

Moving Forward with Constitutional Reform in Kenya

A Report of the CSIS Africa Program

AUTHORS

Brian Kennedy
Lauren Bieniek

December 2010



Moving Forward with Constitutional Reform in Kenya

A Report of the CSIS Africa Program

AUTHORS

Brian Kennedy
Lauren Bieniek

December 2010

About CSIS

In an era of ever-changing global opportunities and challenges, the Center for Strategic and International Studies (CSIS) provides strategic insights and practical policy solutions to decisionmakers. CSIS conducts research and analysis and develops policy initiatives that look into the future and anticipate change.

Founded by David M. Abshire and Admiral Arleigh Burke at the height of the Cold War, CSIS was dedicated to the simple but urgent goal of finding ways for America to survive as a nation and prosper as a people. Since 1962, CSIS has grown to become one of the world's preeminent public policy institutions.

Today, CSIS is a bipartisan, nonprofit organization headquartered in Washington, D.C. More than 220 full-time staff and a large network of affiliated scholars focus their expertise on defense and security; on the world's regions and the unique challenges inherent to them; and on the issues that know no boundary in an increasingly connected world.

Former U.S. senator Sam Nunn became chairman of the CSIS Board of Trustees in 1999, and John J. Hamre has led CSIS as its president and chief executive officer since 2000.

CSIS does not take specific policy positions; accordingly, all views expressed in this publication should be understood to be solely those of the author(s).

© 2010 by the Center for Strategic and International Studies. All rights reserved.

ISBN 978-0-89206-619-3

Cover photo: A Kenyan citizen raises a flag during the signing of the new constitution into law, at Uhuru Park in Nairobi, Kenya, Friday, August 27, 2010. Photo by Tom Maruko © ActionPixs (Maruko)'s photostream; <http://www.flickr.com/photos/httpwwwactionpixsmarukocom/4932252602/sizes/l/in/photostream/>.

Center for Strategic and International Studies
1800 K Street, N.W., Washington, D.C. 20006
Tel: (202) 775-3119
Fax: (202) 775-3199
Web: www.csis.org



MOVING FORWARD WITH CONSTITUTIONAL REFORM IN KENYA

Brian Kennedy and Lauren Bieniek¹

Introduction

On August 4, 2010, Kenyans voted in a national referendum in favor of a new constitution, concluding a push for constitutional change that began more than 20 years ago. With more than 67 percent popular support, the passage of the new constitutional draft symbolizes promise and hope in a country where political tensions have remained high since the violent aftermath of the December 2007 elections. While retaining the current presidential system, the new constitution calls for the dissolution of the position of prime minister, part of a power-sharing agreement set up in early 2008. Although there will still be a strong executive, the new reforms will significantly limit its power vis-à-vis the legislature and judiciary. The new constitution also includes reforms that address the issues of land, devolution, and rule of law.

Support for passage of the new constitution was led by President Mwai Kibaki and Prime Minister Raila Odinga, political rivals in the disputed 2007 election who entered into a power-sharing arrangement and coalition government to restore peace in February 2008. Currently in his second term, Kibaki is barred by term limits from running again in 2012. He now seeks to burnish his legacy by improving the quality of governance before leaving office. Odinga seeks the same to propel himself to become the front-runner in the country's next presidential election. Opposition to the new constitution came from church leaders angered by its clauses on abortion and on the Muslim Kadhis' courts and from politicians threatened by the proposed democratic reforms, most prominently the suspended minister of higher education, William Ruto. With the passage of the new constitution, Ruto, an ethnic Kalenjin who was backed by former president Daniel arap Moi, risks losing his base of support from the Rift Valley. The new constitution also received tepid support from Uhuru Kenyatta, the minister of finance, and Vice President Kalonzo Musyoka. Like Ruto, both aspire to the presidency in 2012, but both lost stature as a result of their lack of support for the new basic law.

Despite this opposition, the referendum process was deemed largely free, fair, and credible, with turnout at 72 percent of registered voters. With efforts from Kenya's electoral commission, civil society, and international organizations, the country was able to overcome lingering fear and mistrust to hold a fairly smooth election with strong turnout.

