



ISSN: 2036-5438

**Commanders-in-chief beyond the border:  
analysing the powers of heads of state in Northern  
American federalism**

by

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Perspectives on Federalism, Vol. 9, issue 1, 2017





## Abstract

Canada and the United States of America are examples of how two constitutional systems in the same region may adopt substantially different solutions in respect of the powers of the head of state. While the United States Founding Fathers opted to follow a republican and presidential path, the Canadian constitutional system developed a framework under the British monarchic background, in part as a rejection of their neighbour country's federal and constitutional choices. This article proceeds with a comparison between both systems of Northern America, demonstrating that the powers of heads of state may vary, even between countries which were historically influenced by the same constitutional and democratic traditions, but, as a result of a multitude of historical and cultural influences, decided to follow different constitutional pathways.

## Key-words

constitutional law, heads of state, separation of powers, checks and balances, federalism



## 1. Introduction

Although different countries may be influenced by diverse constitutional traditions, the character of the head of state has always played a dominant role in the political lives of most of the states around the world. From monarchies to republics, from the *ancien régime* to the post-revolutionary periods, from authoritarian regimes to more democratic systems, kings and presidents have been for years the last redoubt of political power, sovereignty and public order in a large number of countries. In some countries, it is also argued that the moves from a monarchy to a republic (or vice-versa) should depend on a prior identification and definition of which would be the powers of the head of state (Crommelin 2015: 1118-1139). Moreover, in some non-presidential regimes, the role of the head of state is often questioned both by scholars and the public for not being entitled to play a substantial role in the daily political and constitutional practice, though they are asked to act at moments of political crisis.<sup>1</sup>

And even though the countries of Northern America are relatively recent realities, their heads of state are still extremely relevant symbols of each of those constitutional and democratic systems. However, analysing the powers of the heads of state in both Northern American neighbour countries (Canada and United States) is also an exercise in historical and cultural research, since there are substantial differences between the peoples, cultures and customs of the states.

In fact, both countries have been the subject of a vast array of influences, not only from European nations, but also from peoples of other continents such as Africa or Asia, as well as, obviously, from the American continent itself. The current realities of Canada and the United States were built by immigrants and are immeasurably characterized by their multicultural societies (although the Canadian commitment to multiculturalism is quite recent and the United States could be preferably characterised as a “diverse society”). But their political and constitutional history is substantially different. While the United States declared its independence in 1776 (with the establishment of the Confederation in 1781), Canada only had its Confederation established in 1867, though its constitutional choices were also affected by the example of the United States. The Canadian constitutional settlement was conceived by the Fathers of Confederation as a rejection of the American settlement to



the advantage of “a Constitution similar in Principle to that of the United Kingdom” – as stated in the preamble of the Constitution Act –, but simultaneously under “the Desire to be *federally* united into One Dominion” – as it happened in their neighbour country.

Long before, the first inhabitants of Northern America are said to have migrated from Siberia by way of the Bering land bridge and arrived at least between 15,000 and 16,000 years ago, though increasing evidence suggests an even earlier arrival (Gugliotta 2013). However, the European cultural influence goes back to the Age of Discovery, especially to the colonisation by the British and French empires.

Now the Canadian Confederation is celebrating its 150<sup>th</sup> anniversary, this article intends to present the reader with a comparison between both systems in Northern America, trying to demonstrate that the powers of heads of state (and constitutional systems as well) are not necessarily equal in countries which were historically influenced by the same constitutional and democratic traditions and practices, such as Canada or the United States.

From the republican reality of the United States, influenced by a richly ideological revolution that, in fact, served as an introduction to the French Revolution itself, to the Canadian monarchic system, which has been peacefully evolving throughout times until a process of “Patriation” of its Constitution, the different characteristics of both systems require a continuous analysis. Because constitutional systems are not static realities and evolve side by side with social communities and their ways of exercising political power.

As both systems were created at particular moments in history, it is also worth briefly mentioning how a more recent theme, such as environmental protection – an area which political importance has been increasing during the last decades –, is dealt under the existing frameworks that foresee and regulate the powers of the heads of state in Northern America.

## 2. Heads of state and constitutional systems

Before the creation of the reality of states in Northern America, the position of the head of state had already gained particular relevance in the history of states, and also before the existence of states. In fact, the “invention” of the modern state could be attributed to European political history (Reinhard, 2007: 7-14), as the maximum organized form of political power in contemporary societies, in order to face a historical need of political organization, based on founding elements such as people, territory and sovereignty (de



Vergottini 2013: 125). Before that, it is possible to find various expressions: from *Polis*, to *Civitas*, *Res publica*, *Senatus Populusque Romanus*, *Regnum*, *Corona*, *Terra* or *Burg*.

Nonetheless, and though there was already a commonly accepted distinction between the king – or the *ruler* – and his kingdom – or the *realm* – (Albuquerque and Albuquerque 1999: 506), it could be said that with the birth of the state – from the Italian word *stato* and, before that, the Latin origin *status* – that distinction started to be more accentuated. The head of state became now a more *legally* differentiated character from that new reality of what could be considered as the state.<sup>11</sup>

In the liberal state, the principle of the separation of powers always represented a central role (Kelsen 1923-1924: 374-408; Eisenmann 1933: 163-192). The rise of the constitutional state, submitting to the rule of law and the representative system, was based on the idea of freedom and intended to impose limits to political power – historically conferred to the king or ruler –, dividing it and reducing its intervention in citizens' day-to-day life.

The constitutional monarchy was initially characterised, in England, by two centres of power: King and Parliament, who shared the acting of the sovereign power. The head of state was entitled to executive power and participated in the legislative function, limited to a certain number of acts, such as the king's sanction.

With the beginning of parliamentary forms of government, the king and the cabinet (or *government*) started to share executive power, with the king, in the first phase, as the head of the government. Meanwhile, the evolution of the parliamentary system attributed more political affirmation to Parliament, which recognized the place of cabinets with parliamentary majorities as holders of executive power *par excellence*. Consequently, the head of state became relegated to a mere role of *indirizzò* in a political system composed of the main triplet of Electorate-Parliament-Cabinet, based on a majority rule (Bin and Pitruzzella 2015: 145-148). In respect of the rights of the king, Bagehot would respond with the following well-known, and still frequently quoted description:

“the sovereign has, under a constitutional monarchy such as ours, three rights — the right to be consulted, the right to encourage, the right to warn. And a king of great sense and sagacity would want no others. He would find that his having no others would enable him to use these with singular effect” (Bagehot 1873: 85).



Therefore, the office of the head of state in parliamentary systems has seen its space in the constitutional framework significantly reduced to that idea presented by Bagehot (Roberts 2009: 13-17).

After the Germanic experience of the Constitution of the Weimar Republic (1919–1933), the head of state in parliamentary systems started to be regarded as a “guardian of the constitution” – an expression introduced by Carl Schmitt (1931) –, positioned over pluralism and the different party perspectives in the political debate, as well as safeguarding the political unity of the state. However, according to the Weimar Constitution, the head of state had autonomous legitimacy and incisive powers, once he was directly elected by the electorate, having competence to appoint governments (even without support from the Parliament), to dissolve the Parliament and “emergency powers” to suspend the constitutional guarantees of rights. Therefore, the head of state could be an extremely relevant governing structure in times of crisis (Bin and Pitruzzella 2015: 270-272).

