Border security legislation and the construction of uncertain spaces: the policy architecture of Bill C-23[1]

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Abstract:

This chapter examines Canadian parliament Bill C-23, passed in June of 2017, pertaining to the preclearance of goods and people crossing between the Canada-US border. The legislation specifically addresses the contingent powers of American border agents, operating on the Canadian 'side' of the Canada-US border with respect to goods and individuals leaving Canadian jurisdiction and passing into American jurisdiction by land, rail, and air. This chapter is concerned with the ways that the policy architecture of Bill C-23 contingently designs and constructs physical spaces of indeterminate state jurisdiction with significant legal and corporeal implications for the individuals who find themselves passing through these spaces. Further, the public discourse and parliamentary debate surrounding Bill-C23, as well as some of the inconsistencies contained within the final reading of the bill, highlight a fundamental incoherence in attempting to legally delineate what are, in effect, *extra*-legal material spaces.

My contribution to this volume looks at "architecture" conceptually, rather than literally, and its general significance for the interplay of power, people, and physical space. Generally speaking, "architecture" tends to be understood in two distinct but related ways. First, "architecture" can more broadly refer to the configuration or form of something. Second, "architecture" can also refer to the mechanisms and practices by which physical spaces and material structures are

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designed and constructed. It is thus possible to understand how the architecture- that is, the configuration and form- *of* certain types of legislation can also be read as policy architecture that operates as mechanisms and practices that "design and construct" physical spaces and material structures. With this in mind, this chapter examines Canadian parliament Bill C-23[2], passed in June of 2017, pertaining to the preclearance of goods and people crossing between the Canada-US border. The legislation specifically delineates the contingent powers of American border agents, operating on the Canadian 'side' of the Canada-US border with respect to goods and individuals leaving Canadian jurisdiction and passing into American jurisdiction by land, rail, and air. This chapter is concerned with the ways that the policy architecture of Bill C-23 results in significant legal and corporeal implications for the individuals who find themselves passing through these spaces. Further, the bill is a good example of how legislative efforts to regulate borders often serve to contingently design and construct physical spaces of indeterminate state jurisdiction. In the case of Bill C-23, this occurs within the legislative architecture of the bill through a combination of definitional ambiguity; jurisdictional overlap; and the over-determination of sovereign authority. Further, the public discourse and parliamentary debate surrounding Bill-C23, along with the inconsistencies contained in its final reading, highlight a fundamental incoherence in attempting to legally delineate what are, in effect, extra-legal spaces.

History and Context of Bill C-23

Bill C-23, also known by its short title "the Preclearance Act, 2016," is part of a larger set of long-standing border security cooperation measures between the Canadian and American Federal governments. Although the border between what is now the United States and Canada has been

[2] *Preclearance Act, 2016*- Bill C-23, As passed June 21, 2017 (Canada, 42d Parl., 1st sess) http://laws-lois.justice.gc.ca/eng/acts/P-19.32/page-1.html

subject to treaties and regulations dating back to the 1800s, the suite of security measures that currently governs cross-border traffic between the two countries is based on specific commitments made between Prime Minister Jean Chretien and President George W. Bush following the terrorist attacks of September 11, 2001. In an emergency meeting on September 24, 2001, Chretien and Bush met to discuss the urgent threat of terrorism posed by *al Qaeda*, and together charged Homeland Security Advisor Tom Ridge and Foreign and Deputy Prime Minister John Manley with border security cooperation, while also recognizing "the urgent need to enhance security in a way that strengthen(s) the extraordinary trading relationship" between the United States and Canada.[3] As a result, on December 12, 2001, Ridge and Manley signed and announced their joint "Smart Border Declaration," which prescribed an aggressive and comprehensive 30-point action plan to build "a border that is secure and efficient; a border open for business but closed to terrorists."[4]

This would go on to result in the *Free and Secure Trade* (or FAST) Program, designed to reduce delays in cross-border commercial shipments of goods designated as "safe" through secured supply chains set up in collaboration with the private sector; and a re-jigging of the already existing but then embryonic NEXUS program, which was designed to allow pre-approved "low-risk" travelers to go through dedicated fast lanes at border crossings. As part of the Ridge-Manley "Smart Border Declaration," Canada and the United States also agreed to develop a more integrated approach for processing people and things *away* from the border through pre-

[3] Sept 19, 2002. *Joint Statement by Prime Minister Jean Chrétien and President George W. Bush on Implementation of the "Smart Border" Declaration and Action Plan.* Detroit, Michigan
[4] ibid.

existing commitments to strengthen systems around border preclearance processing.[5] Bill C-23 specifically comes out of the resulting "Agreement on Land, Rail, Marine, and Air Transport Preclearance" treaty, which was signed in Washington on March 16, 2015 and further built on the "Agreement on Air Transport Preclearance between the Government of Canada and the Government of the United States of America," which was signed in Toronto on January 18, 2001 and subsequently referenced by the Ridge-Manley Smart Border Declaration.

