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The Adjudication of Kenya's 2013 Election: Public Perception, Judicial Politics, and Institutional Legitimacy

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The Adjudication of Kenya's 2013 Election:
Public Perception, Judicial Politics, and Institutional Legitimacy

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Spring 2013

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Abstract

This article presents the findings from an exploration of the 2013 Kenya Supreme Court ruling on the election petition. Raila Odinga, who averred that Uhuru Kenyatta was wrongly declared the victor of the election, brought a challenge to the Supreme Court. This article presents an overview of the election and judicial proceedings and then delves deeper into the issues. An application of Judicial Politics theory to the decision suggests that the Supreme Court was unbiased in the process. It is found that Uhuru Kenyatta supporters generally view the Supreme Court and the decision favorably and believe that no credible evidence of fraud exists, while Raila Odinga supporters generally did not view the Supreme Court or its decision favorably and believe that the evidence clearly shows that the election was rigged. The evidence suggests that the decision affected the institutional legitimacy of the Court, but not in a debilitating manner.

Acknowledgements

This project involved an often stressful, dedicated month of investigation into election and judicial politics in Kenya and would not have been possible without the help of a number of people. In particular, I would like to thank Dr. Jama and Dr. Karama for offering advice and guidance on how to approach the topic and what to focus on. I would also like to thank my fellow students at the School for International Training for listening to me endlessly talk about politics, offering suggestions for improvement, and teaching me how to cook, and therefore feed myself for a month. Lastly, I would like to thank all of the wonderful people who were willing to spare some time to talk to a mzungu far from home about elections and directions.

A Note Regarding Confidentiality

No names or identifying characteristics are provided in this paper. Due to the sensitive nature of politics and Kenya's history with political violence, the author determined that those providing information should simply be identified as respondents.

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I. INTRODUCTION

A. Background

Kenya, East Africa's largest economy, gained independence from the British in 1963 and has had a troubled relationship with democracy since. The first two Presidents of Kenya were elected either in a de facto one party state, or later, a legally mandated one party state. This was changed in 1992 when multi-party democracy was introduced, thus building confidence in the true nature of Kenya as a democracy. Post-election violence has marred the image of Kenya through many of its elections, with the death of at least 1,200 people and the displacement of at least 350,000 people following the 2007 elections.¹ On March 4th, 2013, the Kenyan people headed to the polls with the dark cloud of the violent 2007 election hanging over their heads and, due to the new constitution ratified in 2010, newfound confidence in their electoral institutions. The Independent Electoral and Boundaries Commission (IEBC), created after the 2007 debacle with the mandate to run a free, fair and transparent election, declared Uhuru Kenyatta the victor of Kenya's 2013 elections on March 9th. The IEBC ignored the accusations from his principal opponent, Raila Odinga, that the election was flawed, unfair, and rigged.² Kenyatta received 50.07%, of the vote, passing the 50% threshold needed to win the election outright by a mere 8,000 votes out of the total 12 million cast. Odinga appealed to Kenya's recently reformed judiciary and demanded the election be nullified.

Historical context is essential in order to understand the actions and perceptions of Kenya's candidates and citizens. Raila Odinga, the candidate declared to have lost by the IEBC, was the same candidate who ran against Uhuru Kenyatta's predecessor, President Mwai Kibaki, in the 2007 elections. After Kibaki was declared the winner, Odinga, "Called for peaceful mass action from supporters because he did not trust the judiciary to be fair,

¹ Harneit-Sievers, Axel, and Ralph-Michael Peters. "Kenya's 2007 General Election and Its Aftershocks." *Africa Spectrum* 43, no. 1. Horn of Africa (2008): 133-144.

² Gettleman, Jeffrey. "Kenyatta Is Declared the Victor in Kenya, but Opponent Plans to Appeal." *The New York Times*, March 9, 2013, sec. World / Africa.
<http://www.nytimes.com/2013/03/10/world/africa/kenyatta-wins-kenya-presidential-election.html>.

but violence spread across the country. More than 1,200 people were killed.”³ To curb the violence, Kofi Annan was called in and the compromise reached saw Odinga as Prime Minister in a power-sharing structure with Kibaki. Uhuru Kenyatta served in this same administration as a Deputy Prime Minister under the direction of Odinga. The Kenyatta and Odinga families’ involvement in Kenyan politics stretch much further back than just the 2007 elections. Raila Odinga’s father was the first Vice President of Kenya and Uhuru Kenyatta’s father was the first President. Both men also enjoy a massive amount of wealth and prestige in Kenya, with Uhuru Kenyatta being named the 26th richest person in Kenya.⁴ This positioned each as uniquely powerful and influential in the Republic of Kenya.

B. Statement of the Problem

The 2013 Kenyan election was, with very few exceptions, violence free. The contemporary nature of the 2013 Kenya election at the time of this study provided a wealth of data not available to any person who attempts to reproduce the study after more time has passed. As memories fade and opinions change over time, this study provides a crucial look into the opinions of voters directly after the election. The fact that widespread violence did not occur in the 2013 election is often attributed to newfound trust in the reformed judicial branch: this study aims to explore that hypothesis through interviews and fieldwork with Kenyan voters. It is crucial to understand if Kenyans now trust the Supreme Court, and why or why not. If they do trust the Supreme Court, then it is critical to explore its role in keeping the peace. While opinion polls are frequently conducted, these polls do not provide the deeper understanding accorded by interviews and fieldwork.

The decision of the Judiciary and its aftermath had significant ramifications domestically. The Kenyan economy is dependent on foreign investments and tourism, both of which are dependent on an image of Kenya as a stable, non-violent democracy. Following the violence of 2007, the tourism industry dropped 35% and horticulture exports dropped

³ Lough, Richard. “Kenya’s Odinga to File Supreme Court Election Petition on Friday.” *Reuters*. Nairobi, March 14, 2013. <http://news.yahoo.com/kenyas-odinga-file-supreme-court-election-petition-friday-161032308.html>.

⁴ “Uhuru Kenyatta - Africa’s 40 Wealthiest People.” *Forbes*. Accessed April 29, 2013. <http://www.forbes.com/pictures/mmk45fgdm/uhuru-kenyatta/>.

40%.⁵ The economic consequences of violent elections impact the lives of all Kenyans, from the poorest Kenyan to the richest, and have ramifications far beyond simply who runs the government.

Gauging the public's reception of the judicial ruling is critical for future elections in budding democracies. It is of monumental importance to study the peaceful election of 2013 and to understand the basis of the peace, though it is also a goal of this paper to explore whether the Judiciary made a just decision. For what is peace without justice? This study provides an in-depth analysis of the judicial proceedings, it then approaches the proceedings through the lens of the theories of Judicial politics and then it explores the public's reception and perception of the rulings through the utilization of in-person interviews and informal discussions.

C. Objectives

This study aims to:

- Present an overview of the 2013 election proceedings, with a particular focus on judicial proceedings.
- Determine whether the Supreme Court was unbiased.
- Gauge the public's perception of the election and judicial proceedings.
- Discuss the institutional legitimacy of the Supreme Court of Kenya.

D. Research Methodology

This study utilized a multitude of sources in order to produce valid and reliable results. The research falls into two broad categories. The first type of research can be aptly described as document research. The researcher was in Kenya throughout the 2013 Kenyan elections and paid close attention to national newspapers. Articles from these newspapers serve as a crucial means of documenting the occurrences in Kenya in March and April of 2013. Articles were included in this study based upon their relevance to the election and the judicial process. See Appendix A for a list of the newspaper articles used. Document research also included review of Supreme Court documents relating to the case. These documents were easy to select, as they were either directly released by the Supreme

⁵ Mueller, Susanne. "Dying to Win: Elections, Political Violence, and Institutional Decay in Kenya." *Journal of Contemporary African Studies* 29, no. 1 (2011): 99–117.

Court or were filed with the Supreme Court in relation to the election petition. All of the documents were available online through the website of the Supreme Court of Kenya. The articles and books utilized for the literature review were found through the use of Honnold-Mudd Library's academic search engines, a tool available to the author due to his affiliation with Pomona College. Search terms used were, "Kenya elections," "Kenya violence," "Kenya legitimacy," "Judicial legitimacy," and "Supreme Court Public Perception." Scanning the bibliography of articles already selected as relevant also helped identify articles. Document research was done to supplement the second type of research.