At this point, the French Gaullist conception of the head of state should also be mentioned, as it is, at least in part, related to the German precedent under Weimar. In fact, the 5<sup>th</sup> Republic in France (with the Constitution of 1958) was primarily intended to limit and rationalise the parliamentarianism of previous republics. However, it went through a metamorphosis with the strong personality of General de Gaulle, the Algerian crisis and the controversial constitutional amendment of 1962 (allegedly breaching articles 11 and 89), resulting in a referendum, which approved de Gaulle’s intention that the president should be directly elected by the citizens. And since then, only in two brief periods (1986-1988 and 1993-1995) of “cohabitation” of the president and a government from a different party, has the Constitution of the 5<sup>th</sup> Republic been applied *à la lettre* (Duverger 1986: 7).

As a matter of fact, although the Weimar Constitution and the Gaullist conception have hardly influenced the constitutionalism of the states in Northern America, they are essential to understand parliamentary, presidential and semi presidential realities and their repercussions in other constitutional experiences, namely in regard of the competences of heads of state in Canada and the United States, which is the subject of this article. And that is the reason why certain historical moments should be presented in this description, starting with the constitutional reality of the United States.





### 3. The head of state in the United States of America

#### 3.1. Republicanism and the Revolution

In June 1774, the Virginia and Massachusetts assemblies independently proposed an intercolonial meeting of delegates from the several colonies to restore union and harmony between Great Britain and her American Colonies.

Pursuant to these calls, the first Continental Congress met in Philadelphia in September of that year, composed of delegates from 12 colonies. On October 14, 1774, the assembly adopted what has become to be known as the Declaration and Resolves of the First Continental Congress. In that instrument, addressed to his Majesty and to the people of Great Britain, there was embodied a statement of rights and principles, many of which were later to be incorporated in the Declaration of Independence and the Federal Constitution. Because of the timing of this Congress, that followed the British and French Enlightenment, the American Revolution and its Constitution have been over the years labelled as profoundly liberal and Lockean (Hartz 1955).

However, later examinations (Robbins 1959; Wood 1969) emphasised the Republican ideology and motivations of the American Independence times, where the revolutionary literature made references to corruption, vice, and virtue. In fact, the people of the Thirteen Colonies were strongly influenced by the religious beliefs of the “pilgrims” of the Mayflower<sup>III</sup> and they generally considered the society of the Old World as corrupted by the prevalence of the particular and personal aims over the general good, serving the oligarchical interests of rulers and politicians (Craig 1990: 317-365).

The main idea of American republicanism was to sacrifice the individual benefits for the public and general good<sup>IV</sup> of society (or the *republic*), as Woods’ words point out:

“Since everyone in the community was linked organically to everyone else, what was good for the whole community was ultimately good for all the parts. The people were in fact a single organic piece (...) with a unitary concern that was the only legitimate objective of governmental policy. This common interest was not, as we might today think of it, simply the sum of consensus of the particular interests that made up the community. It was rather an entity in itself, prior to and distinct from the various private” (Wood 1969: 58)



Accordingly, the Constitution of the United States of America had to be framed by Republican ideals. Its structural provisions, the separation of powers and the checks and balances were intended to prevent the factional political officials from potentially legislating against the public good. As Sunstein states:

“In important respects, the departure from traditional republicanism could not have been greater. Madison willingly abandoned the classical republican understanding that citizens should participate directly in the process of government. Far from being a threat to freedom, a large republic would help to guarantee it. At the same time, Madison’s understanding was sharply distinct from that of the modern pluralists. He hoped that national representatives operating above the fray, would be able to disentangle themselves from local pressures and deliberate on and bring about something like an objective public good. Those representatives would have the virtue associated with classical republican citizens” (Sunstein 1985: 42).

And probably it is as a result of this interpretation that the provisions, set by the Founding Fathers of the United States, and evolving since then, which regulate the process of election of the head of state, are characterised by a considerable complexity, discussed below. As a matter of fact, this complexity could be understood as a constitutional means to ensure that the elected official is a credible or trustworthy citizen for governing a public office of the Federation. Though this question has been raised recently by opinion makers in regards of the more radical positions adopted by Donald J. Trump’s administration.

### **3.2. The Constitution and the office of President of the United States**

Before the approval of the Constitution of 1787, other relevant statements should be emphasised as part of the constitutional law of the United States of America. From the *Covenants* and other legal instruments dating from the colonial era,<sup>v</sup> to the Declaration of Independence, the Virginia Declaration of Rights and the declarations of the other first states, the principles, values and symbols provided by these texts assume extensive importance for those who are willing to know more about constitutional law in that country.

It should be also stressed that the twenty-seven amendments to the original Constitution (of the original seven long articles), which were approved from 1791 until 1992, have the same legal force and represent special relevance, namely in respect of fundamental rights (Miranda 2014: 147). In addition, the Constitutional Law of the United States also includes customary law (not as much as in the United Kingdom, but still relevant) and the





constitutions of the fifty federate states (officially forty-six states and four commonwealths, which are Kentucky, Massachusetts, Pennsylvania, and Virginia).

The final version of *The unanimous Declaration of the thirteen United States of America* was ratified by the Second Continental Congress (representatives of the Thirteen Colonies), in Philadelphia on July 4, 1776, stating in its preamble:

“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”<sup>VI</sup>

The Declaration of Independence was heavily influenced by the Virginia Declaration of Rights,<sup>VII</sup> since its main author, Thomas Jefferson, was actually a delegate from Virginia to the Continental Congress.

In respect of the Constitution, it is noteworthy that the fundamental law in force today was preceded by a previous Constitution, named the *Articles of Confederation and perpetual Union between the states of New Hampshire, Massachusetts-bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia* and which were agreed to by the Continental Congress on November 15, 1777 and entered in force after ratification by Maryland, on March 1, 1781.<sup>VIII</sup>

This first constitutional text predicted that each state would retain “its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which was not by the Confederation expressly delegated to the United States, in Congress assembled” (article II). Nevertheless, it did not provide for a strong executive and had no provision for a federal judiciary (Friedman 2005: 71-79).

The only reference to a president (or something similar to a *chief executive*) was made in article IX (para. 5), where it was foreseen that:

“The United States in Congress assembled shall have authority to appoint a committee, to sit in the recess of Congress, to be denominated ‘A Committee of the States’, and to consist of one delegate from each State; and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction -- to appoint one of their members to preside, provided that no person be allowed to serve in the office of president more than one year in any term of three years (...).”



However, all of the functions executed by the “President of the United States in Congress Assembled”, as he was known, were under the direct control of Congress. As a result, he only performed minor ceremonial duties and often signed documents on behalf of the Congress as a whole.

The presidency of those days is perhaps best compared to someone who could occasionally represent, and speak for, the organization in a public, official capacity, but was not a very important or powerful figure in day-to-day decision making.

The Articles of Confederation were replaced by a new constitution, which created a strong, executive presidency (amongst other innovations). George Washington, who had been Commander-in-Chief of the Continental Army between 1775-1783, assumed office in 1789 as the first full-fledged “President of the United States”, a title only used informally until then.