1. Brian Kennedy is research associate with the CSIS Africa Program. Lauren Bieniek is an intern with the CSIS Africa Program.

To discuss the implications of the new constitution, the Center for Strategic and International Studies (CSIS), in collaboration with the National Democratic Institute (NDI), hosted a major conference in Washington, D.C., on September 20, 2010, entitled “Moving Forward with Constitutional Reform in Kenya.” The conference brought together senior U.S. policymakers, representatives from Washington-based NGOs, and regional analysts, as well as several prominent members of Kenyan civil society. The purpose of the event was to reflect on the constitutional reform process and identify the major challenges for Kenyans moving forward. This report summarizes broad themes that emerged during the conference, including the following:

- *The referendum was largely a success.* Despite minor challenges, the referendum went fairly and smoothly. The combined efforts of the Interim Independent Electoral Commission (IIEC), civil society, and the international community resulted in a successful campaign to register, educate, and protect voters. However, with strong consensus on the referendum, the voting did not truly test the Kenyan electoral system. Whether the country has the institutions to withstand a closely contested election in the future remains uncertain.
- *Civil society should build on momentum gained during the referendum.* Civil society organizations play a crucial role in Kenyan society, filling the void between the government and the people. Such groups positively reinforced the validity of the August vote by providing observation, monitoring, and parallel vote tabulations (PVT). However, these groups need to establish greater autonomy, clarify their visions, and broaden their domestic funding to build a concrete, sustainable grassroots-focused civil society that represents the interests of the Kenyan people.
- *Political expectations are high and will require careful management.* The passage of the constitution brings with it great expectations for tangible change. To minimize any disillusionment that may follow, the Kenyan political establishment will need to communicate that reform will take time and patience.
- *Implementation risks being co-opted by narrow interests.* Political negotiations were prominent throughout the constitution-making process, as politicians jockeyed to secure the best possible arrangement for themselves and their constituents. These tendencies are likely to be repeated in the implementation stage as well. If the status quo is to change, individual politicians must not be allowed to co-opt the substantive demands of the Kenyan people. Broad-based civil society has a role to play in this regard.
- *Government power should be devolved responsibly.* The new constitution aims to reorient the country’s basic political and economic incentive structure. A devolved government is intended to keep politicians from tapping into systems of presidential patronage or ethnic identity for their own advancement. It is also meant to ensure a more equitable and transparent distribution of resources. The quality of governance, however, is determined not only by where power is located within the political structure. Governing entities, both central and regional, must be responsible in and of themselves. Devolution that merely pushes corruption to lower levels will fail to improve governance.
- *Mindful budgetary reform of the central government will be necessary.* The new constitution moves at least 15 percent of the national budget to county-level control. If the national government does not restructure its functions correspondingly, a budgetary crisis is likely.

- *Cost and capacity of local governments must be addressed.* Depending on how restructuring is carried out, the creation of 47 county governments could be very costly. Similarly, although these new structures will be able to draw on the work forces of existing local government structures, recruiting the technocrats to staff 47 county legislatures will be a significant challenge. Establishing transparent, accountable, and efficient county-level government will be a major challenge as Kenya implements the new constitution.
- *U.S. democracy promotion efforts will need to evolve.* The United States should take a backseat on the details of implementation and instead encourage and foster strong Kenyan institutions and support domestic leadership and civil society engagement. Institutional capacity-building efforts at the national and county levels, particularly in the newly empowered legislature, will ultimately strengthen democratic governance and support an increasingly mature and multidimensional U.S.-Kenya relationship.

Conference Panel 1: Passing the Constitution

The first panel brought together experts to analyze how the referendum was passed—the actors involved, patterns observed, and lessons learned. Ken Nyaundi, chair of the Referendum Committee of the Interim Independent Electoral Commission (IIEC), discussed the commission's role in preparing Kenya for a peaceful vote, while Kennedy Masime of the Elections Observation Group (ELOG) discussed civil society's contribution to supporting this electoral process. To help better understand voting patterns and behaviors, Mary O'Hagan from the National Democratic Institute (NDI) discussed preliminary findings from fieldwork conducted pre- and post-referendum.

