultimately difficult to base any arguments about turnout in one election to those in another as turnout is a function of many things, Table 3 provides a few lessons towards thinking about baseline turnout in a non-fraudulent Kenyan election. First, turnout was not generally high in 2002. Central Province, the home region of both the leading candidates Uhuru Kenyatta and Mwai Kibaki, yielded the highest rate at 67%. But not even half of the voters in Nairobi and Coast voted. Second, the standard deviations for turnouts among constituencies in a given province are not large, such that there are not significant differences in turnout between constituencies within a province across provinces in a “normal” (i.e., no fraud) year.

Table 4: 2007 Presidential Turnout

Province	Rank	Percent Turnout	Std. Dev.	Difference between 2007 and 2002 ¹¹
Central	1	83.18	3.47	+16.04
Nyanza	2	77.77	11.59	+21.00
Rift Valley	3	73.78	11.31	+12.29
Eastern	4	71.37	7.96	+10.08

⁹ This is the average percent turnout of constituencies within a province.

¹⁰ This is the standard deviation of constituency turnout within a province.

¹¹ This column subtracts the 2002 from the 2007 turnout percentages, so that positive numbers mean a greater turnout in 2007 whereas negative numbers would suggest lower turnout in 2007.

Western	5	64.14	5.41	+6.73
Northeastern	6	61.40	7.44	+2.70
Nairobi	7	56.88	5.57	+14.72
Coast	8	54.83	9.58	+9.43

Source: Electoral Commission of Kenya (2008)

Looking at the 2007 presidential turnout in Table 4, a number of important dissimilarities from 2002 become apparent. The right column shows that in every province, turnout went up, and by more than 10 percent in five of eight. This is remarkable, although it is perhaps unsurprising that the highest gains were in Nyanza (Odinga’s homeland) and Central (Kibaki’s homeland) provinces. Table 4 also shows larger standard deviations in 2007, suggesting greater variability across constituencies in the same province.

Are high turnouts in Central and Nyanza provinces suggestive of rigging for Kibaki and Odinga? Statistically examining the distribution of turnouts across provinces in 2007 helps to arrive at potentially unrealistically high or low figures. The identities of the main candidates, in addition to the “euphoria” from voters and hard campaigning, should have resulted in generally large turnouts in a candidate’s home region. In those areas, it becomes hard to attribute a large turnout to retail fraud or levels of candidate support, or both. To better form a standard of “suspicious” levels of voting, we need a picture of what turnout might have looked like in an area with high levels of support for a candidate, but without rigging.

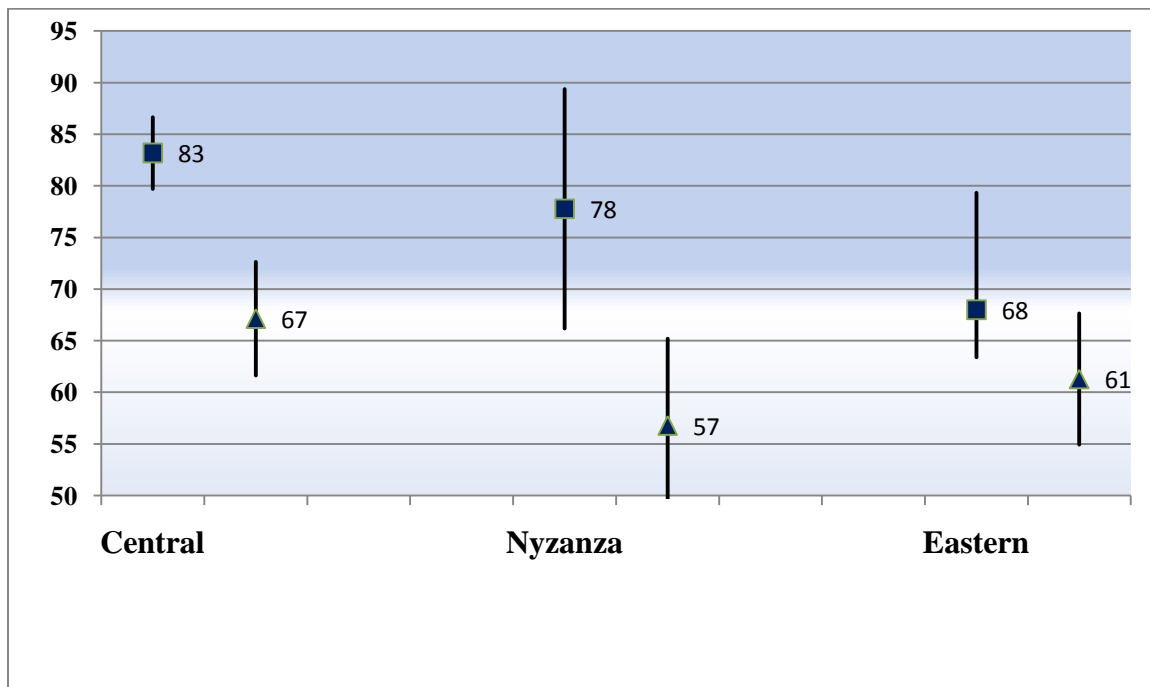
To do so, I compare turnout in Kalonzo Musyoka’s home region of Ukambani in Eastern province to that of Kibaki (Central province) and Odinga (the ethnically Luo parts of Nyanza province). Musyoka ran on the ODM-Kenya ticket and consistently fell in third place behind the two main candidates (Horowitz and Long 2010, see also Figure 3 below). We expect Musyoka voters to be similarly “euphoric” for his candidacy as voters in Odinga and Kibaki’s areas.¹²

¹² Horowitz and Long (2010) find that Musyoka enjoyed nearly as much support in his home area and amongst his co-ethnic Kamba as Odinga and Kibaki did amongst their co-ethnics and home areas.