The second category of research can be classified as fieldwork. This took the form of informal discussions and in-depth interviews. The informal discussions took place primarily while traversing the city of Nairobi, though discussions were also had while the author was in Mombasa and Taita. These informal discussions were not recorded in any form, rather they built a foundation of knowledge before the in-depth interviews took place. The in-depth interviews did not follow a set questionnaire, rather the researcher broached the topic of the elections and then probed from there. Questions, in order to delve deeply, were based off of what the respondent was saying. However, the researcher did gently steer the conversation towards the topic of the Supreme Court if he sensed it was not going to be discussed.

Six in-depth interviews were conducted for this study. Three were with Uhuru Kenyatta supporters and three with Raila Odinga supporters. The interviews ranged from twenty-five minutes to an hour. The in-depth interviews all occurred between May 2nd and May 7th. The interviews were not recorded, as this could have severely limited the responses given, rather they were documented through the use of a notebook.

Four respondents, three of whom were street artists and one of whom worked at a kiosk, were approached on the street near downtown Nairobi. The respondents were all attempting to sell their goods to the researcher. The researcher agreed to peruse the items on display and then struck up a conversation, in Kiswahili, about whatever topic seemed relevant at the moment. The topic of the elections was not broached on the first encounter. The researcher built up rapport with the respondents, all of whom told him to come back again, presumably in order to attempt further to sell items to the researcher. The researcher always promised to return, and did so within the next day or two, at which

point he brought up the fact that he needed to write a term paper on the elections and was looking for information. The respondents agreed to help and the in-depth interviews progressed from there. The four respondents working in downtown Nairobi were all male, three were in their thirties and the fourth was in his fifties.

The other two respondents were contacted through mutual acquaintances. They were both recommended as good people to talk to about politics, indicating that they may have more developed opinions on politics than the average Kenyan. Each served as a valuable source of information. The interviewer did not perceive a noticeable difference between the respondents who were recommended and the ones who were approached on the street in terms of knowledge about politics, though one of the respondents contacted through a mutual acquaintance turned out to be much less extreme in his views than the other respondents. Both of the respondents from this group were men in their mid-to-late twenties. They were met in locations convenient to them, for one this meant meeting in the interviewer's apartment and for the second, meeting at the home of the respondent.

The interviews and the majority of informal discussions occurred in the capital city of Nairobi. Nairobi is the political and economic hub of Kenya, as well as being its largest city. An estimated 3 million people live in Nairobi. The political importance of Nairobi, in combination with the fact that all tribes and groups are present in the city, located it as the logical choice for a study of this nature.

This methodology presents a multitude of biases and issues that should be acknowledged and discussed. The researcher was a white male from the United States of America. These factors position the researcher to be perceived as both an outsider and as part of the dominant society. The fact that the respondents approached on the streets were all attempting to sell their goods to the researcher also needs to be acknowledged as a possible issue. Another issue is that all of the interview respondents were male. This was a purposeful move on the part of the researcher and was done because of the culture in Kenya, where it is not necessarily considered proper for a male to initiate conversation with an unknown female. The desire to not offend anyone limited the scope of the research. However, through intelligence gathered through informal discussions, the researcher had not been led to believe that a significant gender difference exists in opinions on the matters explored.

II. THE EVENTS AND PROCEEDINGS OF THE 2013 ELECTION IN KENYA

A. The Election

The Kenyan people went to the polls on Monday, March 4th to vote in the 2013 Kenyan election, while the global community watched with baited breath to see whether the election would be just and whether the country could remain peaceful. The IEBC reported voter turnout at 86%, a number that has been both called a testament to the Kenyan electorate and a suspiciously high number.⁶ According to polling, Uhuru Kenyatta of the Jubilee Coalition and Raila Odinga of the Coalition for Reform and Democracy (CORD) were both polling at 43% percent within the two weeks leading up to the election.⁷ The day of the election was uneventful in comparison to the violence of 2007, though “violations of electoral procedures” were documented across the country.⁸ The head of the IEBC promised before the election that results would be out within forty-eight hours, though it quickly became clear that this deadline was not going to be met when the IEBC announced it hoped to have the results out by the following Friday, or possibly even the next Monday.⁹ Calls of irregularities arose from both sides on Election Day and quickly gained steam.

Kenya’s Election Observers Group (ELOG) averred that, “In 15.2 percent of polling places, people who were not registered on the electoral roll were nonetheless allowed to vote, and in 17.6 percent, voter secrecy was violated.”¹⁰ Raila Odinga, who preliminary results showed to be trailing by a significant margin of votes, raised concerns over the counting of the votes and the high number of “spoiled votes,” which numbered over

⁶ “Kenyatta Wins Kenyan Presidency.” *BBC*, March 9, 2013, sec. Africa.

<http://www.bbc.co.uk/news/world-africa-21723488>. It should be noted that Kenya calculates voter turnout as a percentage of registered voters, not eligible voters. This inflates voter turnout. The population of Kenya is approximately 42 million; out of these 42 million, a low estimate of eligible voters would be 20 million. Calculating voter turnout, which was 12.04 million, based on a low estimate of eligible voters, as opposed to the 14 million people registered, would place voter turnout at 60%. A much less impressive number, on par with long standing democracies often criticized for having low turnout, such as the United States of America.

⁷ Ndegwa, Alex. “Raila, Uhuru Neck and Neck in 3 New Polls.” *The Standard*. February 20, 2013. http://www.standardmedia.co.ke/?articleID=2000077694&story_title=Kenya-Raila,-Uhuru-neck-and-neck-in-3-new-polls.

⁸ Brownsell, James. “Confusion Swirls over Kenya Vote Count.” *Al Jazeera*, March 6, 2013. <http://www.aljazeera.com/news/africa/2013/03/201336202428235644.html>.

⁹ *Ibid.*

¹⁰ *Ibid.*

300,000.¹¹ A “spoiled vote” is a vote that was filled out or cast incorrectly, thus not counting as a vote for any particular candidate. The IEBC made the decision to include the “spoiled votes” in the overall count of “votes cast,” the ramifications of which were significant. Under Kenyan election law, if no candidate garners over fifty percent of the vote, then a runoff election must be held; so including the “spoiled votes” increased the number of votes that the winning candidate needed to garner. The IEBC decided to include the votes based upon the language under Chapter Seven, Paragraph Eighty-Six, B of the Kenyan Constitution, which requires the IEBC to tabulate “votes cast.”¹² This decision was supported by CORD and opposed by the Jubilee Coalition, likely because results showed Odinga trailing Kenyatta by a significant margin and the inclusion of the votes was beneficial to whoever was trailing.

William Ruto, running mate of Kenyatta, insinuated the IEBC decision regarding “spoiled votes” was due to British interference. A Jubilee spokesman, Charity Ngilu, followed up Ruto’s accusations with the statement, “Further, we at the Jubilee Coalition are alarmed by the abnormally high influx of British military personnel in the country which began around the voting day, under the pretext of training.”¹³ The United Kingdom responded that the troops were on a training mission that had been planned nine months earlier. The accusations of British interference did not appear to gain much steam, likely due to a lack of evidence, and the arguments quickly moved on. Another issue raised with the spoiled votes was the unusually large number. The IEBC later admitted that an error occurred in the transmission of results that multiplied the number of spoiled votes by eight.¹⁴ This error was often cited as a factor that calls all other results into doubt. These errors, among others, led to the filing of petitions with the Supreme Court of Kenya.

B. The Petition

On Saturday, March 9th, 2013, the head of the IEBC announced that Uhuru Kenyatta was the victor of the race. Kenyatta garnered 6,173,433 votes against Raila’s 5,340,546,

¹¹ Ibid.

¹² “The Constitution of Kenya, 2010.” National Council for Law Reporting with the Authority of the Attorney General, 2010. kenyalaw.org.

¹³ Brownsell, “Confusion Swirls over Kenya Vote Count.”

¹⁴ “Kenyan Elections 2013.” *Peaceful Prevention and Community Reporting Project*. Accessed May 4, 2013. <http://kenyanelections2013.org/?tag=iebc>.

thus earning 50.07% of the total votes and barely surpassing the 50% threshold necessary to avoid a runoff.¹⁵ Odinga contested the results, stating that “rampant illegality” marred the election, and appealed the results to the newly reformed Judicial Branch of the Republic of Kenya.¹⁶ While supporters of the Jubilee Coalition took to the streets to celebrate their victory, Odinga and his legal team set out to gather evidence of electoral inconsistencies and fraud. The Constitution allotted them seven days to appeal the decision.