The Interim Independent Electoral Commission was established after the post-election violence of 2007–2008 when the Electoral Commission of Kenya (ECK) was disbanded. The IIEC was mandated to restore free and fair elections in Kenya and in its efforts to do so established a new secretariat, created a new voter register, promoted voter education, supervised elections, and collected and transmitted electoral data. Through its efforts, 12.4 million Kenyans were successfully registered to vote, and 72 percent showed up on election day. The IIEC enhanced public knowledge and awareness by utilizing various forms of media, including radio and television broadcasts to educate the public on critical aspects of the referendum. Additionally, to accommodate illiterate citizens, a green and red color system was created to signify yes and no on the ballots. On the day of the referendum, the IIEC transmitted votes wirelessly from voting stations to the tally center. This avoided the potential hazards of physically transporting votes and thus enhanced the transparency and legitimacy of the results.

Such preparatory efforts and commitment to a successful election by the IIEC, along with the support of civil society, resulted in a peaceful and fair vote in the eyes of the Kenyan people. Focus groups and surveys completed before and after the referendum process by the National Democratic Institute reaffirmed the successes while also pointing to some problematic fissures. Mary O'Hagan, NDI's senior resident director for Kenya, discussed their preliminary findings. Going into the polls, there was a strong consensus in favor of the new constitution and high expectations for its reforms, and more than 90 percent of those surveyed felt confident in the accuracy of the voting results. Although there were spirited attempts to misinform the public on several controversial issues including abortion rights, Muslim Kadhis' courts, and same-sex marriage, NDI's results show that public opinion remained remarkably durable. However, lingering fear led to uneasiness and, among some, an unwillingness to register to vote for fear of intimidation on election day. In the Rift Valley 32 percent of respondents reportedly left their homes before the referendum for fear of a violent backlash, but this fear was largely unfounded: violence and bribery were limited to fewer than 10 percent of those surveyed. Although the August vote went fairly and smoothly, it was driven through by a broad coalition of supporters. The true litmus test of Kenyan institutions will come with hotly contested presidential elections, as will likely be the case in 2012.

The Role of Civil Society

“Civil society is an incubator for alternative leadership.” –David Ndii

When civil society first took root in Kenya in the 1990s, it reflected a narrow, relatively elite network based primarily in Nairobi. By 2002, with the departure of President Moi, much of the leadership of this first generation left civil society to go into politics. However, a new generation of leaders is rising to forge a more grassroots-oriented network. Gaining energy after the 2007–2008

post-election violence, this new cohort is transforming what was once elite-focused into a more representative and extended civil society. Although largely dependent on U.S. and international support and funding, Kenyan civil society organizations (CSOs) act as an important alternative power within the space between local communities and government. The nascent network of CSOs still struggles, however, from a lack of institutional capacity, autonomy, clear vision, and a strong base of support.

Kenyan civil society was able to play a useful and important role in the electoral process, as the case study of ELOG illustrates. ELOG, the Kenyan Elections Observation Group, acts as a coalition of civil society organizations vested in supporting the electoral process. Kennedy Masime, chair of the organization, discussed how ELOG provided diverse and bipartisan monitoring and observation and acted as a watchdog for election spoilers. ELOG also conducted parallel vote tabulations for the referendum, constructively contributing to the success of the vote by providing a comprehensive check on the IIEC tally.

To ensure successful elections in the future, monitoring and observation strategies should continue and new technologies such as digital mapping should be used to their fullest. There is also a need for more direct efforts to foster voter education and participation among youth and women as well as consensus building among all Kenyans. Civil society can continue to provide civic education to the public, garner popular support for implementation of the new constitution, and lend support to legislative and institutional development.

Conference Panel 2: Challenges of Implementation

The second panel brought together experts on governance and land reform to discuss the content of the new constitution, its practical effect on Kenyan political life, and the most likely implementation challenges. Pheroze Nowrojee, a prominent lawyer and human rights activist, discussed the constitution's effect on the rule of law and judicial reform in Kenya. David Ndii, an adviser to the Committee of Experts that drew up Kenya's new constitution, addressed devolution, while Karuti Kanyinga, a senior research fellow at the Institute for Development Studies at the University of Nairobi, spoke on land reform.