However, there have not been allegations of rigging against Musyoka or in his home region. This helps to draw a “control” scenario that allows me to measure the mean turnout a candidate should receive in their home area without fraud.

Graph 1 compares turnouts in the candidates’ home regions, with the squares representing 2007 and the triangles 2002 (the bars show standard deviations). Again, all of the turnouts from 2002 in Eastern, Nyanza, and Central are below 70%. The darkly shaded area represents suspicious turnouts above the 70% cut-off, where the totals from Kibaki’s Central and Odinga’s Nyanza mainly reside.

Figure 1: Average Presidential Turnouts for Central, Nyanza, and Eastern Province for 2007 and 2002 (with standard deviations)



Squares show 2007 turnout; triangles show 2002 turnout

From those constituencies in Eastern province that went for Musyoka, the average turnout rate is 67.66%.¹³ Interestingly, this is nearly identical to the turnout rate of 67.14% in Central Province from 2002, the area from which both main candidates, Kibaki and Kenyatta, come from. Again, this suggests that candidates should expect around a 70% turnout in their home regions, where ballots have not been artificially added to totals.

As such, anything above 70% appears at least somewhat suspicious, and anything above 80% should give cause for alarm. All the constituencies from Central fall above the high 70s; all of the constituencies in Nyanza fall above the mid 60s but with an average of 78%. I also suspect that levels below 50% might be quite unrealistic given previous voting patterns as well as the general trend in the 2007 election. Therefore, I argue that votes above 80% and below 50% are suspicious and use that to structure an analysis of turnout.

Next, I aggregate vote totals from turnouts that appear too high or low. In Nairobi, turnout remained low in 2007 as it had in 2002, but only one constituency produced less than 50% turnout: Dagoretti at 47.17%, which represents a potential 1,614 votes subtracted from the minimum cut-off threshold. Coast province produced consistently low turnouts, especially in the urban constituencies of Mombasa. 12,628 suspicious votes are produced from areas that Odinga won resoundingly but turnout was less than 50%. Northeastern and Western did not yield any suspicious turnouts. Eastern province, the homeland of third place candidate Kalonzo Musyoka, results in four constituencies with problematic turnouts. Three of them—South Imenti, Ruyenjes, and Siakago—come from areas with a majority of Kibaki support, however, producing 2,745

¹³ I do not include the entire Eastern province as Musyoka only polled well in concentration of constituencies there, primarily around his home in Ukambani.

votes beyond the 80% threshold.¹⁴ Taken together, the problems in these provinces are small and not suggestive of malpractice.

However, Central province produces a number of potentially unrealistically high turnouts, even given its status as Kibaki's home region. Out of 29 constituencies, only five had turnouts below 80 percent, the lowest Juja at 73.3 percent. The average turnout was 83.18%, the highest for any province (and higher than the 67 percent from 2002, when both leading presidential candidates were from Central). The total votes from suspiciously high turnouts from Central, which all benefited Kibaki, are 60,628.

Moreover, fifteen constituencies in Nyanza—Odinga's home province—posted rates above 80% and a total of 66,897 votes in Odinga favored areas. The contested constituencies in Nyanza (heavily populated by the swing ethnic group Kisii) did not post unrealistic turnouts.

Analyzing turnouts in Rift Valley at the provincial level is hard since the province is not the home region of either candidate and its constituencies were widely contested between them. But there was large variance in the turnouts in Rift Valley, with a mean of 73.78 percent and standard deviation 11.31 percent. Three contested constituencies register turnouts in the 40s, producing 4,071 "too few" votes.¹⁵ In 17 Odinga-favored constituencies, high turnouts produce 22,687 votes. In Kibaki favored constituencies, high turnouts totalled 4,023 ballots. Therefore, constituencies with high turnouts heavily favored a production of votes for Odinga.¹⁶

Taken together, large turnouts in their home provinces helped both candidates and to about the same degree. It is hard to rely on total turnout though as indicative of fraud or rigging, given that the places one would expect high turnouts is where it might be easier for both sides to

¹⁴ The remaining constituency—Masinga—is in a Musyoka territory and had a 45.5% turnout, or 1,050 "too few" votes.

¹⁵ Given their contested nature, neither candidate obviously wins from a subtraction of votes.

¹⁶ This accords with results from the exit poll, where the Rift Valley was the only province where Odinga performed better in the official ECK results than he did in the exit poll.

artificially inflate totals. However, even accepting a relaxed standard for a likely maximum and minimum turnout and setting Musyoka's home region as a control, a number of suspicious ballots are added and subtracted from the main candidates. This gives support to the observable implication that the credible commitment problem drives both main parties to rig locally, but that non-viable parties do not rig. In Kenya, the costs of artificially inflating votes in one's home region is small relative to the costs of doing it elsewhere, and so both incumbents and opposition members will employ resources to take comparative advantage on their home turf. The fact that domestic observers and party agents from all parties tend to come from the regions where they work at polling stations may contribute to this problem since they are not in fact independent or opposition members but instead support their local candidate (Throup 2008).

c. Differences in Presidential and Parliamentary Turnout

An examination of the differences between presidential and parliamentary turnout produces additional anomalous outliers worthy of investigation. Kenya conducts three elections at the same time on the same day, with voters able to cast ballots for local civic councilors, their members of parliament, and the presidency. It is rare for a voter to cast a ballot for his/her preferred presidential candidate and ignore or decline to cast a ballot for his/her preferred MP and councilor.¹⁷ Therefore, variances between the presidential and parliamentary election will arise primarily as a result of differences in the number of spoiled ballots in the two elections. There will be also a small number of abstentions, but overall this difference is so low that it cannot alter the result of the presidential election. Moreover, differences that exist should be randomly distributed and roughly equal across constituencies.