CORD’s legal team swiftly asked the court to order IEBC and Safaricom, IEBC’s contractor for technical support, to release documents and other evidence related to the election so they could be examined for inconsistencies. Eliud Owalo, the man spearheading CORD’s appeal, pleaded with the court:

I wrote to the IEBC on March 8 requesting information and data. I sent a similar letter to Safaricom whose services were used by IEBC to relay information from polling stations but they all refused to respond... The urgency in the matter is that we have only seven days to file a case at the Supreme Court and if the documents are not made available, our right to justice will be infringed on.¹⁷

The Supreme Court responded to the petition by ordering the IEBC to cooperate with CORD and release forms 34, 35, and 36, forms used by the IEBC to run the election. Safaricom agreed to, “make available log files for all short messages received from Safaricom Limited and all software contracts between the IEBC and all firms that provided software services during the elections.”¹⁸ As CORD’s lawyers set to work, a spokesman for the group revealed their plan for the petition; “We are going to allege fraud. There was collusion between the IEBC and TNA [a member of the Jubilee coalition]. They entered into some sort of

¹⁵ Buluma, Renson. “ODM Leaders Laud Raila for Going Legal Way.” *The Standard*. March 11, 2013. http://www.standardmedia.co.ke/?articleID=2000079073&story_title=Kenya-ODM-leaders-laud-Raila-for-going-legal-way.

¹⁶ Gettleman, Jeffrey. “Kenyatta Is Declared the Victor in Kenya, but Opponent Plans to Appeal.” *The New York Times*, March 9, 2013, sec. World / Africa. <http://www.nytimes.com/2013/03/10/world/africa/kenyatta-wins-kenya-presidential-election.html>.

¹⁷ “IEBC, Cord Ordered to Agree on Documents.” *Daily Nation*. March 13, 2013. <http://www.nation.co.ke/News/politics/-/1064/1718828/-/ayjffj/-/index.html>.

¹⁸ Ogemba, Paul. “Cord Legal Teams Swoops on Bomas.” *Daily Nation*. March 14, 2013. <http://www.nation.co.ke/News/politics/Cord-legal-team-swoops-on-Bomas/-/1064/1719450/-/122v9lk/-/index.html>.

fraudulent enterprise and we are going to be able to show that.”¹⁹ Included in the accusation of collusion between IEBC and Uhuru Kenyatta was the fact that the server for both groups was housed by Safaricom. The serious charge of collusion was indicative of the tension felt in the country leading up to the petition decision.

Raila Odinga filed what would become known as simply “The Petition” on Saturday, March 16th, 2013, one week after Uhuru Kenyatta was declared victor of the election. The Petition alleged that the inconsistencies in voter registration and other failures by the IEBC were enough to prove that it was not, “A free and fair election... administered in an impartial, neutral, efficient, accurate, and accountable manner,” as required by the Constitution of Kenya.²⁰ On the day of the filing, Odinga told reporters, “Every mechanism and every instrument the IEBC deployed failed miserably. Its failure and collapse, on a catastrophic scale on the polling day, so fundamentally changed the system of polling and the number of votes cast.”²¹ Odinga provided his evidence for this claim in Petition Number 5 of 2013 to the Kenya Supreme Court. Two other petitions were also filed in relation to the election, one by the African Center for Open Governance (Africog) also called for the nullification of the election results, while the other, filed by Kenyatta supporters, asserted that the inclusion of the “spoiled votes” in the tabulation of “votes cast” was mistaken. The three petitions were consolidated into one case in order to ease the job of the Supreme Court in hearing and deciding the cases.²²

Moses Kiarie Kuria, Denis Njue Itumbi, and Flowrence Jematiah Serگون called the IEBC as the respondent in Petition Number 3 of 2013. The petition claimed that the IEBC’s, “Decision to include rejected votes in the final tally had a prejudicial effect on the percentage votes won by Mr. Kenyatta.”²³ Gladwell Wathoni Otieno and Zahid Rajan, of

¹⁹ Lough, Richard. “Kenya’s Odinga to File Supreme Court Election Petition on Friday.” *Reuters*. March 14, 2013. <http://news.yahoo.com/kenyas-odinga-file-supreme-court-election-petition-friday-161032308.html>.

²⁰ “The Constitution of Kenya, 2010.” See Chapter Seven, Paragraph 81, Section e.

²¹ Jorgic, Drazen, and Humphrey Malalo. “Kenya’s Odinga Challenges Election Defeat in Top Court.” *Reuters*. March 16, 2013. <http://ca.news.yahoo.com/kenya-police-fire-teargas-disperse-odinga-supporters-075244442.html>.

²² Mutunga, W.M. “Full Decision: 2013 Election Petition.” Supreme Court of Kenya, April 16, 2013. <http://www.judiciary.go.ke/portal/assets/files/NEWS/FULL%20JUDGEMENT-PRESIDENTIAL%20ELECTION%20PETITION%202013.pdf>.

²³ *Ibid.* P. 4

Africog, filed Petition Number 4 of 2013, calling as respondents the IEBC, Issack Hassan, Uhuru Kenyatta, and William Ruto. The Petition averred that the election did not follow the rules laid out in the Constitution, in particular that the failure to, “establish and maintain an accurate Voter Register,” undermined the validity of the election and should be enough to nullify the results.²⁴ Petition 4 also asserted that a, “mandatory legal requirement to electronically transmit election results,” existed and was not met, due to the failure of the electronic transmission system.²⁵ The petitions also allege that in some cases the agents representing each party, who were meant to affirm the validity of the vote counting, were removed from the tallying center. The accusations in Petition 4 extended to pre-election time, when the IEBC awarded a contract for voter registration and recognition machines to an unqualified bidder. This claim is supported by a report by The Standard, which stated:

A review of the tendering procedure by the public procurement regulator found out the tender to supply poll books was awarded to the South African firm, which participated in the Anglo Leasing scandal, on September 29 last year, three weeks before the technical evaluation among the shortlisted bidders.²⁶

The filers of Petition 4 averred that the use of untested machines points to a failure of the IEBC to follow its constitutional mandate.

Raila Odinga filed Petition 5, calling the IEBC, Issack Hassan, Uhuru Kenyatta, and William Ruto as respondents and claiming that, “The electoral process was so fundamentally flawed that it precluded the possibility of discerning whether the presidential results declared were lawful.”²⁷ Like Petition 4, parts of Petition 5 also hinged on the issue of registration. Odinga asserted that the changes in the number of voters registered over time, when the list should have been finalized, demonstrate that the

²⁴ Ibid. P. 4

²⁵ Ibid. P. 5

²⁶ Michira, Moses, and Paul Wafula. “Minutes Reveal How IEBC Bought Pollbooks.” *The Standard Digital News*, March 26, 2013.

http://www.standardmedia.co.ke/?articleID=2000079989&pageNo=1&story_title=Kenya-Minutes-reveal-how-IEBC-bought-pollbooks.

²⁷ Mutunga, “Full Decision: 2013 Election Petition.” P. 5

Constitution and the Elections Act of 2011 were violated.²⁸ The fact that some polling stations reported more votes than registered voters and the failure of the electronic transmitting system to properly report results were other issues cited by Odinga.²⁹ Odinga and his supporters filed another affidavit on March 23rd in support of their claims.

Chief Justice Willy Mutunga and his fellow Justices, citing time constraints, did not allow the affidavit filed on the 23rd to be considered as evidence. The Court expunged all eight hundred and thirty-nine pages of additional evidence submitted by Odinga and seven others, thus disallowing it to be cited or referenced in the trial.³⁰ Odinga argued that, though the timeline for filing additional evidence had technically passed, the evidence took time to collect. He asserted that gathering and compiling evidence takes time and that the Court should listen to the Constitution when it states, "Justice shall be administered without undue regard to procedural technicalities."³¹ Odinga cited this section to argue that the inclusion of the evidence was in line with the Constitution. The Court, however, did not see merit in his argument. They decided that filing such a large document with so little time left before trial would be unfair to the respondents, as they would not have enough time to analyze and respond to the affidavit. Justice Philip Tunio noted:

The affidavits change the character of the petition leading to a new petition. If we allowed the affidavits to remain on record, it will be prejudicial. The petitioner could have applied for leave to file the affidavits... The petitioner proceeded to file an affidavit bearing on his back a reply from seven others. This is not a usual way of presenting affidavit. We would understand if affidavit is filed in proper way. [*sic*]³²

²⁸ "Kenya Elections Act, 2011," 2011.