Curiously, it should be also accentuated at this point that the Articles of Confederation foresaw the interesting following provision regarding the possible will of Canada (as the British-held “Province of Quebec” was already known) to enter the confederation:

“Canada acceding to this confederation, and adjoining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union; but no other colony shall be admitted into the same, unless such admission be agreed to by nine States” (article XI).

The current Constitution of the United States of America was drafted in 1787 and afterwards forwarded to the states, ratified by eleven states by 1788 and by all the thirteen states two years later.

Its preamble is a remarkable piece of symbolism in constitutional and political history, as it states:

“We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”

Since then, this has remained the federal Constitution of the United States, and as Friedman states:



“The federal Constitution was marvellously supple, put together with great political skill. The main reason why it has lasted so long is that the country – aside from the Civil War crisis – has been remarkably stable. The first revolution was the last. But the Constitution itself deserves at least a bit of the credit. It was neither too tight nor too loose. It was in essence a frame, a skeleton, an outline of the form of government; on specifics, it mostly held its tongue” (Friedman 2005: 73-74).

In respect of presidential powers, among the seven articles of the American Constitution,<sup>IX</sup> the first three articles are of particular importance, for they enshrine the separation of powers, drawing on the ideas of Montesquieu. Article I foresees that all legislative powers are conferred to the Congress of the United States (Senate and House of Representatives), while Article II grants the executive powers to the President. The judicial power is presented in Article III, which is conferred to the Supreme Court and other inferior courts.

As a matter of fact, the American system of a separation of powers implies not only the acts which are naturally inherent to the functions of such organs (*faculté de statuer*), but also the possibility of interfering in acts of other organs (*faculté d'empêcher*). That embodies the mechanism which has been named of “checks and balances” (Manin 1994: 257-293; Carey 2009: 121-165).

The President of the United States is, therefore, elected for a mandate of four years, “and, together with the Vice-President chosen for the same Term” (Article II, Section 1),<sup>X</sup> formally through an electoral college; although nowadays it could be said that (due to the intervention of modern political parties and the imperative mandate of presidential electors) it is nearly a direct suffrage (Miranda 2014: 160). Still, the election rules vary from state to state.

At the same time, there is also the possibility that the candidate getting most popular votes is not elected to the Presidency, as it happened in the 2000 presidential election, in which Al Gore gained more votes, 50,999,897 but George W. Bush was elected with 50,456,002 votes.<sup>XI</sup> More recently, the same happened to Hillary Clinton, who received 65,853,516 votes, and Donald J. Trump was elected with only 62,984,825 votes.<sup>XII</sup> And the truth is that both Gore and Clinton, subsequently showed “restraint in upholding the constitutional system” (Ackerman 2010: 30).



Moreover, the Constitution foresees a reciprocal independence of the office holders, with neither the President answerable before the Congress, nor the latter dissolvable by the President. This comment notwithstanding, impeachment or the submission of the President to criminal liability by the Congress, is possible through a qualified majority of two thirds (Articles I, Sec. 3 and II, Sec. 4).<sup>XIII</sup>

Functional interdependence was foreseen in the Constitution, with on the one hand mutual collaboration and accountability – presidential veto to bills, which may be overcome through a majority of two thirds (Article I, Sec. 7), and messages from the President to the Congress (Article II, Sec. 3), and, on the other hand, authorizations and approvals regarding the appointment of high officer, treaties, budgetary credits and inquiry commissions. (Article II, Sec. 2).<sup>XIV</sup>

Actually, in this best example of a presidential system, the figure of the President has the functions of impulse or initiative, both on domestic and international levels (Hathaway 2009: 143-268), and the Congress is entitled to deliberating, i.e. the President is responsible for the most relevant decisions of the mandate, but he is also under the continuous surveillance and effective influence of the Congress (particularly the Senate).

As for the election of the President, it should be noted that each state shall appoint a number of electors in the electoral college, equal to the whole number of senators and representatives to which the state may be entitled in the Congress. But no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed as an elector. (Article II, Sec. 1). These electors will then vote for the office of President.

Article II, Sec. 1 also determines that no person except a natural born citizen, or a citizen of the United States, at the time of the adoption of the Constitution, shall be eligible to the office of President, neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and lived for fourteen years as a resident within the United States.

The same article originally foresaw that, in case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said Office, the same shall devolve on the Vice President, and the Congress may by law provide for the case of removal, death, resignation or inability, both of the President and Vice President, declaring what officer shall then act as President, and such officer shall act



accordingly, until the disability be removed, or a President shall be elected (original Article II, Sec. 1). However, this clause was affected by the XXV Amendment, which clarified it, setting that “in case of the removal of the President from office or of his death or resignation, the Vice President shall become President” (Section 1) and “whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress” (Section 2).

Still the Article II, Sec. 1 sets the following oath or affirmation for the inauguration on the execution of the office: “I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.”

According to Article II, Sec. 2, and notwithstanding the formal competence of the Congress for declaring war (Article I, Sec. 8), the President is also the Commander-in-chief of the armed forces<sup>xv</sup> of the United States, and of the militia of the several States, when called into the actual service of the United States.

This article foresees that he may also require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

The same Article II, Sec. 2 grants the President power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur. Also by and with the Advice and Consent of the Senate, the President shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States.

As foreseen in the mentioned article and section, another the power of the President is to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session. And, moreover, the Sec. 3 of that article sets that the President shall from time to time give to the Congress information of the State of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient. On extraordinary occasions, he has powers to convene both houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper.





Article II, Sec. 3 also enshrines the power of the President to receive ambassadors and other public ministers, as well as to take care that the laws are faithfully executed, and to commission all the officers of the United States.

Turning now to the lack of legislative powers of the President, the truth is that, being the sole authority over the executive branch, the holder of the office controls a vast array of agencies that can issue regulations with little oversight from Congress. Examples of those federal departments, entities and agencies are the Central Intelligence Agency, the National Security Agency, the Food and Drug Administration, the Environmental Protection Agency.

And the truth is that “contemporary political science is catching up with the rising importance of presidential unilateralism” (Ackerman 2010: 198). Although the increasing centrality of the role of the head of state had appeared well before, the presidential terms of George W. Bush and Barack Obama<sup>XVI</sup> have actually consolidated a trend of a strong pragmatic growth of presidential powers, facing the Congress and judicial power (de Vergottini 2013: 687), which is currently being assessed by public opinion makers with the promises of Donald J. Trump.

However, and apart from these increasing powers, the Constitution foresees that the President, Vice President and all civil officers may be removed from their office on impeachment for, and conviction of, treason, bribery, or other high Crimes and misdemeanours (Article II, Sec. 4). On this issue, it should be highlighted that no president has ever been impeached under the constitutional law of the United States. Presidents Andrew Johnson and Bill Clinton were successfully impeached by the House of Representatives, but they were later acquitted by the Senate. In the same way, the impeachment process of Richard Nixon was technically unsuccessful, as he resigned his office before the vote of the full House.<sup>XVII</sup>

### 3.3. Case law regarding the status of the President

In terms of executive privilege and immunity, only Article I, Sec. 6 explicitly states that Senators and Representatives shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same. And for any speech or debate in either House, they shall not be questioned in any other place.





Consequently, presidential privilege and immunity is not mentioned explicitly in the Constitution. Nonetheless, the Supreme Court of the United States ruled it to be an element of the separation of powers doctrine, and/or derived from the supremacy of executive branch in its own area of constitutional activity.