¹⁷ This is confirmed by Gibson and Long's (2009) exit poll, with fewer than 0.1 percent of respondents reporting drop-off between presidential, parliamentary, and civic votes.

Statistics for all the previous multi-party elections conducted since December 1992 support this view.¹⁸ In both 1997 and 2002 the turnouts for the parliamentary and presidential races were almost identical. Even though some made claims of rigging in 1997, there were no marked differences between the total valid votes cast for presidential and the total valid votes cast for parliamentary candidates (except in about 10 constituencies where MPs were elected unopposed).

In 2002, valid votes cast for parliamentary candidates exceeded valid votes cast for presidential candidates in about 48 constituencies by a total of 114,000 votes. This is equivalent to 1.9 percent of the presidential votes in those constituencies. However, two constituencies, Bomachoge and Kasarani, had unusually large differences with 40,000 votes between them or close to one third of the total.¹⁹ If these two outliers are excluded, the variance is 74,000, equivalent to 1.2 percent of the valid votes. 96 constituencies had variance in the other direction, that is, where presidential votes exceeded parliamentary votes. This amounted to 64,000 votes, equivalent to 1.07% (see Table 5).

Table 5: 2002 Presidential Exceeds Parliamentary Turnout

Turnout Threshold²⁰	Votes	As % of Parliamentary	As % of Presidential	Number of Constituencies
Total	64,185	1.07	1.07	96
1 percent	59,723	1.0	1.0	48
2 percent	50,448	0.84	0.84	26
5 percent	34,066	0.57	0.57	11

Source: Electoral Commission of Kenya (2002)

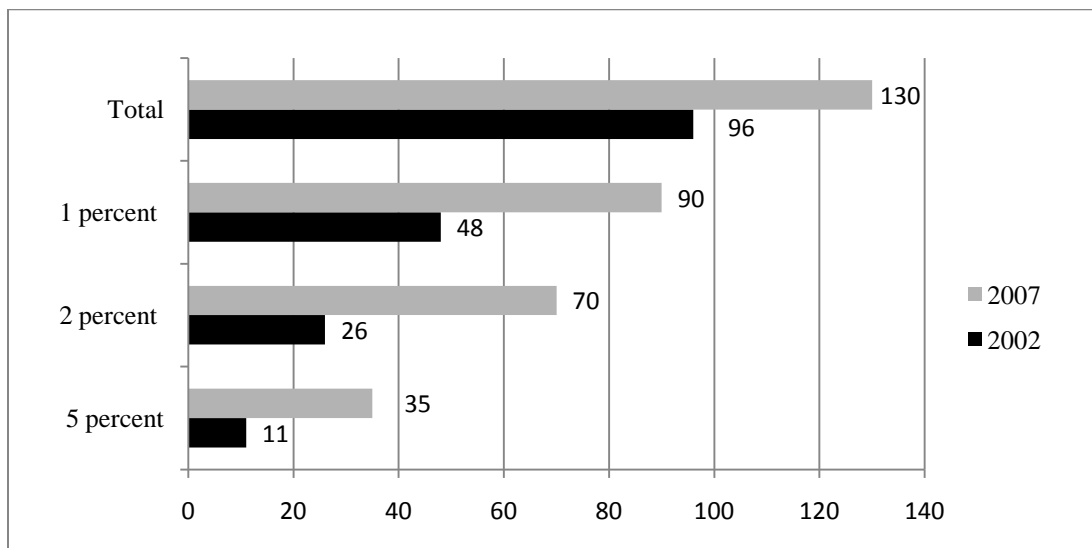
¹⁸ Even though the ruling Kenya African National Union (KANU) ran in some constituencies in 1992 and 1997 unopposed.

¹⁹ This may be suggestive of parliamentary rigging in both of these constituencies.

²⁰ Turnout threshold indicates various standards of differences in turnout between presidential and parliamentary races. That is, the “total” row responds to the total difference between turnouts; the “1 percent” row responds to a difference of 1% between the turnouts, etc.

The variance in both directions almost cancels out leaving about a 10,000-vote difference countrywide, and is consistent with differences in the number of spoiled ballots and a few (but rare) voters who may have purposefully voted for one office and not the other. Regardless of the reason, however, the variance could not swing the presidential election in 2002, where Kibaki won by about 30%. The standard set in the non-fraudulent 2002 election is a difference in turnout of around 1% between the presidential and parliamentary valid vote.

Figure 2: Comparison of Presidential and Parliamentary Turnouts from 2002 and 2007 (with various thresholds)



The difference between valid parliamentary and presidential votes in 2007 is startling when comparing it to this 2002 standard. See Figure 2. Regardless of the threshold chosen (5%, 2%, and 1%), a significant addition of constituencies registered differences in 2007 over 2002. Comparing the two elections, variance of more than 5% occurs in three times as many constituencies in 2007 (35) as in 2002 (11). Variance of 2% or more also occurs with close to three times the frequency, 70 constituencies in 2007 compared to 26 in 2002.