<http://www.cickenya.org/index.php/legislation/acts/item/65-the-elections-act-2011#.UXrbTCspZQ0>.

²⁹ "Summary of CORD's Petition." *The Standard*, 2013.

<http://www.standardmedia.co.ke/choice2013/home/article/2000079436/1/-summary-of-cord-s-petition>.

³⁰ Musau, Nzau, and Jillo Kadida. "Raila Loses Bid for New Evidence." *The Star*, March 27, 2013.

<http://www.the-star.co.ke/news/article-114063/raila-loses-bid-new-evidence>.

³¹ "The Constitution of Kenya, 2010." National Council for Law Reporting with the Authority of the Attorney General, 2010. kenyalaw.org. See Chapter Ten, Section 159, 2, D.

³² Musau and Kadida, "Raila Loses Bid for New Evidence."

This statement indicates that had Odinga and his legal team approached the issue differently, the evidence would have been accepted and the case could have been decided differently. The evidence was never heard, however, and it will never be known whether a failure to file the affidavit correctly has changed the course of history for the Republic of Kenya. The Court held trial with no consideration of this evidence.

C. The Verdict

The Supreme Court, consisting of six Justices and led by Chief Justice Willy Mutunga, held trial for fourteen days before releasing a “brief decision” on March 30th, 2013.³³ The unanimous decision, as originally released, was not the full version containing the reasoning behind it. Rather, it gave the Court’s ruling along with the promise of the release of a full decision and detailed reasoning within two weeks. The brief decision contained three short sections, each offering a unanimous ruling on a different point contested by a petitioner. The first section dealt with the issue of whether the election was conducted in a free, fair, and credible manner, and states, “It is the decision of the court that the said elections were indeed conducted in compliance with the Constitution and the law.”³⁴ This logically led to the second section, which upholds the election of Uhuru Kenyatta and William Ruto as the fourth President of Kenya and Vice-President of Kenya, respectively. The third section responds to the petition that averred the inclusion of “spoiled votes” in the total “votes cast” was flawed. The Supreme Court overturned the decision of the IEBC, stating, “It is the decision of the court that such rejected votes ought not to have been included in calculating the final tallies in favour of each presidential candidate.”³⁵ This decision even further increased the margin of victory enjoyed by Uhuru Kenyatta and William Ruto. The Supreme Court also ruled that it does not have the jurisdiction to order a re-computation of votes. The Supreme Court ruled in favor of Uhuru Kenyatta, William Ruto, and the IEBC on each and every contested point.

³³ Ogemba, Paul. “Elections Were Free and Fair, Judges Say,” March 31, 2013. <http://www.nation.co.ke/News/politics/Court-says-yes-its-Uhuru/-/1064/1735028/-/u831ne/-/index.html>.

³⁴ Mutunga, Willy. “Order of the Court in the Supreme Court of Kenya - Presidential Election Petition.” Supreme Court of Kenya, March 30, 2013. <http://www.judiciary.go.ke/portal/order-of-the-court-in-the-supreme-court-of-kenya-presidential-election-petition.html>.

³⁵ Ibid.

Raila Odinga, who had, “repeatedly indicated [his] commitment to respect and [to] abide by the Supreme Court ruling,” conceded the election to Uhuru Kenyatta on the night of the verdict.³⁶ Odinga asserted that, while he does not agree with the ruling of the Court, his dedication to constitutionalism dictates that he must concede the race.³⁷ Odinga urged the Kenyan people to remain peaceful and accept the decision. A resident of Kibera, the largest urban slum in East Africa located in Nairobi and home to much of the violence in 2007, said, “There was a lot of uproar after the decision came out, but when Raila got on the TV, everyone calmed down right away and things went back to normal.”³⁸ Once Odinga accepted defeat, his supporters followed suit and accepted the verdict.

The Supreme Court released a full, detailed decision on April 16, 2013.³⁹ The full decision was met with little fanfare by the nation as a whole, due to the fact that it merely explains the reasoning behind the ruling laid out two weeks earlier and did not change the outcome. Though unheralded by the general public, the full decision provides a crucial look into the reasoning of the Supreme Court. The Supreme Court of Kenya has only been in existence for two years, thus does not have the years of precedence enjoyed by most Supreme Courts. The Court combated this problem by depending on decisions and rulings from other countries for precedence.

The Court relied upon five rulings issued by the Supreme Court of India; four from Zambia; three each from the United States of America, Seychelles, and Nigeria; two from the Supreme Court of Uganda; and one each from Georgia, the Philippines, Ghana, England, Canada, Mauritius, South Africa, and Croatia.⁴⁰ It is interesting that the Court decided to use some of these decisions as precedence, as multiple cases cited are highly criticized and controversial. *Bush v Gore*, the United States decision determining the 2000 Presidential

³⁶ Odinga, Raila. “Raila: March of Democracy Is Unstoppable,” March 19, 2013.

http://www.standardmedia.co.ke/?articleID=2000079454&story_title=Raila:-March-of-democracy-is-unstoppable.

³⁷ “Raila Accepts Supreme Court Verdict.” *The Standard*. March 30, 2013.

http://www.standardmedia.co.ke/?articleID=2000080475&story_title=Kenya-Raila-accepts-Supreme-Court-verdict.

³⁸ Paraphrased quote from informal discussion on April 27th

³⁹ Juma, Paul. “Supreme Court Releases Judgment on Presidential Petition.” *Daily Nation*. April 16, 2013. <http://www.nation.co.ke/News/politics/Supreme-Court-releases-judgment-on-presidential-petition/-/1064/1749820/-/v0ib7p/-/index.html>.

⁴⁰ Mutunga. “Full Decision: 2013 Election Petition.” See pages: 10, 17, 25, 35, 39, 44, 47, 66, 67, 68, 69, 70, 72, 73, 74, 82, 82, 97, 101, 104

election, is one of the most controversial rulings in the history of the country and is viewed by many as a case of the judiciary unnecessarily meddling in an election for purely political reasons.⁴¹ The Nigerian cases cited have been called the most, “awful and questionable jurisprudence from the Nigerian Supreme Court on the question of elections.”⁴² The Court, while utilizing precedence from other countries, also created precedence for Kenya through original decisions.

A major issue facing the Supreme Court was determining the standard of proof for a presidential petition case. The Court decided that the burden of proof is on the petitioner, meaning that it is the job of the petitioner to prove that the election was flawed, not the job of the respondents to prove anything, other than to respond to evidence raised by the petitioners. The Court located the standard of proof as being in line with a civil trial:

The threshold of proof should, in principle, be *above the balance of probability*,⁴³ though not as high as beyond-reasonable doubt... [Except] In the case of *data-specific electoral requirements*... the party bearing the legal burden of proof must discharge it beyond any reasonable doubt.⁴⁴

This meant that it fell to Raila Odinga and his fellows to prove it was more likely that the election had been rigged than that it had not, a much lower hurdle than proving it beyond a reasonable-doubt. Once the standard of proof had been decided, the Court was able to apply its judicial reasoning to the evidence presented in the case.

The Supreme Court addressed each of the issues raised by the petitioners. The Court ruled that the failure of the electronic transmission system to properly transmit results was due to a failure on the part of the IEBC and not a malicious attempt to rig the election. The Court recommended that the, “relevant state agency,” look into the matter and determine

⁴¹ “Decision: George W. Bush, Et Al, Petitioners V. Albert Gore, Jr, Et Al.” The Supreme Court of The United States of America, 2000. <http://www.law.cornell.edu/supct/html/00-949.ZPC.html>.

⁴² “Reactions To The Supreme Court’s Judgment.” *Kenya Today*. Accessed April 24, 2013. <http://www.kenya-today.com/opinion/reactions-to-the-supreme-court-judgement-on-presidential-election-petition>.

⁴³ “Balance of Probabilities Definition.” Legal Dictionary. *Duhaime.org*. Accessed April 29, 2013. <http://www.duhaime.org/LegalDictionary/B/BalanceofProbabilities.aspx>. “One party's case need only be more probable than the other.”