Rule of Law

Kenya's judiciary, plagued by corruption scandals and politicization, entered this latest reform process largely discredited in the eyes of the Kenyan public. Therefore, one of the imperatives of the new constitution was to insulate the judiciary from undue executive influence and restore its legitimacy and, most importantly, public trust. Among the most significant changes is a provision requiring all current judges and magistrates to be vetted. Depending on how it is implemented, this process could fundamentally change the composure of the judiciary and its relationship to the executive. A second major reform establishes a director of public prosecution, nominated by the president for a single eight-year term. This position rectifies a major conflict of interest by separating the functions of the president's chief legal adviser and the country's chief prosecutor. Both functions previously belonged to Kenya's attorney general.

The new constitution also outlines a framework for the court system that creates a court of appeals, resulting in three tiers of superior courts, including the existing Kadhis' courts and high court. Although the addition of the court of appeals and the new positions within the government are significant, the current focus remains on defining the judicial vetting process and its implications.

Challenges of Implementation: Rule of Law

The vetting process is a crucial prerequisite for re-establishing judicial independence and fostering public respect for the judiciary. The constitution, however, merely states that vetting must establish justices' "suitability," leaving ample room for subjective determination. Therefore, the perceived legitimacy of the process will turn on two central questions: (1) the criteria that should be used to determine suitability, and (2) the most appropriate individuals to vet existing judges.

The Vetting of Judges and Magistrates Bill, which was awaiting approval by the parliament at the time of writing, resolves the first dilemma by defining eight elements, including professional competence, integrity, and judgment, that together define suitability. The second task, selecting a panel of individuals to implement the vetting, is proving more contentious. For the process to be rigorous and fair, those selected to vet the judges must be trusted by a broad cross section of the Kenyan population, and the selection process must be transparent. Two camps have emerged. The members of one support a selection of civil society members from organizations such as the Law Society of Kenya, Federation of Women Lawyers (FIDA) Kenya, International Commission of Jurists, and religious leaders. Members of the second camp contend that the only capable arbiters of judicial suitability are those with a firsthand vantage: judges' own peers. Both approaches carry their own risks of bias.

Devolution

Devolution refers to the decentralization of decisionmaking power from the central government to regional levels of government, in this case the county. While land, abortion, and the future status of Muslim Kadhis' courts may have been the major flash-point issues before the constitution, it is devolution that promises the most dramatic change to Kenya's existing political structure.

In theory, the process of devolution should rebalance the major distributional grievances that have become entrenched in post-colonial Kenya. The country that exploded in violence in 2007 suffered from major imbalances along three dimensions: executive power, electoral power, and financial power. Executive power was highly centralized in the hands of the president, creating an imperial presidency whose office was often used for the exercise of patronage and personal enrichment. Electoral power, a term that refers to the means by which politicians mobilize support for election, has long been structured to encourage mobilization along—rather than across—ethnic lines. Finally, financial power refers to the distribution of financial resources to all citizens. This final dimension of power animates the previous two, allowing state resources to be freely distributed based on political alliance or ethnic identity. The result has been dramatic inequalities in the material wealth of some groups of Kenyans at the expense of others.

The new constitution attempts to redress these imbalances through several major reforms. Among them:

- *the formation of 47 county councils*, with directly elected county executives, as the basis of a politically legitimized, sufficiently resourced local government
- *the creation of a senate as an upper house of the national assembly*, one of several means of strengthening the legislature vis-à-vis the executive
- *limiting the size of the president's cabinet to 24 members* (about half the size of the current coalition cabinet) and requiring that ministers be appointed from outside parliament
- *emphasizing citizen participation in government*, with the aim of giving political autonomy to smaller ethnic groups, thereby relieving the imperative of having representation at the center.

Finally, an entire chapter of the new constitution is devoted to public finance, shifting significant control of expenditures from the executive to the legislature and creating a more transparent and accessible budget process.