Table 6: 2007 Presidential Exceeds Parliamentary Turnout

Turnout Threshold	Votes	As % of Parliamentary	As % of Presidential	Number of Constituencies
Total	325,131	3.41	3.29	130
1 percent	318,176	3.34	3.22	90
2 percent	304,963	3.2	3.09	70
5 percent	237,572	2.49	2.41	35

Source: Electoral Commission of Kenya (2008)

In 2007, there are as many as 35 constituencies where the variance is above 5%, which translates to over 237,000 votes. These constituencies include instances where the variance is above 10,000 votes. This is startling given that the average number of registered voters across the 210 constituencies is 67,833. Embakassi alone had a variance of over 30,000 votes, which is over 20% of the total votes cast for president in that constituency. There are about 70 constituencies where the variance is above 2%, implausibly implying that many people in these constituencies chose not to vote for an MP. In 2007, the parliamentary election has 25 constituencies where the parliamentary vote exceeded the presidential vote by more than 2%. See Table 7. Looking at raw votes, this disparity produces about 116,000 ballots.

Table 7: 2007 Parliamentary exceeds presidential turnout

Turnout Threshold	Votes	As % of Parliamentary	As % of Presidential	Number of Constituencies
Total	130,547	1.37	1.32	69
1 percent	126,936	1.33	1.29	43
2 percent	115,469	1.21	1.17	25
5 percent	105,727	1.11	1.07	16

Source: Electoral Commission of Kenya (2008)

I aggregate total votes that should be considered anomalous by adding votes where parliamentary turnout exceeded presidential and vice versa. Refer to Tables 6 and 7. The variance between the presidential and parliamentary ballots in the 2007 election is a total of 455,667 votes, or 1.4 percent. Even if I allow for a more realistic 1% difference between

parliamentary and presidential results, there are still 445,112 anomalous votes produced between differences in turnout. Changing this to other standards reveals unrealistic anomalies. With 2 percent, 420,432 errant votes are produced and with 5 percent, 343,299. All of these significantly exceed Kibaki's margin of victory of 225,174. Allowing for a 1 percent difference is the most realistic standard based on prior voting behavior, which still produces 219,938 votes beyond what Kibaki needed to win. *In sum, regardless of any of the standards set, the number of conspicuous votes exceeds Kibaki's winning margin.*

It is important to note that this analysis is restricted to those constituencies where on balance the differences between stuffing, wasting, or even undercounting were great enough to produce abnormal variance in the turnout rates that appear in the official ECK results. There may in fact be a number of constituencies where either stuffing or wasting occurred in both races simultaneously, in the same direction (whether added or subtracted), and roughly to the same degree. For example, if both presidential and parliamentary candidates simultaneously stuffed ballots, the turnouts between the two races would increase together without differences between them. This method of studying differences may therefore *underestimate* the magnitude of rigging.

Table 8: Differences allocated to candidate strongholds

Strongholds	Parliamentary > Presidential	Presidential > Parliamentary	Total	Percent total
Kibaki	65,692	28,905	94,598	27%
Odinga	26,455	2,127	28,582	8%
Musyoka	12,916	31,392	44,308	13%
Contested	151,163	29,620	180,784	52%

Table 9 divides the proportions of suspicious turnout ballots between the candidates. Of the three candidates, Kibaki benefits the most with 27% of those ballots coming from his

stronghold constituencies. Odinga benefits the least with only 8%. At first glance, it appears that Musyoka benefits with 13%. However, in the absence of serious allegations against Musyoka, it seems more likely that these ballots helped Kibaki, who ran second in these constituencies.

Kibaki and Odinga won by such overwhelmingly percentages in their strongholds that any additional votes could only have benefitted them. But as a competitive second place finisher in Musyoka's strongholds, added ballots in those areas could have advantaged Kibaki instead of Musyoka. That places Kibaki's baseline percent anomaly between 27%-40% of the total.

Over half (52%) of the ballots come from contested areas, which makes it impossible to specify exactly how the votes created from these curious turnouts affected the final tally. Table 10 shows that between the three main candidates, the differences in turnout benefited President Kibaki the most, where he generated more than three times the number of dubious ballots than his lead challenger Odinga. Once again, the differences in Musyoka's strongholds are more likely to have benefitted Kibaki. From those strongholds, Kibaki garners 138,906 extra ballots. That means Kibaki would have only had to garner 86,268 of the 180,784 votes (or 48%) from contested areas to create his margin of victory over Odinga.

Incumbents are more likely to have rigged in contested areas because while both parties are able to commit retail fraud in their home regions, rigging in contested areas is more costly and easier to monitor and combat. Retail fraud in these areas is much less likely, and therefore incumbents will find other means to add vote totals in those areas, including manipulating the commission and the final tally of votes at the central counting centre. This accords with the journalistic accounts of suspicious vote additions and subtractions observed inside of the ECK (e.g., Bengali 2008; *The Standard on Sunday 2008*), and many of the contested constituencies were the ones that the ECK reported late, making it possible that PNU and/or ECK agents held

the announcement of these constituencies until late to make up deficiencies in Kibaki's total compared to Odinga's.