⁴⁴ Mutunga, W.M. “Order of the Court in the Supreme Court of Kenya - Presidential Election Petition.” P. 75

who is responsible for awarding the contract to an unqualified bidder.⁴⁵ As to the issue of whether the Constitution requires results to be transmitted electronically, the Court avers:

Since such technology has not yet achieved a level of reliability, it cannot as yet be considered a permanent or irreversible foundation for the conduct of the electoral process. This *negates the Petitioner's contention* that, in the instant case, *injustice, or, illegality in the conduct of election would result, if IEBC did not consistently employ electronic technology.*⁴⁶

This reasoning reveals the court's logic for ruling against a major point of contention by both Odinga and Africog.

Willy Mutunga and his fellows decided that the removal of party agents from the tallying center was done because they became rowdy. In order to keep the tallying center orderly and calm, it was necessary to remove them. The Court decided that the tallying, "was indeed conducted in *accordance with the law,*" and the removal of party agents, "*did not* undermine the credibility of the tallying."⁴⁷ The Supreme Court further believes that the register "*is not a single document,*" but rather a variety of documents intended to facilitate voting. This led them to conclude that the voter registry was properly handled and that the IEBC properly explained all discrepancies. As to the changes made in the number of registered voters, the Court ruled it was done with the intention of allowing people to vote and is sufficiently explained as to not be suspicious.⁴⁸

The question of "spoiled votes" was explored in depth. The final decision was based on the idea that a "spoiled vote" is "void," and it thus does not make sense, in regards to the "overall design and intent of the Constitution," to count them as part of the overall "votes cast."⁴⁹ The Supreme Court of the Republic of Kenya concluded:

In summary, the evidence, in our opinion, *does not disclose any profound irregularity* in the management of the electoral process, nor does it gravely impeach the *mode of participation* in the electoral process by any of the candidates who offered himself or herself before the voting public. It is *not*

⁴⁵ Ibid. P. 86

⁴⁶ Ibid. P. 86

⁴⁷ Ibid. P. 89

⁴⁸ Ibid. P. 30

⁴⁹ Ibid. P. 104

evident, on the facts of this case, that the candidate declared as the President-elect had not obtained the basic vote-threshold justifying his being declared as such... We will, therefore, *disallow* the Petition, and uphold the Presidential-election results as declared by IEBC on 9th March, 2013.⁵⁰

With that paragraph, the Supreme Court of Kenya closed the door on Kenya's 2013 election.

III. THE JUDICIAL POLITICS OF THE ELECTION PETITION

A. A Review of the Theories of Judicial Politics

Scholars have been theorizing ways to explain and predict the decisions made by Supreme Courts around the globe for at least the past sixty-five years.⁵¹ The importance and stature of Supreme Courts has led to intensive study by scholars spanning the disciplines, from sociologists to economists to political scientists, and provides a rich body of literature. The field is often referred to as "Judicial Politics," and provides a useful lens through which the Kenya Supreme Court's decision on The Petition can be viewed.⁵² Theories attempting to explain and predict the decision-making of Supreme Court Justices generally fall into two camps. The first camp is called "Classical Legal Theory" and the second is often referred to as "Legal Realism." Legal Realism has since branched out into "Attitudinalism" and "New Institutionalism." This section will lay out these competing theories and then explore them within the context of The Petition.

Classical Legal Theory holds that judges are autonomous, independent arbiters of the law and that every judge decides cases purely based upon the facts presented and the relevant legal doctrine. Felix Frankfurter, a United State's Supreme Court Justice from 1939 to 1962, epitomized this view in a strongly worded dissent from the other justices. Frankfurter penned:

⁵⁰ Ibid. P. 110

⁵¹ Pritchett, C. H. *The Roosevelt Court: a Study in Judicial Politics and Values, 1937-1947*. Macmillan Company, 1948.
<http://search.proquest.com.ccl.idm.oclc.org/pais/docview/58709289/13D966C3FE45DAC8DAB/1?accountid=10141>.

⁵² Mutunga, W.M. "Raila Odinga & 2 Others V Independent Electoral and Boundaries Commission and 3 Others[2013]." Supreme Court of Kenya, March 30, 2013.
http://kenyalaw.org/CaseSearch/view_preview1.php?link=85783978992664394266645.

As judges, we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution, and are equally bound by our judicial obligations... As a member of this Court, I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their regard.⁵³

This view is echoed by Willy Mutunga himself, “The Supreme Court is a court for all Kenyans and it does not and will not reflect any ethnic, religious, region, or generational bias in its decision.”⁵⁴ Classical Legal Theory, while a strongly held idealistic belief by many people, began to be forcefully attacked in the mid-twentieth century due to the development of the school of thought known as Legal Realism.⁵⁵

The division of Legal Realism known as “Attitudinalism,” arose before “New Institutionalism,” and is, “premised on the theory that judicial decision making [is] essentially political.”⁵⁶ Attitudinalism holds that judges are merely politicians expressing their policy preferences through the judicial branch. Proponents of this theory assert that Supreme Court decisions do not depend on the “merits of the legal arguments,” but are instead based upon the judges previously held opinions and systems of belief. This led to the modeling of judicial behavior based upon perceived ideological leanings, which studies have shown can predict individual Supreme Court Justices votes, a statistically significant, seventy-five percent of the time.⁵⁷ Though this line of reasoning led to strong predictive modeling, the school of thought known as “New Institutionalism” arose and offers a variety of critiques and advances that proponents of the theory view as improvements to Attitudinalism.

Advocates of New Institutionalism aver that the Attitudinalism approach to judicial reasoning is too simplistic and ignores the effect of institutional norms and legal

⁵³ Frankfurter, Felix. “Dissent: West Virginia State Board of Education V. Barnette (No. 591),” March 11, 1943. http://www.law.cornell.edu/supct/html/historics/USSC_CR_0319_0624_ZD.html.

⁵⁴ Mutunga, W.M. “Speech by the Chief Justice Dr Willy Mutunga, on Receiving the Certificate of the President-Elect from the IEBC Chairman,” March 9, 2013. <http://www.judiciary.go.ke/portal/speech-by-the-chief-justice-dr-willy-mutunga-on-receiving-the-certificate-of-the-president-elect-from-the-iebc-chairman.html>.

⁵⁵ Abramowicz, Michael, and Maxwell L. Stearns. “Beyond Counting Votes: The Political Economy of Bush V. Gore.” *Vanderbilt Law Review* 54, no. 5 (October 2001): 1847–1952.

⁵⁶ *Ibid.* P. 1873

⁵⁷ *Ibid.* P. 1874

precedence.⁵⁸ The two theories are founded upon the same principle, that judges are not independent arbiters of justice, but rather decide based upon their own policy preferences and beliefs. However, proponents of New Institutionalism point out that judges are not simply able to decide a case in any way they see fit. A proponent points this out in the statement, “We must recognize that legal argument is not just mumbo-jumbo, that even if legal reasoning is culturally determined, there are stronger arguments and weaker ones from the perspective of a particular legal culture.”⁵⁹ The author of this statement then reverts back to the Attitudinalism approach by asserting that when a case has two equally valid sides, a judge will side with whichever he has a personal tilt towards. The application of each theoretical lens to the case of *The Petition* yields interesting results.

B. Application of Theory to the Supreme Court of Kenya

The Supreme Court of Kenya handed down a unanimous decision in the highly scrutinized and heavily criticized case of, “*Raila Odinga & 2 Others V Independent Electoral and Boundaries Commission and 3 Others*.”⁶⁰ The court handed down rulings that favored Kenya President Elect Uhuru Kenyatta; a candidate strongly supported by President Mwai Kibaki. In light of the historical corruption and lack of judicial independence in Kenya, this decision was met with skepticism and criticism. However, the decision was not met with violence as many predicted.⁶¹ It is clear that the verdict was handed down in an unbiased and fair manner through the lens of Classical Legal Theory. However, many critics of the decision offer critiques of the ruling, whether intentionally or not, through the lens of Legal Realism. They aver that the court decided as it did, not based upon the evidence presented, but because the justices on the court agreed with Kenyatta and desired to see him become

⁵⁸ March, James, and Johan Olsen. “The New Institutionalism: Organizational Factors in Political Life.” *American Political Science Review* 78 (1984).