On this matter, Chief Justice Warren E. Burger, writing for the majority in *US v. Nixon*, stated that:

"Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings."<sup>xviii</sup>

Some years later, in *Nixon v. Fitzgerald*, the Supreme Court ruled that the President has absolute immunity from civil lawsuits seeking damages for presidential actions.<sup>xix</sup>

However, the Court ruled in *Clinton v. Jones* that a sitting President does not have presidential immunity from suit over conduct unrelated to his official duties. Paula Jones's suit was based on conduct alleged to have occurred while Clinton was governor of Arkansas. Clinton had sought to postpone the lawsuit until after he left office, but the Court stated that it had never suggested that the President or any other public official has an immunity that "extends beyond the scope of any action taken in an official capacity."

The Court based its immunity doctrine on a functional approach, extending immunity only to "acts in performance of particular functions of his office." It also rejected Clinton's claim that the courts would violate the separation of powers between the executive and judicial branches if a court heard the suit. Finally, the Court rejected the President's contention that defending the lawsuit would impose unacceptable burdens on the President's time and energy.<sup>xx</sup>

## 4. The head of state in Canada

### 4.1. From British province to the "Patriation"

Given that the Queen represents an extremely important federal constitutional role, as her name is invoked when one refers to each of the three powers – executive (Queen-in-



Council), legislative (Queen-in-Parliament) and judicial (Queen-on-the-Bench) – it would be worth investigating how this relation between Canada and the British sovereign began (Macleod 2012: 16-17).

In 1583, Sir Humphrey Gilbert, by the royal prerogative of Queen Elizabeth I, founded St. John's, Newfoundland, as the first North American English colony. Later, the French explorer Samuel de Champlain arrived in 1603 and established the first permanent European settlements at Port Royal (in 1605) and Quebec City (in 1608).

The Royal Proclamation of 1763 (issued by King George III following Great Britain's acquisition of the French territory in North America) created the Province of Quebec out of New France, and annexed Cape Breton Island to Nova Scotia. The 1783 Treaty of Paris recognized American independence.

To accommodate the 10,000 English-speaking settlers, known as the United Empire Loyalists, who had arrived from the United States following the American Revolution, the Constitutional Act of 1791 divided the province into French-speaking Lower Canada (later Quebec) and English-speaking Upper Canada (later Ontario), granting each its own elected legislative assembly.

Consequently, the two Canadas remained divided until the issuance of the *Act of Union 1840* (which is how the *British North America Act, 1840* is commonly known), which merged them into a united Province of Canada. A responsible government was established with a Governor General, an Executive Council (then Cabinet of Ministers) and a Legislative Council.

The British Parliament approved the *British North America Act 1867*, which outlined Canada's system of government, combining Britain's Westminster model of parliamentary government with division of sovereignty (Canadian federalism).<sup>XXI</sup>

During the final quarter of the 20<sup>th</sup> century, a considerable number of negotiations took place in order to implement a political process that would lead to Canadian sovereignty, which is historically known as the *Patriation of the Constitution* of 1982 (Harder and Patten 2015).

The word "Patriation" was based upon the idea of repatriation but, once the Canadian constitution was originally approved under the British law, it could not be returned to



Canada. Consequently, the chosen word had to be Patriation, without the prefix *re-* (Hogg 2003: 55).

The process included the approval of the *Canada Act 1982*<sup>XXII</sup> by the Parliament of the United Kingdom, which decreed that no future acts of that Parliament would extend to Canada and ended the necessity to request amendments to the Constitution of Canada, once those amendments could be approved solely by Canada's constitutional institutions.<sup>XXIII</sup>

As Schedule B to the previously mentioned act, the *Constitution Act, 1982* was approved, it amended the *British North America Act, 1867* (now renamed *Constitution Act, 1867*), enacted a Charter of Rights and Freedoms, recognized aboriginal rights; amended the equalization formula, created an amending formula for the Constitution, and declared the documents which are part of the Constitution.<sup>XXIV</sup>

Since then, there have been eleven minor amendments (from 1983 to 2011), being most of them limited in range, regarding issues that affect particular provinces.

#### 4.2. The Constitution Act, the Sovereign and the Governor General

Today Canada is composed of ten provinces<sup>XXV</sup> and three territories<sup>XXVI</sup> and, in respect of constitutional powers, all executive authority is understood to derive from the Sovereign, who is Canada's formal head of state.

The state is, consequently, embodied in the Sovereign: every Canadian Member of Parliament is required to swear allegiance to the Queen.

Elections are called and laws are enacted in the name of the Crown. No bill may become law without Royal Assent. Formally, the Prime Minister and the Cabinet are merely part of the Crown's council of advisers. They govern in the name and with the consent of the Crown, which could be defined as follows:

“As the embodiment of the Crown, the Queen serves as head of state in Canada's constitutional monarchy. The Queen and her vice-regal representatives — the governor general and lieutenant-governors — possess what are known as prerogative powers, which can be made without the approval of another branch of government, though they are rarely used. The Queen and her vice-regal representatives also fulfil ceremonial “head of state” functions. Territorial commissioners represent the federal government in the territories but perform similar duties to lieutenant-governors.”<sup>XXVII</sup>



As a result, the Sovereign is represented in Canada by the Governor General (as in a number of other Commonwealth realms). In fact, the Constitution Act 1867 determines, in its Article 9, that the executive government and authority of and over Canada is declared to continue to be vested in the Queen. Following that norm, Article 10 recognizes the existence of a Governor General, who chooses, summons and removes (from time to time) Privy Councillors and Members of the Queen's Privy Council for Canada, which aids and advises in the Government of Canada (Article 11).

According to Article 12, the Governor General is entitled to all powers, authorities, and functions under the acts of the Parliament, with Advice of Privy Council, or alone. Throughout the Constitution Act 1867 there are various provisions referring to “the Governor General in Council”, which refers to the Governor General acting by and with the Advice of the Queen's Privy Council for Canada (Article 13).

Furthermore, Article 14 enshrines the power of the monarch to authorize Governor General to appoint Deputies (from time to time):

“within any Part or Parts of Canada, and in that Capacity to exercise during the Pleasure of the Governor General such of the Powers, Authorities, and Functions of the Governor General as the Governor General deems it necessary or expedient to assign (...).”

For the command of armed forces (the Land and Naval Militia, and of all Naval and Military Forces, of and in Canada)<sup>XXVIII</sup>, Article 15 clarifies that it is vested in the Queen.

The Constitution submits (though formally, as it will be possible to see further) the legislative to some control by the executive branch. As Article 17 determines that there shall be “One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons”, Article 24 grants the Governor General the power of (from time to time and in the Queen's name) summoning qualified individuals to the Senate.

In reality, this power is literally tailored after the same powers of the Queen in the British upper house (the House of Lords). But the Queen may, by herself, on the recommendation of the Governor General, direct that four or eight members are to be added to the Senate, and so the Governor General shall summon four or eight qualified persons, representing equally all the divisions of Canada (Article 26). And Article 27 foresees that the Governor General shall not summon any person to the Senate, except on a further like direction by the



Queen on the like recommendation, to represent one of the divisions of Canada until such division is represented by twenty-four senators and no more.