Bill C-23 then, has a fairly long-standing pedigree in cross-border security cooperation that actually pre-dates the events of 9/11. Nevertheless, the ongoing development of border preclearance practices seems to instantiate the central role of pre-emptive temporal logics in the security politics of a post-9/11 context. Indeed, the very premise of *pre*clearance appears to be based on the presumption that preventing a dangerous person from crossing the border is more effective if one can stop them *before*- that is sooner- than their arrival at the actual border. The use of preclearance modalities like threat assessment and risk management implies an anticipatory and temporal logic of pre-emption, as Amoore (2006), Aradau and Van Munster (2007), and Stockdale (2013, 2015) all remind us. But it also suggests the existence of a *spatial* logic of pre-emption as well, where the "before" in *pre*clearance refers also to sites of physical space that are materially removed from the geographic border.

It is not novel to point out that a strictly geographic conceptualization of state-space and borders fails to capture the many nuances of bordering practices and the non-spatial nature of state-power and jurisdictional authority (Vaughan-Williams 2009; Rumford 2008; Basaran 2008). Early

[5] December 6, 2002, US-Canada Smart Border/30 Point Action Plan Update, The White House Archives https://georgewbush-whitehouse.archives.gov/news/releases/2002/12/20021206-1.html

critiques of the geographical assumptions of International Relations theory, like those of Agnew (1994), warned us away from falling into the "territorial trap" of conceiving state power in purely geographic terms. Agnew points out that we tend to see states as "clear spatial demarcations of territory, in which the state exerts its sovereign power." Nevertheless, the materiality of space- of physical sites and places- continues to be relevant to any understanding of how the architecture of the border operates. In the case of US border preclearance areas in Canadian facilities, physical sites of American sovereign authority are called into being through the architecture of Canadian border legislation. When Canadian citizens and Permanent Residents *physically enter these spaces,* their status as subjects of Canadian state authority becomes uncertain.

Challenges and Controversy

Bill C-23 became a contentious piece of legislation almost immediately after Public Safety Minister Ralph Goodale tabled it in June of 2016, through its second reading in February of 2017, and into its final form as passed by the House of Commons on June 21, 2017. The bill was actively challenged in several parliamentary debates and by various legal and advocacy groups with an interest in the significance and implications of the bill, along several different registers. Groups that conveyed their concerns in opposition to the bill included the International Civil Liberties Monitoring Group, the National Council of Canadian Muslims, the Canadian Bar Association, the Iranian Canadian Congress, and the International Longshore and Warehouse Union of Canada, among others. According to an access to information request by the Canadian Broadcasting Corporation in the spring of 2017, the bill also received an unusually large number of write-in complaints from private individuals- enough to fill the over 700-page report that was

delivered to the news agency.[6] The bill also faced considerable scrutiny and debate in the Canadian Senate before it was finally granted Royal Assent in December 2017.

As mentioned, prior to Bill C-23 preclearance areas already existed in several Canadian locations under the existing "Agreement on Air Transport Preclearance between the Government of Canada and the Government of the United States of America," signed in 2001. American officials (defined as "preclearance officers" by C-23) were already working on the Canadian side of the border in their capacity as border agents engaging in preclearance practices. But there were several aspects of the new regulations that merited concern by the legal watchdogs and rights-advocacy groups mentioned above. Interestingly, the repeated assurances of Prime Minister Justin Trudeau and other defenders of the bill that the rights of individuals passing through these spaces would still be upheld by the Canadian Charter of Rights and Freedoms, does not seem to bear out upon closer reading of the bill. In particular, the final form of the bill still contains within it several notable contradictions and problems arising from definitional ambiguity, jurisdictional overlap, and the over-determination of sovereign authority.