Challenges of Implementation: Devolution

The success of the above reforms will hinge on two primary implementation challenges: operationalizing the county assemblies and reforming the central government. The first, enabling local authorities to carry out their newly designated functions, is the easier of the two challenges. The legacy of colonialism left behind basic institutions of local government, providing a platform on which to build. Nevertheless, decentralization has failed Kenya before. Today, this memory serves as a sobering reminder that “decentralizing” bad government can merely diffuse and exacerbate old problems: as local governments become more self-sufficient, there is some risk that Kenya's 47 county governors will become a new focal point for corruption and patronage.

In the short term, local governments are likely to struggle to recruit capable civil servants. While many will come from county councils, the constitution calls for a dramatic enlargement of the local government system. At present there is simply not enough legislative and administrative expertise to staff councils in each of Kenya's 47 counties.

An even more significant question is how the central government itself will be reformed to accommodate its new role. The devolution of power and resources from the center to local authorities as is currently mandated means that the national budget will shrink considerably as more functions are shifted to local governments. Aside from providing education and security, the central government will, in theory, be reduced primarily to policy and regulatory functions. This smaller mandate no longer justifies the bloated bureaucratic structure in Nairobi, and the political elite will face a stark choice: borrow and run increasing budget deficits, or downsize the administrative establishment to match its new mission.

Land

The struggle over land ownership lies at the nexus of many of the main themes of Kenyan political and social history: political inequalities, ethnicity, territorial control, and population settlement are all tied to fundamental questions of land ownership and access. Appropriately, land has been a key reform issue and features prominently in the new constitution. A new Land Commission will have responsibility for scrutinizing land registration and investigating injustices. The distinction between public, private, and community land has been clarified, and all new land grants will be subject to parliamentary approval—a direct reaction to the longtime use of land grants as the president's personal patronage tool. The new constitution also vests the power to regulate access to the land with the people and attempts to ensure that investments in land benefit local populations.

Challenges of Implementation: Land

All of the above reforms serve the common aims of ensuring that the administration of land respects clearly defined law and operates in a transparent manner. Nevertheless, land remains closely tied to the electoral dynamics of Kenya, meaning that many vested interests will stand to lose if these reforms are successfully implemented. Land grabbers are likely to hinder implementation with technical arguments, while anti-reformers within the government may forestall implementation by limiting access to land and meeting only minimum standards for reform. Thus, the extent to which both land and ethnicity are used by politicians as mobilizing tools in advance of the 2012 elections will be a good indicator of the initial success of the constitution.

The legislative implementation of land reform also poses a substantial hurdle: land laws need to be coordinated such that they are clear and consistent throughout the country. Poor or incomplete implementation will lead to local conflicts over land rights and administrative responsibilities. At present, questions linger. For instance, will authority over the management of extractive resources be vested in local or national government? The National Land Policy, last revised in 2009, will need to be updated once again to reflect the new imperatives of devolution set forth by the constitution.

U.S.-Kenya Relations

The United States and Kenya have a longstanding cooperative relationship, and the United States has every interest in seeing Kenya succeed in consolidating democratic change and bolstering economic growth, which will serve long-standing U.S. interests in democracy and human rights as well as more recent strategic and security concerns. The depth and scope of U.S.-Kenya relations is unique among U.S. relations with African nations. Kenya, relatively stable in a region that has seen multiple crises in the past decades, has been a key partner to the United States on an array of critical regional issues, including humanitarian access, regional security, refugee assistance, conflict mediation, and counter-terror and counter-piracy measures. Kenya is a major recipient of U.S. assistance through the President's Emergency Plan for AIDS Relief. The U.S.-Kenya military-to-military relationship has been strong for many decades, and the country's relatively sophisticated infrastructure makes it a prime destination for U.S. NGOs, businesses, and university partnerships.

The Obama administration has made it a point to foster close relations between the two countries. Visits and engagement by top U.S. officials have signaled the strong interest that the Obama administration attaches to Kenya's political stability and to maintaining a robust U.S.-Kenya relationship. Kenyans have also shown a high degree of interest in U.S. politics over the past two to three years. The 2008 election of Barack Obama was welcomed with emotion and expectation, and President Obama's popularity among Kenyans remains high.