⁵⁹ Abramowicz and Stearns. “Beyond Counting Votes: The Political Economy of *Bush V. Gore*.” P. 1889

⁶⁰ Mutunga. “*Raila Odinga & 2 Others V Independent Electoral and Boundaries Commission and 3 Others*[2013].”

⁶¹ U.S. Embassy - Nairobi. “Security Message for U.S. Citizens: Election Ruling Expected,” March 25, 2013. Excerpt: “This is to inform U.S. citizens in Kenya that the Kenyan Supreme Court is expected to rule on the petitions challenging the presidential election result by March 30, 2013... Remember even gatherings intended to be peaceful can turn violent with little or no warning.”

president.⁶² This is a tempting outlook to take, especially because the judiciary was historically hand selected by the President of Kenya and easily manipulated. The outlook fails to take into account two important factors. The first factor is that the Kenyan Constitution of 2010 insulates the Supreme Court from undue pressure by granting financial independence and job security.⁶³ The second factor is that it fails to take into account the individual views of the Supreme Court Justices.

Data on the historical views of the Justices is limited, as the Supreme Court, as currently constituted, has only been in existence for two years. However data on the views of the Justices does exist. President Kibaki appointed all of the Justices at the recommendation of the Judicial Service Commission and with the approval of the National Assembly. The fact that all of the justices had to be accepted by Kibaki would suggest that the Justices were supporters of Kibaki, and by extension Kenyatta, and lends credence to the Legal Realism theory. A closer look at the Justices backgrounds reveals the shallow logic contained therein. Chief Justice Willy Mutunga will be used as the prime example to explore Legal Realism.

Willy Mutunga, age sixty-six, is well known among the Kenyan community for his activism and dedication to positive reform. Mutunga was imprisoned for a year by Daniel arap Moi, the second president of Kenya, for speaking out against the regime. He then furthered his study of law and helped found the Kenya Human Rights Commission while in exile in Canada.⁶⁴ After returning to Kenya, he helped start the Law Society of Kenya, a group of “reform-minded activist[s],” and directed the Kenyan office of the Ford Foundation.⁶⁵ One anti-corruption official said, ““People have never had as much faith in

⁶² “Reactions To The Supreme Court’s Judgment - Raila’s Presidential Election Petition - Kenya Today.” *Kenya Today*. Accessed April 24, 2013. <http://www.kenya-today.com/opinion/reactions-to-the-supreme-court-judgement-on-presidential-election-petition>. A comment made on the page stated: “THEY HAD ALREADY MADE A DECISION BEFORE CORD FINISHED GIVING EVIDENCE.”

⁶³ “The Constitution of Kenya, 2010.” See Chapter Ten, titled “Judiciary.”

⁶⁴ Shah, Seema. “The Supreme Court’s Silence Regarding Criticisms of the Electoral Process Surprised Many, Especially Given That the Court Is Led by Well-known Activist Willy Mutunga.” *The Peoples Court*, April 8, 2013. <http://www.thepeoplescourt.co.ke/opinions/127-kenya-s-quiet-court-ruling-where-was-willy>

⁶⁵ Ibid.

the chief justice as they do in Willy Mutunga."⁶⁶ All of this led to a large amount of confidence in Mutunga, though his statements in support of Odinga led many to assert that he would be partial to Odinga. He is quoted as saying, "I am convinced that Kenya's transition needs Raila [Odinga] as the president of this country."⁶⁷ His history, seen through the lens of Legal Realism, would suggest that he would do everything in his power to ensure that the ruling was decided in favor of Odinga. As this was not the case, a scholar analyzing the decision as a legal realist would have to assume that Raila Odinga's case had so little merit that Mutunga was constrained to the point that he had to decide in favor of Kenyatta. The variety of the backgrounds on the Supreme Court and the fact that the decision was unanimous, viewed through the lens of Legal Realism, suggest that the merit of the legal argument presented by Odinga was not strong enough to allow the Justices to adjudicate in a way that fit their views.

A caveat to all of this is that the Supreme Court, in order to maintain institutional legitimacy, likely viewed it as crucial to decide unanimously. This decision could have echoed a sentiment purported by United States Supreme Court Justice Stephen Breyer, when he noted in the controversial ruling of *Bush v. Gore*, "In this highly politicized matter, the appearance of a split decision runs the risk of undermining the public's confidence in the court itself."⁶⁸ In a hypothetical scenario in which the majority was partial to Kenyatta and was going to decide in his favor, it is possible that Mutunga made the calculated choice to maintain the legitimacy of the court and peace in the country by joining the majority and making the decision unanimous. As Africog observer Seema Shah theorized, "Perhaps he felt it was important for the court to maintain a united front in a bid to preserve public confidence during this fragile time."⁶⁹ Another theory is that the Supreme Court viewed it as necessary for the survival of the country to decide in favor of Kenyatta. The tension created by the election dampened investment and tourism. Another election would have

⁶⁶ Lough, Richard. "Trust in Kenya's Top Judge Tested by Election Challenge." *Reuters*. March 21, 2013. <http://www.reuters.com/article/2013/03/21/us-kenya-elections-judiciary-idUSBRE92K0FM20130321>.

⁶⁷ *Ibid*.

⁶⁸ "Election 2000 - The Postelection Events Day by Day." *U.S. News*, 2000. <http://www.usnews.com/usnews/news/election/magtimeline.htm>.

⁶⁹ Shah. "The Supreme Court's Silence Regarding Criticisms of the Electoral Process Surprised Many, Especially Given That the Court Is Led by Well-known Activist Willy Mutunga."

proved to be extremely expensive and also problematic due to the nature of the charges. If the IEBC was found to be in collusion with Kenyatta, then no institution exists that could hold the election. Kenyatta would also need to be charged with the crime of rigging a presidential election.

The many theories presented in this section are just that, theories. Sadly, only the Supreme Court Justices themselves will ever know the truth of the matter, though applying both Classical Legal Theory and Legal Realism to the case suggests that the Supreme Court ruled in the manner it should have.

IV. THE INSTITUTIONAL LEGITIMACY OF THE SUPREME COURT

A. Literature Review

The concept of legitimacy and its importance to the operation of any sort of organization, be it a small group or a national government, has been an issue of intense study, dating as far back as Plato and Aristotle.⁷⁰ Max Weber, a German Sociologist writing in the late nineteenth and early twentieth century, laid out what is now considered the foundation for any study of legitimacy.⁷¹ Weber argues that legitimacy derives itself from three types of authority: legal authority, traditional authority, and charismatic authority.

Legal authority derives its authority from a set of legal principles, based upon fairness and equity, and tends to apply to democracies. Traditional authority is power that is accepted because it is how the society has always been ruled. Charismatic authority sees people following a leader purely because of that leader's qualities, and not because of any legal or traditional authority. Jesus, Gandhi, and Hitler are all good examples of charismatic leaders. Legitimacy is crucial to the ability of a government to govern, and in a democracy, the perceived legitimacy of the judicial branch is critical. As Dogan notes, the judiciary is, "The last bastion against corruption... When they are also contaminated... we can predict a crisis of legitimacy."⁷² The exact definition of legitimacy, and thus ways to measure it, is a

⁷⁰ See: Platón. *The Republic*. Hackett Pub., 1974. See also: Aristotle, and Peter Simpson. *The Politics of Aristotle*. University of North Carolina Press, 1997.

⁷¹ Weber, Max. *The Essential Weber: A Reader*. Routledge, 2004. Chapter 7.

⁷² Dogan, Mattei. "Conceptions of Legitimacy." Edited by Mary Hawkesworth and Maurice Kogan. *Encyclopedia of Government and Politics*. London and New York: Routledge, 1992.
<http://downloads.pavroz.ru/files/encyclofgovandpol.pdf#page=147>.

hotly contested point in the academic worlds of both sociology and political science. The Encyclopedia of Government and Politics states that legitimacy stems from the belief that, “existing institutions are appropriate or morally proper.”⁷³ This stands as a sufficiently strong working definition for the purposes of this report, though the issue of how to measure said legitimacy is still in need of exploration.