First, Bill C-23 fails to define carefully several terms and concepts that leave open far too much room for interpretation- either by not defining the term at all or by defining terms ambiguously. For example, Section 5 ("Definitions") of Bill C-23 clearly defines "preclearance officers" as *American* agents working in preclearance areas, whereas "border control officers" refers to the *Canadian* agents working in those same areas. This clarification appeared to have been added to

[6] Dyer, Evan (August 6, 2017) *Ottawa gets an earful on proposed expansion of U.S. border pre-clearance powers,* CBC.ca Politics https://www.cbc.ca/news/politics/pre-clearance-u-s-travellers-bill-c-23-reaction-1.4213797

the final reading of the bill precisely because of advocacy groups' recommendations to do so, but the final read of the legislation failed to define the term "police officer" as used in the bill. This is concerning because the use of the term "police officers" in Part 1 fails to clarify whether these are *Canadian* police officers or *American* police officers. This definitional ambiguity is significant because, as discussed below, Bill C-23 allows armed US officials to operate in these preclearance areas with considerable discretionary authority. While the "preclearance officer" definition is limited to American personnel, there is nothing in the bill that limits the definition of "police officer" to *Canadian* police officers, per se. Considering the power granted to "police officers" in Bill C-23, the failure to clearly define who that pertains to opens up a considerable amount of definitional overlap and jurisdictional ambiguity within several different sections of the bill, as discussed below.

The definitional ambiguity around "goods and documents" versus "devices" is also notable. Defenders of Bill C-23 have pointed out that previous incarnations of relevant border regulations have long granted preclearance officers and border control officers the authority to look at, and even seize, electronic devices from travellers who are looking to cross the Canada-US border. However, this power was granted in combination with provisions that allowed travellers to voluntarily withdraw from border preclearance and related questioning, without prejudice. Earlier preclearance regulations also prohibited preclearance officers or border control officers from seizing property or detaining travellers without probable cause.

In contrast, Section 2(b) of Bill C-23 defines a "document in any form" in ways that clearly include electronic devices, opening up the possibility that private information from those devices

can be copied and retained even upon the event of voluntary withdrawal by a traveller from questioning (Section 31(2-c)). This is on top of the further-expanded provision that "goods" (which include personal electronic devices) may be "opened" in searches (Section 31(2-e) *subject to the discretion* of the US preclearance officer. In Section 20(c) preclearance officers are further granted the general right to "detain goods bound for the US," which includes personal electronic devices, and again leaves that up to their own discretional authority. These are examples of how Bill C-23 grants considerable authority to American preclearance officers, allowing them to demand private passwords from travelers without cause, or to seize and retain their communication devices without cause, both of which are in clear violation of privacy and search-and-seizure rights under Canadian law. Contrary to repeated assurances to Canadian citizens and permanent residents that American preclearance officers' actions must be in accordance with the Charter, and contrary to several small changes made to Bill C-23's final version- as discussed below- the bill ultimately gives US preclearance officers broad discretionary authority to take a dragnet approach to all travellers in preclearance areas, even if they are in possession of legal travel documents that are clearly in order, and even if they wish to withdraw from questioning.

According to the provisions of Bill C-23, preclearance officers could also theoretically question a traveller- without cause or recourse- about their beliefs, creed, political affiliations, or anything of that nature even though doing so would be a clear violation of their Charter rights. This is because Bill C-23 repeatedly defers to the discretionary authority of preclearance officers to act solely on the basis of their "belief" or "suspicion." Unlike "probable cause," the mere belief or suspicion of individual officers would not otherwise provide a legitimate basis upon which to

discretionally suspend the Charter rights of Canadian citizens or permanent residents for any reason. This major problem with the bill formed the central concern for many of its detractors.

As mentioned, several sections and clauses were added and/or altered in the final version of C-23, presumably in response to these same concerns. For example, Section 11(2) was added to the final reading to affirm a commitment to "provide every preclearance officer with training on the Canadian law that applies to the exercise of the preclearance officer's powers and the performance of their duties and functions under [the] Act." Section 25(1) of the final version states that border agents must "inform the traveller of their right to be taken to the officer's senior officer," but does not specify if they have a right to request to speak to a *Canadian* senior officer. Section 26.1 was also added to state that "a traveller may, in a prescribed manner, inform the Canadian senior officials of the Preclearance Consultative Group established under the Agreement of any situations referred to in sections 22 [strip search], 23 [monitored bowel movement], and 24 [X-Ray search], subsections 31(2) and 32 [voluntary withdrawal from questioning] of this Act." None of these updated provisions can reasonably be expected to safeguard travellers from the discretionary authority of American preclearance officers in the moment that they are physically present in the preclearance area. This is because it is precisely *by physically being there in that moment*, that the individual who is subject to the preclearance officer's broad discretionary authority has become, in effect, an abject body in a space of uncertainty.