Though cooperation has been predominant, U.S.-Kenya relations have been tense at times. Corruption has been the relationship's primary frustrating element. For example, in September 2009, as part of an effort to ensure the constitutional referendum's integrity and to push the coalition government to make good on promises of reform, 15 Kenyan officials were denied U.S. entry visas for attempting to impede the process. Then in January 2010, Ambassador Michael Ranneberger cut U.S. aid to Kenya's Ministry of Education after more than \$1 million was found to be missing from the budget.

U.S. Referendum Involvement

Visible, high-level diplomatic outreach has been a cornerstone of the U.S. strategy of support for Kenya's constitutional review process. Johnnie Carson, Assistant Secretary of State for African Affairs and former U.S. ambassador to Kenya, made the country a priority during his first two years, even in the face of major crises unfolding in neighboring Sudan and Somalia. Carson's engagement was amplified by several high-level diplomatic visits. In 2009, Secretary of State Hillary Clinton began an 11-day Africa tour with a visit to Kenya during which she held bilateral meetings with government officials addressing issues of corruption and political reform. Vice President Joe Biden's visit in June 2010 marked the arrival of the highest-ranking U.S. official to visit Kenya in decades. Both Secretary Clinton and Vice President Biden made a point to engage Kenyan citizens as well as politicians, giving public speeches and meeting with civil society members. President Obama has expressed his personal interest in Kenya and given interviews on U.S.-Kenya relations.

The United States has provided democracy assistance to Kenya since the early 1990s, but U.S. programs of support have suffered from inconsistency, with U.S. focus oscillating between Kenyan civil society and its governance institutions. As institutions and civil society continue to mature, U.S. approaches to democracy and governance assistance also need to evolve. Kenya's civil society, its vigorous media, growing professional and business class, and cadre of reformers will ultimately be the greatest forces for change in Kenya, and Kenyans may come to view vociferous U.S. interventions as condescending or counterproductive.

Already, some observers, both in Kenya and the United States, suggest that the Obama administration had too loud a voice in the reform process, inappropriately seeking to influence Kenya's internal politics by supporting individuals and weighing in in favor of the constitution itself rather than focusing solely on the credibility and fairness of the process. Some Kenyans were bemused by Secretary Clinton's boast to the African Chiefs of Mission Conference about how the administration kept "hammering" Kenyan leadership. Administration officials emphasize that their efforts were focused on the reform process itself, but these critiques do point to the need to be sensitive to perceptions of overweening influence or condescension.

Conference participants offered thoughts on how the United States can best support Kenya's reform ambitions going forward. Among the recommendations that emerged were the following:

- *Soften diplomatic engagement.* The United States should soften its diplomatic tone and minimize its footprint in the details of the implementation process. Vigorous U.S. efforts to ensure a fair referendum should now turn to quiet support of the country's chosen reforms and capacity building for civil society and newly restructured institutions. Kenyan leadership should direct the implementation process, buttressed by constructive civil society participation. One participant suggested that one area where U.S. public statements can play a positive role is in holding accountable those who perpetrated violence after the 2007 elections. Maintaining this position will support Kenya's effort to shed abusive practices from its political system. As the reforms are implemented and preparations for the 2012 elections begin, Kenya's governing institutions will require strong domestic leadership.
- *Sustain policy attention.* Due in large part to the U.S. domestic rotation of power, U.S. policy on Kenya has not always been consistent. For both Kenya and the United States to gain full benefit from the relationship, U.S. policy towards Kenya needs to be characterized by clear, sustainable efforts to achieve durable, long-term goals.