The issue of legitimacy is one that is ever present in the minds of judicial scholars, as Caldeira and Gibson state, “To persist and function effectively, political institutions must continuously try to amass and husband the goodwill of the public.”⁷⁴ Scholars have been attempting to study and quantify the institutional legitimacy of judiciaries for years, though the contested American election decision in *Bush v. Gore* sparked a surge of interest in this exact area and produced a dearth of literature. The issue of who was to be President of the United States, due to flawed voting mechanisms in Florida, was brought in front of the US Supreme Court in 2000. This situation was not unlike that of Kenya in 2013.

Scholars in the United States often depended on the use of surveys distributed to large numbers of Americans. The surveys asked questions like, “If [Al Gore/George W. Bush] is declared the winner and inaugurated next January, would you accept him as the legitimate president, or not?” and, “The U.S. Supreme Court's ruling could ultimately decide who will be the next president. Which comes closer to your view-I would accept it as a legitimate outcome no matter which candidate it favors, or I would not accept it as a legitimate outcome?”⁷⁵ The polls also asked questions about support for the Supreme Court. They were done before and after the verdict and then after significant time had passed in order to compare the effect of the decision on public support for the judiciary.⁷⁶ These studies found that support for the Supreme Court after *Bush v. Gore* was highly divided

⁷³ Ibid. P. 116

⁷⁴ Caldeira, Gregory A., and James L. Gibson. “The Etiology of Public Support for the Supreme Court.” *American Journal of Political Science* 36, no. 3 (August 1992): 635–664.

⁷⁵ Moore, David W. “Ultimately, Americans Would Accept Either Bush or Gore as Legitimate President.” *The Gallup Poll Monthly* no. 422 (November 1, 2000): 7.

⁷⁶ See: Yates, Jeffrey, and Andrew Whitford. “The Presidency and the Supreme Court After Bush V. Gore: Implications for Institutional Legitimacy and Effectiveness.” *Stanford Law and Policy Review* 101 (2002). See also: Kritzer, Herbert M. “Impact of Bush V. Gore on Public Perceptions and Knowledge of Supreme Court, The.” *Judicature* 85 (2002 2001): 32. See also: Cann, Damon M., and Jeff Yates. “Homegrown Institutional Legitimacy. Assessing Citizens’ Diffuse Support for State Courts.” *American Politics Research* 36, no. 2 (2008): 297–329.
doi:<http://dx.doi.org.ccl.idm.oclc.org/10.1177/1532673X07308737>.

along partisan lines. Conservatives strongly supported the Court and believed they made the right decision, while liberals were highly critical of the Court and believed the election was stolen.⁷⁷ The literature also finds a link between partisanship and evaluation of evidence.⁷⁸ People are more likely to believe evidence if it agrees with their pre-existing views. It should be noted that in the end, the majority of the public accepted Bush as a legitimate President.⁷⁹

The wealth of polling data in the United States pre and post Bush v. Gore enabled researchers to write verbosely on the impact of the decision on institutional legitimacy. The scholars seemed to overlook the importance of in depth interviews and discussions with citizens as to *why or why not* the decision affected their views. This type of study would have greatly benefited the study of the institutional legitimacy of judicial branches. Polling firms in Kenya⁸⁰ have the capability, and hopefully will take the initiative, to poll swaths of the electorate to test institutional legitimacy, but the need for an on the ground study of Kenyan's views on the election and legitimacy is necessary. It was crucial that said study be carried out as closely as possible to the judicial verdict. This is what this section aims to do.

B. Perceptions Regarding the Validity of Evidence

Supporters of Raila Odinga, hereafter referred to as Odinga respondents, and supporters of Uhuru Kenyatta, hereafter referred to as Kenyatta respondents, had vastly divergent views on the validity of the evidence presented. Kenyatta respondents, as expected, asserted that there was no evidence supporting the claim that the election was rigged. They attributed the election challenge to Odinga being a sore loser and just wanting to be in power. They made comments such as, "Raila always complains," and often made reference to Odinga being similar to his father, who once purportedly made a comment about wanting to be President purely because he wanted to be President.⁸¹ This belief in Odinga just wanting to be President was not all that was expressed by some Kenyatta respondents.

⁷⁷ Kritzer, Herbert M. "Impact of Bush V. Gore on Public Perceptions and Knowledge of Supreme Court, The." *Judicature* 85 (2002 2001): 32.

⁷⁸ Bartels, Larry M. "Beyond the Running Tally: Partisan Bias in Political Perceptions." *Political Behavior* 24, no. 2 (June 1, 2002): 117-150. doi:10.1023/A:1021226224601.

⁷⁹ Kritzer, "Impact of Bush V. Gore on Public Perceptions and Knowledge of Supreme Court, The."

⁸⁰ "Ipsos Synovate." Accessed May 1, 2013. <http://www.ipsos.co.ke/home/index.php>.

⁸¹ Quote taken from interview conducted May 2nd, 2013

Some Kenyatta respondents viewed Odinga's challenge as much more malicious, offering statements such as, "He is a dictator, Raila doesn't want peace," and "He is an inciter."⁸² This split the Kenyatta respondents into two camps, those who viewed Odinga's challenge as simply an attempt to gain power and those who viewed it as a power grab along with an attempt to incite violence within the country. Though in two different camps, all Kenyatta respondents believed there was no validity to the evidence presented. In terms of the particulars of the petition, supporters of Kenyatta expressed the view that when the Biometric Voter Registration Machines (BVR) failed, the candidates and the IEBC came together and agreed to go to a manual tallying system, "But now CORD claims that was cheating."⁸³ Representatives of CORD would definitely disagree with this portrayal of the case, but regardless, it goes to show that supporters of Kenyatta completely supported Kenyatta in The Petition. Odinga respondents presented contrary views to those of Kenyatta respondents.

Odinga respondents consistently cited the overwhelming evidence of fraud presented by Raila Odinga and his legal team. The particular evidence cited was that of the housing of the server for both the IEBC and TNA with the same provider and the fact that the BVR machines were purchased before tested. One respondent pushed, "If the original things were not bought correctly, if the server is there, how can it be fair?"⁸⁴ The emphasis on the overwhelming amount of evidence was repeated throughout interviews and informal discussions. Respondents also pointed to the evidence that was not allowed by the Supreme Court. A respondent remarked on the "hundreds of pages of evidence expunged," insinuating that if this evidence had been allowed it would have been impossible for the Court to decide against Odinga.⁸⁵

The evidence gathered through informal discussions and interviews with Odinga and Kenyatta respondents strongly support the theory that political biases influence evaluation of evidence. As Bartels states, "Partisan bias in political perceptions plays a

⁸² Ibid.

⁸³ Quote taken from interview conducted May 2nd, 2013

⁸⁴ Quote taken from interview conducted May 5th, 2013

⁸⁵ Quote taken from interview conducted May 7th, 2013

crucial role in perpetuating and reinforcing sharp differences in opinion.”⁸⁶ The clear division between Odinga respondents and Kenyatta respondents, in regards to the strength of evidence, strongly supports this theory and exposes the problematic nature inherent in determining whether there actually is evidence of fraud. The findings also call into question the opinions of all commentators and people who are heavily invested in the Kenyan political landscape. The evaluation of evidence, logically, has a large effect on the opinion of whether the Court made the correct decision.

C. Perceived Institutional Legitimacy

As with evaluation of evidence, there was a sharp division in opinions between Odinga respondents and Kenyatta respondents in regards to whether the Supreme Court made the correct decision and whether they were unbiased in the process. Kenyatta respondents believed the Supreme Court was completely unbiased and insulated from undue pressure. Kenyatta respondents also believed that Odinga supporters had full faith in the process. Kenyatta respondents emphatically attributed their own trust, and the purported trust of Raila Odinga supporters, in the Supreme Court to the new Constitution. Upon being asked the question, “Why do you think CORD brought the case to the Court instead of reacting as they did the last time?” a respondent replied, “The Constitution! In the new Constitution, the judges are vetted and have been career judges. There is no corruption with the Supreme Court. *They are vetted, that is why we trust them.*”⁸⁷ Even Kenyatta respondents, whose candidate would have been favored by the previous, corrupt set-up of the Supreme Court, are strongly in favor of the changes and argue that it has quelled corruption in the Supreme Court. The views expressed by Kenyatta respondents lend support to the theory that the reformation of the Supreme Court in the new Constitution was the driving factor behind the peace.