This relates to the other main *problematique* of Bill C-23, specifically with regards to jurisdictional uncertainty and the paradoxical over-determination of indeterminate sovereign

authority that occurs as a result. The bill is an article of Canadian legislation that attempts to regulate the actions of agents of the American state, not under American law, but under Canadian law. Yet the bill gives clear discretionary authority to US preclearance officers to request private information from people without cause and to question *further* a person who is attempting to withdraw from questioning and asserting their right to decide not to enter the US. Canadian law does not even allow this type of action by Canadian law-enforcement officers, as suggested by recent court decisions against the practice of carding by police. Here again, the vague and broad discretionary power granted to preclearance officers in many sections of C-23 does not appear to align with the repeated platitudes that preclearance officers must behave within the confines of the Charter.

Sections of C-23 that "establish that the exercise of any power and performance of any duty or function by a United States preclearance officer is subject to Canadian law, including the *Canadian Charter of Rights and Freedoms*, the *Canadian Bill of Rights* and the *Canadian Human Rights Act*;" (Preamble (c); Section 9; Section 11) are in direct conflict with other sections of C-23 that clearly suggest otherwise. For example, Bill C-23 allows for strip and cavity searches and monitored bowel movements on the basis of the afore-mentioned "belief" and "suspicion" by preclearance officers (Sections 22 and 23). Bill C-23 also gives preclearance officers the authority to remove travelers to health facilities if "they believe the traveler is at risk of harm or doing harm" 24(5). Section 10(1) outlines which preclearance powers are exercised under the laws of the United States while Section 10(2) outlines limitations to those laws with regards to interrogation, examination, search, seizure, forfeiture, detention, and arrest that are then subject to 11(1), which reiterates the primacy of the Charter. But, in other sections, like in

24(5) and 36(2), preclearance officers appear to be granted those very powers in several circumstances.

In the most extreme iteration of granting exceptional sovereign authority to American officers operating in ostensibly Canadian spaces, Sections 16(1) and (2) of C-23 give preclearance officers the incredible discretionary power to use force and inflict bodily harm, *including lethal force* if they "have reasonable grounds *to believe* that it is necessary for self-preservation or the preservation of anyone under the officer's protection" (my emphasis). C-23 also grants individual US preclearance officers' immunity from civil liability or civil proceedings, and places limits on the extradition and arrest of any US preclearance officer who may have committed offences while in Canada. These sections functionally abrogate the rights of Canadian citizens and permanent residents against individuals in positions of authority, and do not appear to be reciprocated in Part 2, which is the section of the bill that governs Canadian preclearance practices in American facilities. Finally, C-23 provides for assistance to US preclearance officers from Canadian border officials and police officers but does not outline any assistance or support for travelers who run into difficulties while in preclearance. This contrasts with the guarantee that a Canadian traveler can rely on embassy or high commission staff to aid them if they come into trouble in a foreign jurisdiction, further heightening the uncertainty faced by persons navigating the border.

Preclearance Areas as Uncertain Spaces

> "If we didn't have preclearance in Canada, people would be passing customs in the United States… and in the United States, American laws dominate and control the behaviour of people in border crossings... When you're doing preclearance in Canada, the Canadian Charter of Rights and Freedoms and Canadian laws are in place, so there is extra protection"
> - *Prime Minister Justin Trudeau, in defence of Preclearance Areas and Bill C-23.*[7]

[7] Pedwell, Terry (Feb 22, 2107) *Bill C-23: Justin Trudeau Defends Border Preclearance Bill,* Huffington Post Politics https://www.huffingtonpost.ca/2017/02/22/trudeau-preclearance-bill_n_14933560.html

State space is rarely a contiguous or coherently defined zone of sovereign authority (Neumann 1996; Basaran 2008; Rumford 2008; Mountz 2011). There are obvious examples of non-contiguous state space, such as archipelago nations or when states are in possession of far-flung territories. Relatedly, there are also other types of "irregular" state spaces that confound the territorially-based expectations of how sovereign authority, according to our common sense around it, is supposed to work. For example, established norms of diplomacy, protected by international conventions, render the confines of a foreign embassy as being under the legal jurisdiction of its corresponding state government. So, when you enter the American Embassy in Ottawa, you are "leaving" Canada and "arriving" in a non-contiguous American jurisdictional space. It is upon this basis of international convention that Julian Assange, the founder of WikiLeaks who is facing criminal charges in Sweden and the United States, managed to remain holed-up for so long as an asylum seeker within the compound of the Ecuadorian Embassy in London, because the UK does not have an extradition treaty with Ecuador.[8] What is key, is that in this type of example, the person's location in physical space still allows them to remain a subject (with rights) of state authority rather than an abject (without rights) (Isin and Rygiel 2007; Basaran 2008; Mountz 2011).