IV. Factors That Contributed to Fraud

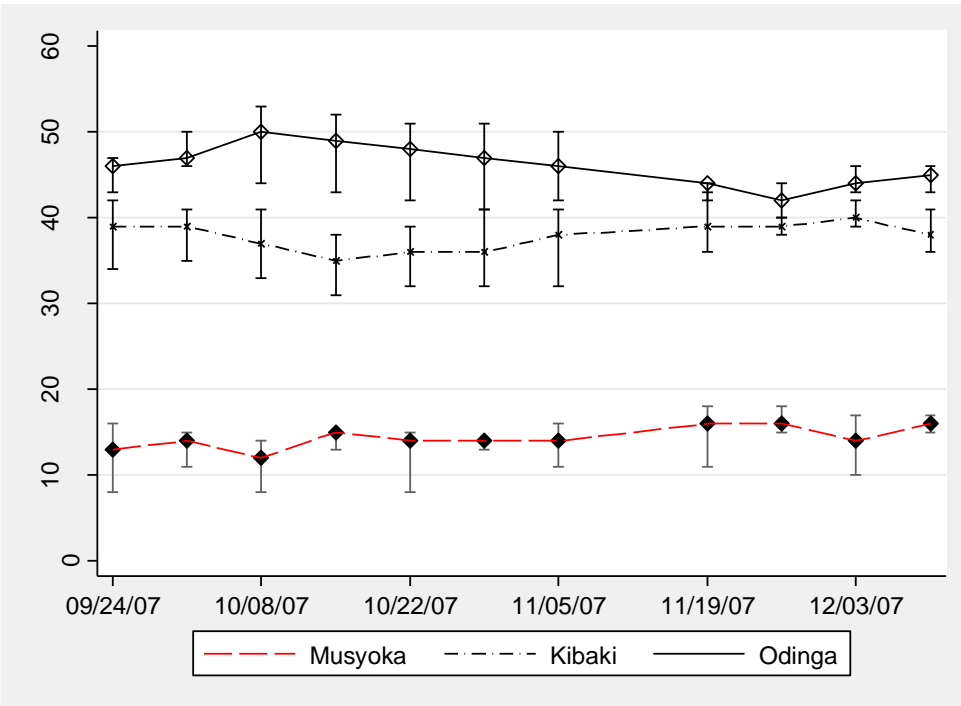
This section tries to match the theoretical predictions of strategies of rigging with the statistical investigation that suggests rigging occurred on both sides and by enough to have announced the wrong winner.

Perceived closeness of the race

In his study of civil wars, Fearon (1998) notes that the more parity that exists between groups the more likely that a relative shift in power will exacerbate credible commitment problems. The same can be said of elections—the more both sides think they may win—the harder for them it is to credibly commit to run a clean race. Closer elections should tempt both sides to cheat—in the shadow of a close race, the marginal cost of cheating is less than the costs of turning out to be on the losing side.

Figure 3 aggregates a number of pre-election polls taken before Kenya's 2007 election. Two consistent patterns are important to note. The first is that Odinga and Kibaki were in a tight race in the few months leading up to the election, and Odinga only lead by a few points going into election day. The second is that Musyoka held a distant third—with no chance of catching up to the two front-runners (Horowitz and Long 2010; Owino and Kiage 2010). Given the wide media coverage of the horse race and how accurately it was perceived by PNU and ODM supports (Horowitz and Long 2010), both sides knew that either could win or lose.

Figure 3: Closeness of Race (aggregated data from published polls)



Source: Horowitz and Long 2010

The closeness of the race no doubt encouraged *both* PNU/Kibaki and ODM/Odinga to rig; lending support to the third observable implication that both incumbents and opposition parties will cheat in their home regions. Given that Kibaki held the incumbency, his coalition had the most to lose from a clean election in which they believed they could lose. Conversely, Odinga was the main challenger and had the most to gain from victory. Given that Musyoka was not viable, rigging would accomplish little for his coalition. Thus, we should expect to see PNU/ODM cheat to try and preserve/change the status quo and their majority/minority status. We should not expect ODM-K to cheat. The statistical evidence from the previous sections suggests that both PNU and ODM committed local retail fraud, that PNU also benefitted from anomalous votes outside of its region and in contested areas, and that ODM-K did not cheat.

Electoral Institutions in Kenya

Despite the significant relative balance of power that can result from elections as new majorities unseat prior ones and gain power, there can be significant costs to doing so if parties are caught. Assuming they are independent and efficacious, agencies such as electoral commissions tasked with managing elections can sanction parties, nullify results, and instigate legal action. If, however, commissions are partisan they are likely to push incumbents to rig providing support for my second observable implication that if rigging takes place it will do so at the level of the commission and by those who control it (in Kenya's case, the incumbent party).

The Electoral Commission of Kenya (ECK) was responsible for managing elections, tallying the votes, and certifying a winner. But while the Constitution of Kenya attempts to establish an independent ECK, it does nothing to guarantee it. Section 41.9 state that “the Commission [ECK] shall not be subject to the direction of any other person or authority.” Subsequent legislation, including the National Assembly and Presidential Elections Act and the Code of Conduct for Members and Staff of the Electoral Commission, requires that “every member of the Commission shall serve impartially and independently and perform the functions of a member in good faith and without fear, favor or prejudice, and without influence from the Government, any public officer, any political party, any candidate participating in an election, or any other person or authority”.

Yet the institutional rules fail to guarantee this independence, as the Constitution allows the president to appoint all of the 22 commissioners of the ECK. The Inter-Party Parliamentary Group (IPPG) agreement of 1997 requires/asks him to seek consultation from opposition party members.²¹ The IPPG specifically states that parties in parliament ought to nominate commissioners relative to their strength in Parliament. However, Kibaki completely ignored this

²¹ Kibaki helped to negotiate the IPPG amid fears that Moi would try and manipulate the Commission to rig the 1997 election.

agreement, replacing 19 of the 22 commissioners with party stalwarts in the month before the 2007 election. After the appointment of these 19, there were only five commissioners of the 22 who had previously administered an election at all (European Union 2008: 15). Worries over this action were balanced by the re-appointment of Chairman Samuel Kivuitu, who enjoyed broad public support and approval given his ability to run a clean election in 2002 in light of fears that President Moi might rig or abrogate results to stay in power or install his anointed successor running on the KANU ticket, Uhuru Kenyatta. Members of the international community and observers also held confidence in Kivuitu.