According to Article 30, the resignation of senators is made by writing and addressed to the Governor General. And power to appoint a Senator to be Speaker of the Senate, and remove him and appoint another in his stead, is enshrined in the Governor General, by Article 34.

On the subject of the proceedings related to the lower house (House of Commons), Article 50 foresees the competence of dissolution by the Governor General, during the five years' legislature of that constitutional organ. Additionally, in cases of money votes in that chamber, Article 54 determines that any vote, resolution, address, or bill for the appropriation of any part of the public revenue, or of any tax or impost, must be first recommended by the Governor General in the session in which such vote is proposed.

Concerning the “royal assent” by the executive power in Canada, a bill passed by the Houses of the Parliament shall be presented to the Governor General for the Queen’s Assent, he shall declare, according to his discretion (subject to the Constitution Act and the Queen’s instructions), either that he assents thereto in the Queen’s Name, or that he withholds the Queen’s Assent, or even that he reserves the bill “for the Signification of the Queen’s Pleasure” (Article 55).

However, if the Governor General assents to a bill in the Queen’s Name, he shall “by the first convenient Opportunity” send it to one of the Queen’s principal Secretaries of State, and if the Queen in Council within two years after receipt thereof by the Secretary of State thinks fit to disallow the act, such disallowance being signified by the Governor General, by speech or message to each of the Houses of the Parliament or by proclamation, shall annul the referred act. (Article 56). Bills reserved for the signification of the “Queen’s pleasure” shall not have any force (Article 57).

On issues regarding provincial governance, the Governor General appoints an officer for each province, named Lieutenant Governor (Article 58), who is entitled to make and



subscribe before the Governor General or some person authorized by him the respective oath of allegiance, before assuming the duties of their office (Article 59).

The Governor General is also responsible for appointing administrators to execute the office and functions of Lieutenant Governors during their absences, illness, or other inabilities (Article 67).

Nevertheless, according to Article 91, it is the Queen who, by and with the Advice and Consent of the Senate and House of Commons, makes laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by the Constitution Act assigned exclusively to the legislatures of the provinces.

On other relevant issues, namely regarding exclusive powers of provinces, it is possible to verify that, even in provincial legislation respecting Education (for example), the Governor General in Council may intervene (Article 93, par. 4), requesting the Parliament of Canada to make remedial laws for the due execution of the provisions of the Constitution Act.

In terms of the judicature, the Governor General also plays an extremely relevant role, since he has powers to appoint the judges of all (Superior, District, and County) courts in each province, except those of the courts of probate in Nova Scotia and New Brunswick (Article 96).<sup>xxix</sup> Judges of the superior courts shall hold office during good behaviour, but the Governor General may remove them on address of the Senate and House of Commons (Article 99).

On issues of revenues, debts, assets and taxation, the Governor General in Council may order reviews and audits to the Consolidated Revenue Fund of Canada (Article 103), as well as having powers to order (from time to time) the form and manner of making payments made under the Constitution Act, or in discharge of liabilities created under any act of the provinces or territories of Canada (Article 120).

Before taking seat, every member of both houses of the Parliament of Canada shall take and subscribe before the Governor General (or someone authorized by him) the following oath of allegiance: “I A.B. do swear, That I will be faithful and bear true Allegiance to Her Majesty [name of the sovereign].” (Article 128 and Fifth Schedule, Part 1). Moreover, for





every member of the Senate and every member of the Legislative Council of Quebec, a similar procedure shall occur in order to subscribe the following declaration of qualification:

“I A.B. do declare and testify, That I am by Law duly qualified to be appointed a Member of the Senate of Canada [or as the Case may be], and that I am legally or equitably seised as of Freehold for my own Use and Benefit of Lands or Tenements held in Free and Common Socage [or seised or possessed for my own Use and Benefit of Lands or Tenements held in Franc-alieu or in Roture (as the Case may be),] in the Province of Nova Scotia [or as the Case may be] of the Value of Four thousand Dollars over and above all Rents, Dues, Debts, Mortgages, Charges, and Incumbrances due or payable out of or charged on or affecting the same, and that I have not collusively or colourably obtained a Title to or become possessed of the said Lands and Tenements or any Part thereof for the Purpose of enabling me to become a Member of the Senate of Canada [or as the Case may be], and that my Real and Personal Property are together worth Four thousand Dollars over and above my Debts and Liabilities” (Article 128 and Fifth Schedule, Part 2).

The Governor General in Council has also powers to appoint (from time to time) such officers as deemed necessary or proper for the effectual execution of the Constitution Act, until otherwise provided by the Parliament (Article 131). Curiously, Article 132 foresees that the powers necessary or proper for performing the obligations treaties are entitled to the Parliament and the Government of Canada, not expressly mentioning the head of state. However, the usual proceedings have established that it is the Government that decides whether to ratify the Treaty or to introduce legislation to bring the treaty into force, after obtaining the authorisation to ratify the treaty by the Governor in Council.<sup>xxx</sup>

Under the procedure for amending the Constitution Act 1867, determined in Part V of the Constitution Act 1982, the Governor General is entitled to issue the respective proclamation, after the requirements of authorisation by (a) resolutions of the Senate and House of Commons, or (b) resolutions of the legislative assemblies of at least two-thirds of



the provinces that have, in the aggregate, according to the then latest general census, at least fifty per cent of the population of all the provinces (Article 38 – CA1982).

Proclamation powers of the Governor General<sup>xxxI</sup> in these matters are foreseen for cases of amendment by unanimous consent (Article 41 – CA1982) and amendment of provisions relating to some but not all provinces (Article 43 – CA1982).

As a result, analysing the provisions presented above, it is possible to conclude that, although the head of state is the sovereign (queen or king)<sup>xxxII</sup>, vested of “executive government and authority” (Article 9), that sovereign is represented by the Governor General, with the advice or with the advice and consent of or in conjunction with the Queen’s Privy Council for Canada, or even individually (Article 12).

In respect of the office of Governor General, reference should be made to the extremely difficult movement of trying to take distance from Westminster rule, which reached an important moment in 1952, when Charles Vincent Massey, the first Canadian-born Governor General, was appointed. After him, a constitutional convention of alternating between anglophone and francophone Canadians was instituted with the appointment of Georges-Philéas Vanier – a Quebecer who was the first francophone Governor General. It is also worth mentioning that the practice of appointing Canadian-born citizens was broken in 1999, when Adrienne Clarkson, a Hong Kong-born refugee to Canada, was appointed the 26<sup>th</sup> Governor General.

#### 4.3. The “Unwritten Constitution” and the Prime Minister’s role

As far as constitutional conventions are concerned, large parts of Canada’s Constitution are unwritten; a critical part of the unwritten constitutional rules is “constitutional principles”, these derive from several related sources.

They are inherent in Canada’s “basic constitutional structure”<sup>xxxIII</sup> or “implicit in the very nature of a Constitution.”<sup>xxxIV</sup> Constitutional principles are constitutional imperatives and they are beyond the powers of Canadian legislatures to override.<sup>xxxV</sup> One element of Canada’s unwritten Constitution consists of “usages, practices, customs and conventions.” The “rules of responsible government” are of this character. These regulate the relations between the Crown, the Prime Minister, the Cabinet and the two Houses of Parliament.