On the flip side, there are spaces that are designated as *non*-state spaces. Functionally devoid of official state authority, these are spaces bereft of singular state jurisdiction where individuals who find themselves there are rendered neither subject nor abject. Designated No Man's Lands,

[8] Notably, this protection ended in early April 2019 at the discretion of the Ecuadorian government's decision to end the hospitality that allowed Assange to remain subject to Ecuadorian laws and exempt from extradition. Notably, his arrest and extradition was not conducted by the Ecuadorian government, but by UK authorities after Assange was physically ejected from the embassy.

and international waters are examples of these types of spaces because, by definition, no particular sovereign authority has final jurisdictional standing there. But preclearance areas are not "non-state spaces." Nor do they operate quite like the non-contiguous irregular state-space of an embassy, although they are often spoken of in proximate terms. Instead, it is more accurate to say that preclearance areas reside somewhere along the same dark continuum of "abject spaces" that offshore migrant processing zones and black sites like Guantanamo Bay exist along. These are what Neumann might call an "anomalous zone," or what Basaran (2008) might call "zones of exception," or what Stoler (2006) might call an example of the "imperial formations" of the United States' security and state apparatus (128).

Preclearance areas, despite (but also because of) the impetus to regulate them with legislation, have much in common with these other zones of geographic and discursive indeterminate jurisdiction. They operate less as non-state spaces devoid of order and rule, and more as liminal spaces that *are a part of* the

> … macropolitics whose technologies of rule thrive on the productions of exceptions and their uneven and changing proliferation. Critical features of imperial formations include harboring and building on territorial ambiguity, redefining legal categories of belonging and quasi-membership, and shifting the geographic and demographic zone of partially suspended rights… imperial formations give rise… to new sites of- and social groups with- privileged exemption. (Stoler 2006, 128)

Like the uncertainty built into the bilateral security agreements between the US and the Philippines to govern the US Military's "unofficial forward operating bases" there (Mustapha 2018), the bilateral agreements governing preclearance areas between the US and Canada are jurisdictive artifices of these same sorts of imperial formations. The vagueness and internal incoherence of Bill C-23's policy architecture, discussed above, provides a type of legal

flexibility that contributes directly to these "zones of territorial and procedural ambiguity… and creates both legal and geographic spaces for the privileged exemption of US [personnel]" (Mustapha 2018).

Spaces like these are designed and constructed to be "zones of exception" (Basaran 2008). They are exceptional spaces that- even if legislated in some way- seemingly exist *outside* of conventional or typical geographies, revealing the complicated relationships between sovereignty, the law, people, and physical geographic spaces. They are also "zones of exception" because they are physical spaces that constitute people as either subjects (with rights) or abject (without rights) in relation to decisions made by whichever sovereign power is exercised there, which is particularly relevant to preclearance areas. More importantly however, Basaran (2008) would argue that these zones of exception are not actually "exceptional" in the sense that they generally arise out of the ordinary laws and practices of sovereign power, and that they are "fundamentally embedded in the ordinary politics of the liberal state" (339). Along these lines, it would be easy to characterize Bill C-23 and the preclearance areas it creates as more evidence of how sovereign power is characterized by its ability to invoke "the exception" and how, accordingly, illiberal practices are part and parcel of the security politics of liberal states (Basaran 2008; Doty 2007). So the central question of how US sovereign authority operates at the virtual border (Muller 2009); or how British sovereign authority works at the "remote borders" of the UK (Rumford 2008); or how Australian sovereign authority works in relation to migrants on offshore islands (Mountz 2011) is centered around the ways that border spaces determine the relationships between people and a particular state authority.