Besides the 22 commissioners housed at the ECK's secretariat in Nairobi, they had district officers for all 71 districts as well as returning officers for each of the 210 parliamentary constituencies. With 27,555 polling stations for nearly 14 million voters, the ECK hired almost 250,000 polling station staffers. Party agents were also supposed to be present at each polling center, however even the national parties (ODM and PNU) failed to attend voting and the count at each station. Constituency and returning officers were not supposed to work in areas from whence they live in order to guarantee a fair tally, however this was not always guaranteed. The EU missions reports that some returning officers were replaced a few days before the election, without explanation (European Union 2008: 31).

The ECK also issued confusing and contradictory information about the voting process and registration in the lead-up to voting. While anyone who is double registered should by law be barred from voting, the ECK said that anyone could vote as long as they were not registered *more than twice*, an attempt to mollify the political parties but which may have contributed to retail fraud by PNU and ODM supporters. The ECK also failed to establish and implement consistent rules with respect to voters who required assistance, such as the blind, illiterate, or

otherwise disabled; but left much of the discretion up to individual returning officers such that rules were not consistently applied. The High Court is charged with receiving petitions on the presidential and parliamentary races. Should a problem arise and a person or party wish to make a complaint about the process or count, the legal framework for submitting election complaints relied mostly on submitting complaints in court, which have long been perceived to be unfair and are staffed by people appointed by the incumbent PNU.

Despite some safeguards to ensure the fair conduct and tally of elections, there are actually few legal provisions to ensure that this is the case. First, the ECK is not required to release results at the polling station level, only at the constituency level. This means that it is impossible to track any disputes that might take place at polling stations, and doesn't allow for back-checking if problems arise at the constituency level. Moreover, many party agents failed to act as a check against polling station results as they did not attend the counts at the 27,555 polling stations.

Moreover and surprisingly, nothing in the Presidential Elections Act requires that results are posted at polling stations or constituency tallying centers. There is no legal guideline that outlines the procedures that should be followed if any constituency count forms ("Forms 16") are to be changed to make corrections or who is allowed to do so.

The ECK demonstrated a shocking level of incompetence at simply managing the forms that recorded total votes within each constituency. I conducted a forensic audit of all 209 Forms 16²², given that what initially contributed to suspicions were reports from the EU observer mission that results had been altered at the ECK from the constituency counts in Molo and Kieni. Examination and scrutiny of the ECK's Forms 16 are at the crux of arguments for electoral

²² While Kenya has a total of 210 constituencies, the analysis using the 2007 elections data excludes Kamukunji constituency since presidential results were cancelled there.

reform. Forms 16 hold the tallies from all of the polling stations within a constituency, and therefore list the final presidential tallies at the constituency level. A number of problems existed across the submission of these forms.

Not all returning officers used the same form and none of them followed a standard format with candidate names pre-printed in the same order. Therefore, every sheet followed a different method of listing the candidates and their totals. Many of the candidate names written-in by the returning officers were difficult to read, as were the total votes per candidate. This makes tallying more difficult and potentially prone to errors. Two forms had no signature from returning officers²³, six forms were not dated²⁴ and one form listed “December 20th” as the date²⁵, and thirty-nine forms (or 19% of constituencies) never received a stamp from ECK headquarters showing that the Commission ever officially received the results in Nairobi. Some forms also included totals that had been crossed-out and revised, which may have been accurate corrections from prior mistakes made by the returning officers, but which may have also led to confusion and led observers to think that the vote totals had been artificially altered.

Important differences exist between the numbers given on the Forms 16 and the results published by the ECK in final form. Twenty-four constituencies held discrepancies between Kibaki’s totals. In 21 of these constituencies, Kibaki registered more votes in the original tally (on the Form 16) than were ultimately published by the ECK, totalling 30,668 votes. In three, he registered more votes in the final tally than he did on the original forms, totalling 9,296 votes. The total difference in votes is therefore 39,964 and the net difference or “loss” between original Forms 16 and the final ECK results of 21,372.

²³ Ndia and Eldama Ravine; although it is important to recognize that ECK officials in Nairobi could have appended signatures to forms where they were missing and so the existence of a signature is not proof that the returning officer provided it.

²⁴ Laikipia West, Laikipia East, South Mugirango, Bomachoge, Bobasi, Kitutu Masaba.

²⁵ Mukurweini; a date seven days before the election.

Odinga's differences in totals occurred in 27 constituencies (18 overlap with Kibaki's differences in totals). In 21, he registered more votes in the original tally than were ultimately published, totalling 8,257 votes. In six, he registered more votes in the final publication compared to the original tally, for a total of 11,216 votes. The total difference in votes is 19,473 and a net "gain" of 2,959 votes from the original to the final tally.

Aggregating all of the vote differences for the two main candidates between Form 16 results and those published by the ECK *does not* produce enough of a difference to have changed Kibaki's official victory. However, the fact that Kibaki and Odinga "won" and "lost" votes between the two tallies suggests problems at the constituency count, the ECK publication, or both. Because Forms 16 are supposed to represent the final certified tally produced by constituency returning officers, no differences should exist between a Form 16 and what ECK headquarters publish in the final instance assuming the count is correct. Analyzing the differences between the Forms 16 and ECK data does not allow for attribution as to whether sins of omission or commission exist with returning officers and/or ECK officials at headquarters. But the discrepancies produced in 34 (17%) constituencies in this election are alarming and underscore gross incompetence in the management of the tally by the ECK. Moreover, given that these discrepancies are biased in favor of Kibaki, they suggest that at either the constituency or ECK level, electoral institutions were manipulated to help the incumbent party, supporting my fourth observable implication.