In fact, the Constitution Act did not provide for a Prime Minister, so constitutional tradition has defined this position in Canada. Here, the position of the Prime Minister



represents the connection between the Governor General and the rest of the political and administrative branches of the government.

The Prime Minister selects his ministers from Members of Parliament and he also has the power to dismiss them, ensuring Parliamentary responsibility. Consequently, ministers may be called to the chambers to answer questions on their actions at any time, with the possibility that they might have to resign if losing Parliament's confidence. In Canada, the Prime Minister is usually elected by a national constituency that supersedes local interests and that, therefore, confers on him or her an additional power before the elected house of the legislature, the House of Commons. Unlike the President of the United States, the Prime Minister of Canada can be supported by an absolute majority of seats or a relative majority during the administration mandate, always dependent on Parliament's confidence, as in any typical parliamentary system.

The prime minister plays the role of chief executive but also of chief legislator, since it is customarily the Government which introduces the most essential legislation. And although the competence of summoning members of the upper house is conferred on the Governor General (Article 24), it is usually the Prime Minister who appoints members of the Senate and, as the central figure in the government of Canada, the Prime Minister commands the access to the nation's media (Maddex 2008: 84-85).

Nevertheless, three political crises, in which the so-called reserve powers of the Governor General were used in respect of declining (or not) the advice of the Prime Minister, have contributed to defining the role of the Governor General as it is currently understood in Canadian constitutional system.

The first case occurred in 1896, when Prime Minister Charles Tupper refused to cede power, insisting that Liberals would be unable to form a government despite their having won most of the seats in the House of Commons. In response, Governor General the Earl of Aberdeen refused to accept Tupper's advice.<sup>xxxvi</sup> Then the "King-Byng Affair", which happened in 1926, should also be mentioned. In that case, Prime Minister William Lyon Mackenzie King, already in minority government and having lost two votes asked Governor General the Viscount Byng of Vimy to dissolve parliament. The latter refused to do it, considering that parliament was should sit for a reasonable period before a new election



should be called, until the moment that the parliament was demonstrably unable to form another government (Forsey 1943; Forsey 1951: 457-467).

More recently, during Stephen Harper's Tory minority governments, Governor General Michaëlle Jean was faced with a with the choice of dissolving parliament, proroguing parliament, or asking the Prime Minister to resign and inviting the opposition to form a new government. As a result, after two hours of consultation with various constitutional experts, Governor General Jean decided for prorogation; the Liberals ended up changing their leadership and the proposal for 2009 government's budget was accepted by the major opposition party. Prime Minister Harper would again request the Governor General a prorogation, which was granted until March 2011, when was defeated in a no-confidence vote.

In a nutshell, these presented cases demonstrate that even institutional figures that most of the times appear to play a shy role or political position in constitutional frameworks may act at any moment, depending on importance of the political moments (normally in constitutional crises). If the powers exist, if they were constitutionally foreseen, the public official is entitled to exercise them.

## **5. Actual differences and similarities of heads of state's status**

### **5.1. A general constitutional comparison**

To comparing the constitutional systems of the United States and Canada is to evaluate two absolutely different forms of government. In fact, the "presidential-congressional system" (Forsey 2005: 24) in the United States was created in order to individualize a form of government in which the classical principle of separation of powers would be applied in a rigid way having, on the one hand, the legislative power dedicated to the law-making processes and, on the other hand, the executive branch committed to the activity of government (or administration).

The President of the United States appeared to be a pure Republican head of state, chosen on a national basis and only entitled to executive powers. There is an effective balance of both powers (executive and legislative), with no accountability between the President and the Congress and, at the same time, the President could not dissolve the legislative houses.



However, the position of the President of the United States has been progressively enhanced, due to: (a) the federal reality of the country and the relevance of the federal executive; (b) the increasingly relevance of the external policy and the central role of the head of the executive in that area; and (c) the need of a strong presidential executive in order to face moments of crisis. As it was stated above, the administrations of George W. Bush and Barack Obama have been only the most recent examples of that increase of the central position of presidents (de Vergottini 2013: 687).

Conversely, the Canadian monarchic and “parliamentary-cabinet government” has progressively granted more powers to the Prime Minister (even though the position was never expressly foreseen in the Constitution), relegating the position of the Governor General, who is the official representative of the head of state in Canadian territory,<sup>xxxvii</sup> to no more than a ceremonial office. And the Queen, who is actually and constitutionally the head of state (and formally responsible for the executive branch)<sup>xxxviii</sup> has been, in practice, even more distanced from those powers.

Therefore, it could be stated that the Constitution Act of Canada appears to grant, as it was presented above, a myriad of powers to the Governor General (as the representative of the Queen), such as being responsible for the executive activity of the country, summoning senators, or even appointing judges. And by only reading the written Constitution of Canada, it could be even said that the Governor General seemed to have much more power than the President of the United States. But, in practice, many of those powers are, at the present time, distributed amongst the different branches of the constitutional system (particularly the competences of the Prime Minister and his cabinet).

One interesting example of that could be the initiative of the Prime Minister for appointing senators, or even the effective exercise of the powers of government and administration by the cabinet, led by the Prime Minister, who represents the majority of the deputies elected to the House of Commons. In reality, this means that the system has been progressively (and through the so-called “unwritten constitution”) developing a new balance of powers between constitutional actors in Canada, and adapting the system to the progression of parliamentary democracies.

Another curious issue concerns the powers to call a referendum, unforeseen in either constitution, though several U.S. state constitutions do contain the possibility of referendum. In the case of Canada, a large number of referendums have been held and the competence





for calling the national vote (both binding or non-binding) is allocated to the federal government, although not expressly adumbrated in the Constitution (Marquis, 1993).

Nonetheless, there is still a vast number of powers which could be compared as similar between the President of the United States and the Queen or the Governor General (on behalf and in the name of the Sovereign), such as the office of Commander-in-chief of the armed forces (the President and the Queen), the power of promulgating (approving of assenting) and vetoing (rejecting or annulling)<sup>xxxix</sup> bills from the legislative houses, appointing ambassadors or other officials, or the appointment of a certain number of judges (which, in fact, suggests doubts about actual separation of powers, even in the United States that is widely known for enshrining the referred principle and that of “checks and balances”).

## 5.2. The example of environmental issues

In a world where political actors are more and more concerned about the risks and dangers of climate change, and in promoting sustainable development, at local and global level, it would be relevant to examine the powers of heads of state in both countries in respect of environmental issues and the protection of natural resources.

At this point, the Paris Agreement, within the United Nations Framework Convention on Climate Change (UNFCCC) dealing with greenhouse gas emissions mitigation, adaptation and finance starting in the year 2020, should be mentioned as a paramount theme. Particularly, after the last announcement by President Donald J. Trump that the United States will withdraw from the Paris Climate Accord.

As discussed, the President of the United States, though not being constitutionally entitled to legislative powers, in fact controls a large number of agencies that can issue regulations with little oversight and accountability from the Congress. Consequently, with regard to environmental issues, the President may play an extremely important role, once he appoints the administrator of the Environmental Protection Agency, but subject to confirmation of the Senate (Lewis 1985).<sup>xl</sup> Moreover, the administrator of EPA customarily sits with the President in cabinet meetings, which grants this agency an essential role within the administration and executive power. And this is why changes of heads of state (not only but also the majorities of mandates in Senate) may cause relevant shifts in environmental policies, regulation and legislation too.