- *Focus on institutions rather than individuals.* Efforts at strengthening democracy ought to be directed toward creating a set of institutions with robust and countervailing power. State institutions, rather than political parties or individuals, should be the focus of U.S. efforts in its engagement with the Kenyan government. One positive example of a longer-term engagement supporting the development of Kenyan institutions has been the Parliamentary Strengthening Program, which since 2000 has helped provide technical assistance and analysis to the Kenya National Assembly (KNA), helping to improve its capacity, transparency, and autonomy. The program has spanned three successive U.S. administrations and represents the sustained, quiet engagement needed for lasting impact.
- *Prioritize sustainability.* The United States already has multiple programs in support of Kenyan civil society. This is a positive foundation on which to build. The challenge now is deepening, broadening, strengthening, and sustaining civil society to ensure that it remains responsive to the needs and aspiration of Kenyans, rather than those of external donors. From a U.S. perspective, this means not only supporting civil society to empower Kenyan citizens, but also encouraging these civil society partners to make positive strides toward becoming self-sustaining forces in Kenyan society and politics. To this end, the United States should seek ways to promote domestic investments in civil society to reverse the current overwhelming dependence on external funding.

Conclusion

The constitutional referendum process has been deemed a success. Now the real work of implementing the ratified reforms and preparing for a possibly contentious national election begins. Kenya's new constitution promises sweeping change to Kenya's political and economic future and has brought with it new energy and a sense of purpose. Yet with soaring expectations comes a sobering reality: implementation will be a long, difficult process. The months and years to come will test the will of all citizens to transcend personal or political interests for the best interests of Kenyan society as a whole. The Kenyan political class and civil society must manage these expectations by communicating the scope and magnitude of the challenge: more than 100 laws must be written and passed in order for the constitution to become fully operational.

The 2012 presidential elections will provide the first significant indications about whether the new constitution is fulfilling its mission. Will politicians continue to use ethnicity as a prominent mobilizing tool, or will they develop new ways of consolidating political support? Will the new electoral commission follow the precedent set forth by the IIEC and organize a free and fair election? Both of these will be important litmus tests for the constitution's success.

In subsequent years, it will be important to watch how the revamped system of checks and balances works in practice. Will the new county governments improve transparency at all levels of government, or will patronage and graft merely be supplanted from the executive to the 47 county governments? Will the judiciary regain its independence and legitimacy, or will it continue to be a tool of the executive?

Despite lingering questions, there are plenty of reasons for optimism: Kenyans have shown resilience in bouncing back from the 2007–2008 post-election violence to accomplish a peaceful referendum. Strong civil society leadership, a growing private sector, and a generational change in the political class are all encouraging trends. These three groups can be the engines of Kenyan prosperity, and the United States would do well to support them. As noted, however, the lasting impact of U.S. policy will turn not on its support of individuals or even political parties. Rather, a successful policy will encourage the development of Kenyan political culture by supporting civil society organizations, and it will encourage a capable, transparent government by supporting the institutional structures that will be driven forward by Kenya's vibrant, young political class.

Conference Agenda
The CSIS Africa Program and the National Democratic Institute
present

Moving Forward with Constitutional Reform in Kenya

September 20, 2010

B1 Conference Room, CSIS

Welcoming Remarks: Jennifer Cooke, director, Africa Program, CSIS

Panel 1: Passing the Constitution

Ken Nyaundi, chairman of Referendum Committee, Interim Independent Electoral Commission

Kennedy Masime, executive director, Center for Governance and Development and chair,
Elections Observation Group (ELOG)

Mary O'Hagan, senior resident director, Kenya, National Democratic Institute (NDI)

Moderator: Keith Jennings, regional director, Southern and East Africa, National
Democratic Institute (NDI)

*Panel 2: The Challenges of Implementation: Land, Devolution, and the
Rule of Law*

David Ndii, independent consultant

Pheroze Nowrojee, lawyer and human rights activist

Karuti Kanyinga, senior fellow, Institute for Development Studies, University of Nairobi

Moderator: Joel Barkan, senior associate, CSIS

Lunchtime Roundtable: U.S.-Kenya Relations

Michelle D. Gavin, special assistant to the president and senior director for African affairs,
National Security Staff, The White House

Joel Barkan, senior associate, CSIS

David Ndii, independent consultant

Kennedy Masime, executive director, Center for Governance and Development, and chair,
Elections Observation Group (ELOG)

Moderator: Jennifer Cooke, director, Africa Program, CSIS



1800 K Street, NW | Washington, DC 20006

Tel: (202) 887-0200 | Fax: (202) 775-3199

E-mail: books@csis.org | Web: www.csis.org