V. Discussion and Conclusion

The analysis in this chapters show that parties to a race force a credible commitment problem in running a clean election. Both incumbent and opposition members have local

methods of retail fraud, and incumbents can additionally employ state resources, including undue influence on commissions, to increase their totals further. The perceived closeness of the race compounds this problem, as does a lack of an independent and credible third party actor to manage and tally votes. Fraud is problematic because it vitiates the delegation relationship between citizens and elected leaders, and may unfairly result in the re-election of leaders who voters otherwise want to toss out of office due to poor performance. Therefore, electoral management is a vital component to races in emerging democracies.

Yet in spite of the deficiencies in the ECK, could international observers have played a third party role in allowing a fair and credible race? Evidence suggests while some members of the international community used their observer status to try and force a reexamination of results and the tally, others fought for a quick declaration of victory and transition to a second Kibaki term.

While protests began to rage even before ECK Chairman Kivuitu announced the final result, the European Union's observer mission announced that they had seen ECK officials artificially altering results from Molo and Kieni constituencies, which prevented them from certifying the election as free and fair. At a January 1, 2008 press conference (two days after Kibaki was sworn in), the head of mission Alexander Lamsdorff reported on the various problems in the count that the EU had observed and suggested a forensic audit of returns. On the EU's advice, European powers refrained from congratulating Kibaki and instead were poised for an electoral stalemate between Kibaki and Odinga and a possible recount. If the EU had not raised these issues and objections, it is doubtful that the issue of rigging would have ever been raised or challenged by anyone in the international community.

Unless IRI had released the USAID/IRI/UCSD exit poll, which provided the only independent verification of Kenyan voting intentions.²⁶ Controversially, IRI did not release the results of the poll initially, even though they had done so for the two previous elections where they had conducted exit polls (for the 2002 general elections and the 2005 constitutional referendum).

It remains unclear why IRI decided not to release the data. In the days of the disputed results and initial protest in early January, I learned from IRI's Kenya country director Kenneth Flottman that although he personally wanted to publish the results, IRI did not want a release because they thought that showing an Odinga victory might further contribute to violence. However, the results of the poll had already been leaked by this point and first reported in the media by Alex Halperin of *Slate* in a January 2, 2008 in a piece titled "What's Really Going On in Kenya? And why didn't a U.S.-funded group release its exit-poll data?" Moreover, I had been informed of IRI's decision not to release the results before the protest and violence even began, on the night of the election—after results showing an Odinga victory had been seen by IRI, USAID, UCSD, and Strategic. On the evening of December 27 soon after polls had closed, IRI's program officer Jennifer Flinn notified me that two members of their observer delegation, Connie Newman and Stephanie Blanton, did not want to release but she did not provide an explanation as to why. As the negotiation process between Kibaki and Odinga progressed through January, IRI claimed that they could not publish the poll because its methodology was faulty—even though they had agreed to the methodology formulated by UCSD before the survey was implemented.

²⁶ Contractually, IRI controlled a release of the data in the first six months after the exit poll was conducted and we were unable to publish the results or speak to the media. The contract also specifies that "IRI remains the sole funder, producer, and/or source of the exit poll."

In August 2008, after the violence had abated and a power-sharing agreement between Kibaki and Odinga struck, IRI released a statement endorsing the poll's methodology and its results after three independent consultants audited the poll. This announcement occurred one day before I made a presentation to IREC in Nairobi with Clark Gibson, in which we testified as to the poll's results and threats to validity, none of which would reasonably change the unambiguous finding that Raila Odinga garnered more votes than Mwai Kibaki in Kenya's presidential election.

Journalistic investigations have uncovered perhaps other intentions as to why IRI may have withheld the results. Managers at Strategic confirmed to me that they had relayed early results from the exit poll to Sheryl Stumbras, USAID's democracy and governance advisor in Nairobi, at around 3pm on election day. Rothmyer (2008) reports in the *The Nation* magazine that those results found their way to US Ambassador Michael Ranneberger the same day, and writes: "Ranneberger went on to tell the *Washington Post* on December 31 that 'the US would accept' the announcement that Kibaki had won, and the State Department congratulated Kibaki on his win--a position that it later retracted after the European Union raised concerns about election rigging." Contrary to the EU's recommendation, the US was adamantly opposed to any sort of recount of the votes.

In *The New York Times*, Gettleman and McIntire (2009) investigate Ranneberger's role in formulating US policy in Kenya and his involvement in the exit poll. They quote Flottman as saying that Ranneberger had appeared pro-government both publicly and private in the run-up to the election, and that Ranneberger tried to make IRI release a pre-election poll that showed Kibaki ahead (despite a number of other polls that showed Odinga in the lead). Rothmyer suggests that the Bush Administration favored a Kibaki victory given his assistance in their

policies concerning the “war on terror” in East Africa and the Horn, including the infamous “rendition” policy of which the Kibaki regime is believed to have played host. The Administration though a Kibaki government would produce a more stable and reliable regional ally. Odinga’s strong links to Kenya’s Muslim community and his historical socialist leanings could have made US policymakers nervous (Gettleman and McIntire 2009). Whatever their intentions, IRI’s failure to release the results of the exit poll contributed to further confusion over the results.

Lacking a fair and impartial commission, international observers played an important, if variegated, role in Kenya’s 2007 election. On the one hand, the EU mission pointed to severe problems and raised the likelihood of malfeasance in the eyes of the international community, who eventually played a vital role in forcing the inclusion of Odinga and ODM in government. On the other hand, the US and its agents abrogated their ability to play an independent and third party role in flagging fraud by misusing the one tool at their disposal, and the only independent verification on how Kenyans voted: the exit poll. As Joel Barkan, an American political scientist with decades of experience in Kenya and a member of IRI’s observer mission, commented to Gettleman and McIntire (2009): “With the breakdown of the electoral commission, that is precisely the point when you want an exit poll to be released.”