For example, during the Clinton presidency, the United States signed the Kyoto Protocol on 12 November 1998, but the Senate did not ratify it and George W. Bush opposed the treaty. Another example happened during the Obama administration: the White House Office of Energy and Climate Change Policy was created (in 2008), as a new government entity that would coordinate administration policy on energy and climate change, but it was abolished in 2011, as Congress would no longer fund the office in the budget. It now moved under the umbrella of Domestic Policy Council, which coordinates the domestic policy-making process in the White House.<sup>XLI</sup>

It was also during the Obama administration that more than 190 countries came together to adopt the most ambitious climate change agreement in history, which became known as the Paris Agreement (within the framework of the United Nations Framework Convention on Climate Change), for greenhouse gases emissions mitigation, adaptation and finance. And most recently, new president Donald J. Trump announced that the United States would withdraw from the Paris climate accord.<sup>XLII</sup>

In Canada, while competences regarding the environment and natural resources are shared between national and provincial legislatures (Article 92A), there is a Minister of Environment and Climate Change (Minister of the Crown), appointed by the Governor General of Canada. This minister is part of the Cabinet, serving “at Her Majesty’s pleasure”, and responsible for the federal government’s department named Environment and Climate Change Canada, as well as for Parks Canada and the Canadian Environmental Assessment Agency.<sup>XLIII</sup>

In fact, the Governor General, representing the Sovereign, is responsible for appointing and removing the Minister, as deemed necessary or proper (Articles 11), but once the “unwritten constitution” enshrines the existence of a cabinet and a Prime Minister, there is no need for the Queen (ordinarily represented by the Governor General) to interfere in those powers. Because, as Forsey would state:

“(…) in Canada, the head of state can, *in exceptional circumstances*, protect Parliament and the people against a Prime Minister and Ministers who may forget that “minister” means “servant,” and may try to make themselves masters” (Forsey 2005: 26).



And that is an imperative conduct that should be borne in mind by all politicians who exercise public functions in a constitutional system, no matter if they are heads of state, heads of government, parliamentarians or even local public officers.

## 6. Conclusions

In conclusion, after the enquiry described on the previous pages, it should be emphasised that when analysing the constitutional systems of Northern America, namely regarding the powers of the heads of state, the United States consists of a federal republic, with a “presidential-congressional” system, influenced by the principle of the separation of powers and tempered by a “checks and balances” structure. Instead, Canadian constitutional system is characterized by a monarchy, which was influenced by the British experience of a “parliamentary-cabinet” government.

The President of the United States is elected by universal suffrage, though indirect because of the existence of an electoral college, while in Canada it is the Queen who appoints a Governor General to represent her and act on her behalf.

The administration in the United States is led by the President, who is chief of the executive branch. The Queen of Canada is represented by the Governor General, who appoints a Privy Council, and among its members, a Prime Minister, who is an elected deputy from the House of Commons, and a Cabinet to perform the executive powers.

As a matter of fact, both are vested with executive powers, but the Queen and the Governor General of Canada are only, in practice, formally tenants of that power, once the *de facto* executive branch is exercised by the Prime Minister and his Cabinet. This means that the Constitution Act of Canada expressly foresees more *de jure* executive powers for the head of state than it is executed in the day-to-day political practice.

Curiously, both heads of state are entitled to appoint judges of the Supreme Court (and in Canada, even more than that), which, in fact, suggests doubts about the actual force of the principle of separation of powers (Ervin 1970: 108-127). Moreover, both constitutions do not expressly foresee immunity for the heads of state, though there has been some debate about that issue in the United States, namely during Nixon and Clinton administrations.

The constitutional systems presented are typical cases of the Common-law tradition (influenced by the British ancestors) and, because of that, it is possible to attest the existence



of a certain number of norms (especially in Canada) derived from the so-called “unwritten constitution”, conventions or customary law (Binnie 2011; Walters 2001: 91-141). However, these specificities of different systems and traditions (and their following developments) are the ones that substantiate the continuous study and research of comparative public law, generating interest for researchers beyond borders and between continents. Even when the application of norms and principles depend on the actions of human beings, who occupy institutional offices, at certain and specific moments or periods in time.

### APPENDIX I COMPARATIVE TABLE

<b>POWERS/CHARACTERISTICS OF THE HEADS OF STATE</b>						
	<b>UNITED STATES OF AMERICA (PRESIDENT)</b>			<b>CANADA (QUEEN, REPRESENTED BY A GOVERNOR GENERAL)</b>		
	Yes/No	Alternative/ Limitation	Article(s)	Yes/No	Alternative/ Limitation	Article(s)
Election by direct, universal suffrage	No.	Indirect. Electoral college. Universal suffrage.	II, Sec. 1	No		-
Mandate	-	4 years	II, Sec. 1	No		-
Re-election	Yes. Once.	-	XXII Amend.	No		-
Resignation	Yes.		II, Sec. 1	No	(the Queen's representative is “at Her Majesty's pleasure”)	-
Dissolution of the Parliament	No.			Yes		50
Appointment and dismissal of the Prime Minister	No.	The Vice President is elected with the President	II, Sec. 1	Yes		11
Appointment and dismissal of Members of the Government	Yes.		II, Sec. 2	Yes		11
Promulgation	Yes.		I, Sec. 7	Yes		55, 56, 57
Veto	Yes.		I, Sec. 7	Yes		55, 56, 57



Convocation of a referendum	No.		-	No	Powers of the Government	-
Commander-in-Chief of the Armed Forces	Yes.		II, Sec. 2	Yes		15
Criminal Liability	Yes.	-	II, Sec. 4	No		-
Ratification of Treaties	No.	Power to sign, with consent of Senate.	II, Sec. 2	No	Only authorizes ratification	-
Appointment of Ambassadors and other representatives	Yes.		II, Sec. 2	No	Powers of the Government	-
Immunity/Incompatibilities	No.	See case law	-	N/A	“the king can do no wrong”	-
Executive Competence	Yes.		II, Sec. 1	Yes.	As the Queen’s representative, traditionally delegated to the Cabinet	9
Competence/relationship to the judiciary	Yes.		II, Sec. 2	Yes		96
Competence/relationship to the legislative	No.	But appoints department officials, who may issue regulations	-	No.		-
Competences in education	No.	But appoints department officials	-	Yes.	Intervention, requesting the Parliament to make remedial laws for due execution of the Constitution	93
Competences in environment	No.	But appoints department officials (e.g. EPA)	-	No.	But appoints ministers (in the Cabinet)	-

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<sup>1</sup> See recent examples of parliamentary crisis in Italy, Spain, Portugal or Greece.

<sup>11</sup> About the historical types of state, see Miranda 2014: 57-76.

<sup>111</sup> On this purpose, Peter Drucker stated in a text named “Organized Religion and the American Creed”, in the *Review of Politics* of July 1956, that: “The unique relationship between religion, the state, and society is perhaps



the most fundamental – certainly it is the most distinctive – feature of America religious as well as American political life. It is not only central to any understanding of American institutions. It also constitutes the sharpest difference between American and European institutions, concepts, and traditions. This country has developed the most thoroughgoing, if not the only truly secular state. (...) The United States is, however, also the only country of the West in which society is conceived as being basically a religious society.