Odinga respondents were not convinced that the Supreme Court acted fairly. The majority of Odinga respondents averred that the Supreme Court was bribed. Two of the respondents interviewed, as well as many informally talked to, swiftly expressed their belief that the Supreme Court was bribed, making statements such as, “I Believe Uhuru

⁸⁶ Bartels, “Beyond the Running Tally.”

⁸⁷ Quote taken from interview conducted May 2nd, 2013

bribed the Supreme Court.”⁸⁸ Odinga himself implied support for this view. When a reporter articulated the fact that Chief Justice Mutunga said he was offended that he was accused of being bribed, Odinga responded, “When the Chief Justice says he is offended, he should know that there are Kenyans out there who are more offended than him.” He was arguing that the injustice of the Supreme Court decision is far more offensive to Kenyans than accusations of bribery are to Mutunga. Odinga’s statement reveals the widespread belief held among Odinga supporters that the election was rigged. When asked whether the vetting process is important, an Odinga respondent vocalized the view that, “Public vetting is a good thing. But once that is done, there is no one watching.”⁸⁹ The views of most Odinga respondents call into question whether the reformation of the Supreme Court is truly the reason the peace was kept.

The respondents cited the overwhelming evidence of fraud presented by Odinga as proof that the Court must have been corrupt, otherwise they would have decided in favor of Odinga. One of the respondents also proposed the theory that Kenyatta and his fellows premeditated the preaching of peace purely for the purpose of stemming objections to the rigging of the election. He believes that such emphasis on peace made it impossible for anyone to object to the obvious riggings because it would, “make them look bad.”⁹⁰ The opinions purported by two of the respondents, and most of the informal discussions, were somewhat similar to the third Odinga respondent, but also remarkably different.

The third Odinga respondent is not an extreme Odinga supporter, though he does support Odinga. This respondent called the election, “Amazing,” in stark contrast to the other respondents.⁹¹ The respondent approached the election as a businessman, as well as an Odinga supporter. The attraction of tourism and investment offered by a stable democracy was more important to him than an Odinga victory. He asserted, “We can let Uhuru have his five years and then beat him next time.”⁹² He was also ecstatic about what the election means for Kenya as a country, exclaiming, “After the election, we are

⁸⁸ Quote taken from interview conducted May 5th, 2013

⁸⁹ Quote taken from interview conducted May 5th, 2013

⁹⁰ Quote taken from interview conducted May 4th, 2013

⁹¹ Quote taken from interview conducted May 7th, 2013

⁹² Ibid.

completely repositioned as a mature democracy!”⁹³ He did, however, believe that there is a strong chance that the election was rigged. He stated:

I think that the Supreme Court made the executive decision regardless of the evidence. It would have been bad for the country had they decided against Uhuru. Tourism is such a big industry, investment is so big, if the tension had continued it would not have been good for the country and Uhuru was ahead by such a big margin that it wouldn't have mattered if there was a re-election.⁹⁴

This quote, revealing he believes that peace is the most important factor, was semi-contradictory to a statement made earlier in the interview.

In a discussion about the violence of 2007, the respondent said, “In 2007, Odinga wasn't trying to stop the violence. But really, should he have?” This implies the belief that violence can be necessary in the case of gross injustice. The third Odinga respondent, while much less accusatory in his tone, viewed the Supreme Court decision not as an unbiased look at the evidence, but as a group of people deciding to do what was right for the country at that particular moment. While he himself did not think the process was unbiased, he believed that other Kenyan's do. He purported, “People trust the process.”⁹⁵ This echoed the interviews held with Kenyatta respondents and offers support to the theory that the Constitution and the newly reformed Supreme Court were a crucial factor in keeping the peace during the 2013 election.

The interviews with Kenyatta and Odinga respondents did not uncover the same views on the Supreme Court and suggest a complex relationship with the Supreme Court. Interviews with Odinga respondents suggest that the Supreme Court damaged the public's view of its institutional legitimacy. The fact that the decision was unanimous likely kept the Court from a crisis of legitimacy. The data also suggests that the Constitutional reform was a necessary, but not sufficient, condition. It is almost certain that Odinga and his supporters would not have accepted the results, had a new Constitution not been enacted that grants independence and insulation from political pressure to the Supreme Court. However, the

⁹³ Ibid.

⁹⁴ Quote taken from interview conducted May 7th, 2013

⁹⁵ Ibid.

mere fact that this reform occurred did not single handedly keep the peace. Many other factors came into play.

D. Factors Affecting the Peace

While they emphasized the importance of the new Constitution, Kenyatta supporters also expressed the belief that other factors influenced the keeping of the peace following the release of the decision. One of the respondents attributed the peace to the work of churches that were all, “spreading the message of peace.”⁹⁶ Another respondent believes that the nationalization of news organizations helped. According to the respondent, the 2007 election was fraught with small, local news stations inciting violence among the populace, but the “local media was cut down.”⁹⁷ Now almost everyone watches national news programs. While it may have stemmed the violence, a supporter of Raila Odinga in Taita believes Kibaki closed his local station because it favored Uhuru. An inquiry into the shuttering of small, local news broadcasts and whether it had an effect on the outcome of the election is something that should to be done, though it is beyond the scope of this report. A Kenyatta respondent also expressed the view that, “People learned it’s the politicians inciting violence.” The respondent continued, “If someone came up and tried to fight me, I would just say, ‘No. That’s the politicians who want that. Not us. We are all Kenyans.”⁹⁸ This renunciation of politicians was an interesting turn in the interview, as much of the interview had focused on how great Uhuru Kenyatta is and how “primitive and lazy” Odinga and his tribe are.⁹⁹ The national unity inherent in the, “We are all Kenyans,” statement suggests that the Kenyan people may be starting to view themselves as one people, instead of as ethnically divided, opposing groups as the literature suggests they do.¹⁰⁰

The acceptance of the decision by Raila Odinga also played a prominent role in the peace. A respondent, as mentioned earlier in this study, noted that Odinga did not do much to try and quell the violence in 2007. As documented by the Associated Press in 2013, “Odinga, who challenged the validity of Kenyatta's win, told reporters after the court ruling

⁹⁶ Quote taken from interview conducted May 2nd, 2013

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Mwakikagile, Godfrey. *Ethnic Politics in Kenya and Nigeria*. Nova Publishers, 2001.

on Saturday that he wished Kenyatta well and urged Kenyans to remain peaceful.”¹⁰¹ The urging of the people to stay peaceful and respect the Constitution is similar to America’s Presidential candidate Al Gore’s acceptance of defeat after *Bush v. Gore*. The data supports the literature that proposes that the reaction of leadership has a huge effect on the reaction of the people.

V. CONCLUSION

A. Conclusion

This study presents a valuable summary of the 2013 Kenyan Presidential Election, explores the theories of Judicial Politics in relationship to The Petition, and provides valuable insight into the thinking of the Kenyan people through fieldwork in Kenya conducted promptly after the full decision was released. The application of theory to the Supreme Court decision suggests that the Supreme Court decided the case on its merits and made the correct decision, though the possibility remains that the decision was made in order to keep the peace. The responses given during interviews with Kenyans lend support to the theory that political leanings strongly affect people’s evaluation of evidence. The interviews also suggest that the institutional legitimacy of the Supreme Court was undercut by the decision, but that a unanimous decision likely saved the Court from a crisis of legitimacy.

The findings suggest that the reformation of the Supreme Court in the 2010 Constitution is likely a necessary, but not sufficient, condition for having a peaceful election. This is important for other budding democracies to keep in mind. A country attempting to overcome a history of violent elections or transitioning into a democracy must have an independent, isolated judicial branch, though it likely must also do other things, such as preaching peace throughout the country before the election, if it wishes to keep the peace.

B. Recommendations for Further Research

Many issues were raised in this study that, given the time and resources available, were beyond the scope of the study to explore. Issues that particularly deserve to be

¹⁰¹ “Loser in Kenya Election Accepts Court Defeat.” *Associated Press*, March 30, 2013.
<http://bigstory.ap.org/article/raila-odinga-loser-kenya-election-accepts-court-ruling-upholding-result-urges-unity>.

studied will be discussed here. The study of institutional legitimacy, in regards to the Kenya Supreme Court, would be greatly advanced through widespread polling. Local media is also an area in desperate need of study. Local media needs to be examined from both the perspective of whether its elimination truly added to the peace, and also whether local media outlets that supported Raila Odinga were purposefully shut down by the government in an attempt to help Uhuru Kenyatta.

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