Despite the Bush Administration’s desire to exclude Odinga from the political process and declare a Kibaki victory, the mediation process led by Kofi Annan created power-sharing and the Kenya National Dialogue and Reconciliation Act. While these reform efforts have led to the disbanding of the ECK and the creation of a new commission, it is yet to be seen whether they will be able to hold a free and fair vote, as Kenyans will never know the true outcome of their 2007 election.

Appendix

Table 9: 2007 Problem Constituencies Identified by the ECK and/or ODM

Province	Constituency	ECK	ODM	Reason given (ODM)
Nairobi	Makadara	Yes	Yes	<i>Conflicting figures</i>
	Kamukunji	Yes	No	
	Starehe	No	Yes	<i>Conflicting figures</i>
Coast	Dagoretti	Yes	No	
	Embakasi	Yes	No	
	Changamwe	Yes	No	
	Kisauni	Yes	No	
	Likoni	Yes	No	
	Mvita	Yes	No	
	Msambwemi	Yes	No	
	Kinango	Yes	Yes	<i>Conflicting figures</i>
	Bahari	Yes	No	
	Magarini	Yes	No	
	Garsen	Yes	No	
	Galole	No	Yes	<i>Conflicting figures</i>
	Voi	No	Yes	<i>Conflicting figures</i>
	Northeastern	Dujis	No	Yes
Lagdera		No	Yes	<i>Conflicting documents</i>
Fafi		Yes	No	
Ijara		Yes	Yes	<i>Conflicting documents</i>
Wajir North		Yes	No	
Wajir West		Yes	Yes	<i>Conflicting documents</i>
Eastern	Mandera East	No	Yes	<i>Conflicting documents</i>
	Isiolo North	Yes	No	
	Isiolo South	Yes	No	
	North Imenti	Yes	No	
	South Imenti	Yes	Yes	<i>Conflicting figures</i>
	Igembe South	No	Yes	<i>No supporting documents</i>
	Igembe North	Yes	Yes	<i>No supporting documents</i>
	Tigania West	Yes	No	
	Tigania East	Yes	No	
	Nithi	Yes	No	
	Tharaka	Yes	Yes	<i>Conflicting figures</i>
	Manyatta	No	Yes	<i>Conflicting figures</i>
	Runyenjes	No	Yes	<i>Conflicting figures</i>
	Mutito	Yes	No	
	Kangundo	Yes	No	
	Kathiani	Yes	No	
	Mwala	Yes	No	
	Mbooni	Yes	No	
	Kilome	Yes	No	
	Makueni	Yes	Yes	<i>Conflicting figures</i>
Central	Kibwezi	Yes	No	
	Kinangop	No	Yes	<i>Conflicting figures</i>

	Ol Kalou	Yes	Yes	<i>Conflicting figures</i>
	Kieni	No	Yes	<i>Conflicting figures</i>
	Mathira	No	Yes	<i>Conflicting figures</i>
	Mwea	No	Yes	<i>Conflicting figures</i>
	Gichigu	No	Yes	<i>Conflicting figures</i>
	Ndia	No	Yes	<i>Conflicting figures</i>
	Mathioya	No	Yes	<i>Conflicting figures</i>
	Kandara	No	Yes	<i>No supporting documents</i>
	Githunguri	No	Yes	<i>Conflicting figures</i>
	Kiambaa	Yes	Yes	<i>Conflicting figures</i>
	Limuru	Yes	No	
	Gatundu South	No	Yes	<i>Conflicting figures</i>
	Juja	No	Yes	<i>Conflicting figures</i>
Rift Valley	Turkana South	Yes	Yes	<i>Conflicting figures</i>
	Turkana Central	Yes	No	
	Kacheliba	Yes	No	
	Kapenguria	Yes	No	
	Baringo East	Yes	No	
	Baringo Central	Yes	No	
	Laikipia West	No	Yes	<i>Conflicting figures</i>
	Laikipia East	Yes	No	
	Naivasha	Yes	Yes	<i>Conflicting figures</i>
	Nakuru Town	Yes	Yes	<i>Conflicting figures</i>
	Molo	Yes	No	
	Rongai	No	Yes	<i>Conflicting figures</i>
	Subukia	No	Yes	<i>Conflicting figures</i>
	Kajiado North	Yes	No	
	Ainamoi	Yes	No	
	Buret	Yes	No	
	Sotik	Yes	No	
Western	Malava	Yes	No	
	Emuhaya	Yes	No	
	Kimilili	Yes	Yes	<i>Conflicting figures</i>
	Webuye	No	Yes	<i>Conflicting figures</i>
	Bumula	No	Yes	<i>Conflicting figures</i>
	Funyula	Yes	No	
Nyanza	Muthoroni	Yes	No	
	Rangwe	Yes	No	
	Ndhiwa	Yes	No	
	Kuria	No	Yes	<i>Conflicting figures</i>
	Bonchari	No	Yes	<i>Conflicting figures</i>
	Nyaribari Masaba	No	Yes	<i>Conflicting figures</i>
	Nyaribari Chache	Yes	No	
	Kitutu Chache	Yes	Yes	<i>Conflicting figures</i>
	South Mugirando	Yes	Yes	<i>Conflicting figures</i>
	Bomachoge	Yes	Yes	<i>Conflicting figures</i>
	Bobasi	Yes	No	
	Kitutu Masaba	No	Yes	<i>Conflicting figures</i>
	West Mugirago	No	Yes	<i>Conflicting figures</i>
	North Mugirago Borabu	No	Yes	<i>Conflicting figures</i>

Source: Press statements by ECK and the Daily Nation