By its very nature the sphere of the state has to be an autonomous sphere, a sphere entirely of the “natural reason.” But also, by definition, a free society is only possible if based solidly on the religious individual. (...) This leads to the basic American concept: the state must neither support nor favor any one religious denomination. (...) But at the same time the state must always sponsor, protect, and favor religious life in general. The United States is indeed a “secular” state as far as any one denomination is concerned. But it is at the same time a “religious” commonwealth as concerns the general belief in the necessity of a truly religious basis of citizenship” (Maritain 1958: 180-181).

<sup>IV</sup> Better known later as *welfare* since the presidency of Franklin D. Roosevelt.

<sup>V</sup> The English law was not absolutely repealed after the American Revolution. It must be noted that a Virginia law of 1776 declared that “the common law of England, all statutes or acts of Parliament made in aid of the common law prior to the fourth year of the reign of King James the first, and which are of general nature, not local to that kingdom (...) shall be considered as in full force, until the same shall be altered by the legislative power (...)” See Hening 1821: 127.

<sup>VI</sup> The Declaration of Independence is available on the webpage of the U.S. National Archives and Records Administration: [http://www.archives.gov/exhibits/charters/declaration\\_transcript.html](http://www.archives.gov/exhibits/charters/declaration_transcript.html).

<sup>VII</sup> Which began with the words “that all Men are born equally free and independent”, the power to govern was in the people, and officers of government were their “Trustees and Servants, and at all times amenable to them.” See Billings 1991: 335–370.

<sup>VIII</sup> The Articles of Confederation are available on the webpage of *The Avalon Project: Documents in Law, History and Diplomacy* of Yale School of Law: [http://avalon.law.yale.edu/18th\\_century/artconf.asp](http://avalon.law.yale.edu/18th_century/artconf.asp).

<sup>IX</sup> The Constitution of the United States is divided in the following parts:

- Articles I, II, and III: separation of powers → the federal government is divided into three branches:
  - Legislative (bicameral Congress);
  - Executive (President); and
  - Judicial (Supreme Court and other federal courts).
- Articles IV, V and VI: federalism, rights and responsibilities of state governments and of the states in relationship to the federal government.
- Article VII: procedure used by the (at that time) thirteen States to ratify it.
- Further Amendments to the original text.

<sup>X</sup> According to Article I, Sec. 3, the Vice-President of the United States shall be President of the Senate, but with no vote, unless they be equally divided. And a President *pro tempore* shall be elected in the absence of the Vice President, or when he exercises the office of President of the United States.

<sup>XI</sup> Full results are available on the webpage of the Federal Election Commission:

<http://www.fec.gov/pubrec/2000presgeresults.htm>.

<sup>XII</sup> Final results of the last election are also available on the webpage of the Federal Election Commission:

<https://transition.fec.gov/pubrec/fe2016/2016presgeresults.pdf>.

<sup>XIII</sup> This requirement of a two thirds majority denotes the presidential character of the American system, once a shorter majority would imply the conversion of that system to a parliamentary one.

<sup>XIV</sup> The “legislative veto”, or a reserve of approval of actions and decisions adopted in the use of authorizations conferred to the President, was also a practice of collaboration and accountability, for 50 years. However, it was declared as unconstitutional by the Supreme Court in 1983. See Roban 1984: 949-970 and Nuno Piçarra 1990: 325-353.

<sup>XV</sup> Though the provision only foresaw at that time the army and the navy, air force must be also included in the competences of Commander-in-chief.

<sup>XVI</sup> Barack Obama was the last President of the United States, until January 2017, before Donald J. Trump.

<sup>XVII</sup> On the topic of the list of twenty-seven Amendments to the Constitution, the ones which may assume a particular relevance in the issue of the competences of the head of state are the following:

- XII Amendment: presidential election procedures, regarding vote of the electors;
- XVII Amendment: direct election of United States Senators by popular vote;
- XX Amendment: date on which the terms of the President and Vice President (January 20) and Senators and Representatives (January 3) end and begin;





- XXII Amendment: number of times a person can be elected President, which is no more than twice, and a person who has served more than two years of a term to which someone else was elected cannot be elected more than once;
  - XXV Amendment: succession to the Presidency and procedures for filling a vacancy in the office of the Vice President, as well as responding to residential disabilities.
- xxviii *United States v. Nixon*, 418 U.S. 683 (1974).
- xxix *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).
- xx *Clinton v. Jones*, 520 U.S. 681 (1997).
- xxi On the issue of federalism in Canada, see Richard 2005.
- xxii Including a Charter of Rights and Freedoms (Part I).
- xxiii There is also a French language version with equal legal weight as Schedule A. And the Constitution Act, 1982 is also written in both languages (as Schedule B).
- xxiv The government of Quebec has never formally approved the enactment of the Constitution Act, 1982, though formal consent was never necessary.
- xxv Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island, Quebec, and Saskatchewan.
- xxvi Northwest Territories, Nunavut, and Yukon.
- xxvii See *The Canadian Encyclopaedia*, on the entrance of “crown”:  
<http://www.thecanadianencyclopedia.com/en/article/crown/>.
- xxviii As in the United States, though the provision only foresaw at that time the army and the navy, air force must be also included in the competences of Commander-in-chief.
- xxix Article 97 also determines that, until the laws relative to property and civil rights in the Ontario, Nova Scotia, and New Brunswick, and the procedure of the courts in those provinces, are made uniform, the judges of the courts of those provinces appointed by the Governor General shall be selected from the respective bars of those provinces. And, in what concerns the appointment of judges of the courts of Quebec, Article 98 foresees that they shall always be selected from the bar of that province.
- xxx Procedures are available on the webpage of Global Affairs Canada: <http://www.treaty-accord.gc.ca/procedures.aspx>.
- xxxi Advised by the Queen’s Privy Council for Canada, according to Article 48 – CA1982.
- xxxii Currently, Elizabeth II, Queen of the United Kingdom, Canada, Australia, and New Zealand, and Head of the Commonwealth, who is represented in Canada by the Governor General, David Lloyd Johnston.
- xxxiii *OPSEU v. Ontario* (1987), 144; *Hunt v. T&N plc* (1993), 56.
- xxxiv *Manitoba Language Rights Reference* (1985), 64.
- xxxv See *Hunt*, 56; *Secession Reference* (1998), 54.
- xxxvi See Charles Tupper’s biography on *Dictionary of Canadian Biography*:  
[http://www.biographi.ca/en/bio/tupper\\_charles\\_14E.html](http://www.biographi.ca/en/bio/tupper_charles_14E.html).
- xxxvii Article 12 of Constitution Act 1867.
- xxxviii Article 9 of Constitution Act 1867.
- xxxix Expressions which are used may vary between different constitutions (and even along the same texts).
- xl See also Reorganization Plan No. 3 of 1970 (July 9, 1970), Section 1. (b).
- xli See: <https://www.whitehouse.gov/administration/eop/dpc>.
- xlii See: <https://www.whitehouse.gov/the-press-office/2017/06/01/statement-president-trump-paris-climate-accord>.
- xliii See Environment and Climate Change Canada: <https://www.ec.gc.ca/>; Parks Canada: <http://www.pc.gc.ca/>; and Canadian Environmental Assessment Agency: <http://www.ceaa.gc.ca/>.

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