Consequently, a lot of the work that focuses on how the border exemplifies the Schmittian "decider" status of the sovereign tends to treat the question of state authority in singular terms (Doty 2007). But what is unique about preclearance areas is that Canadian sovereign authority, through its *own* legislative architecture, *relinquishes its own sovereign power in these physical spaces*, which are themselves vaguely defined and demarcated. Further, Bill C-23 does this by establishing liminal zones of exception where the boundaries and edges of American sovereign authority are not clearly defined either. Hence, it is disingenuous for defenders of Bill C-23 to suggest that individuals in preclearance areas remain subject to "regular" Canadian law or continue to enjoy the protections of the Charter, because neither of those things have clear jurisdiction there. Nor is it accurate to say that individuals in preclearance areas are subject to "regular" American laws instead- as they would be if they were travelling in the United States or visiting one of their embassies- because C-23 explicitly grants privileged exemptions from those very laws to agents of another sovereign state. Therefore, claims like Trudeau's in the quote at the beginning of this section are inconsistent with the actual outcomes of the bill's provisions. It is interesting that in attempts to reassure C-23's detractors, Trudeau rationalizes that it is "better" for Canadian residents to be processed "in Canada." In doing so, he seems to tacitly acknowledge that people passing through preclearance areas are more vulnerable in spaces of American sovereign authority.

Conclusions- Uncertainty as Security Governance

> Me- "Should I take off my shoes today? My cardigan? What about my iPad?"
>
> Him- "Cardigan off, shoes stay on. Tablet out if it's in a case or connected to a keypad."
>
> Me- "Thanks. It's different every time I go through security. I can never be sure."
>
> Him- "It's good that you're never sure, miss. We like it that way. *We want you to be confused about what happens here. It makes it harder for the bad guys*."[9]

[9] This conversation took place in August of 2018, as I passed through security at Toronto Pearson airport, *en route* to my departure gate to catch an international flight. Travelers were being ushered through into the security scanner

Bill C-23 is part of the particular security architecture of preclearance areas that highlights the ongoing emergence of "spatial forms" where both citizenship *and* politics are occurring in both domestic *and* "international" ways (Agnew 1994). These spaces emerge due to both globalization and localization; to both fragmentation and regionalization; and can be found in "patchworks of arrangements nestled within existing and recognizable spaces, yet forming interstitial territories that are neither here nor there… yet they are everywhere" (Isin and Rygiel 2007). One might argue that preclearance areas are no different from any number of "abject spaces" that we could talk about- that they are just another example of how frontiers and borders operate and are designed to regulate the mobility of people in places where "ordinary" laws are temporarily suspended. Someone could further argue that they are part of what makes an airport exceptional (Salter 2008). That they are examples of how sovereign power, through its own internal paradoxes (Connolly 2004) necessarily produces spaces where individuals and groups lose the umbrella of rights-protection granted by state protection but are nevertheless still subjected to its many violences (Mountz 2011; Basaran 2008). Or that preclearance areas highlight the multiple and indeterminate configurations of power and authority that have long been features of how sovereign power tries to repeatedly re-found and consolidate itself through informal, petty, and "nested" sovereignties (Hansen and Sepputat 2006).

lines quickly and I couldn't see if the people ahead of me were removing their shoes or jackets, because they were slightly around the corner. In my quest to be efficient I asked the closest security officer for some direction and this short exchange ensued. Despite the fact that the stated policies of the TSA and CATSA are to ease congestion and confusion at the border, I found myself thinking a lot about how disorienting and confounding these security lines are, no matter how often I travel.

For all these reasons, preclearance areas are significant. As outlined in this chapter, their existence does highlight the "deciding" power of the sovereign- and often as it comes to be wielded unevenly through the 'petty-sovereign" discretion of the border agent; the tenuousness and contingency of rights themselves; and the normative fiction of the benevolent state. Preclearance areas, despite the veneer of legality provided by legislation like Bill C-23, are necessarily on the continuum of extra-legal abject spaces. To the extent that they are "state spaces" they are designed and constructed to be, at best, indeterminate spaces of state jurisdiction and, at worst, anomalous zones of exception. In many ways they seem like foregone conclusions that exemplify the sovereign need for exceptions. Why then, is it even necessary to attempt to legislate a space like a preclearance area?

I argue that the challenges and controversies around Bill C-23 also underscore another way to understand the significance of these attempts to legally delineate what are, in effect, extra-legal spaces. Preclearance areas are more like black sites than like embassies precisely because they occur within both the legislative and spatial architecture of the border, and Basaran (2008) argues that "the problem of border zones is that legal exclusions can be easily produced by legal means" (352). But C-23 is also the production of *sovereign* exclusion by legal means. In other words, it is through C-23 that Canadian sovereign power has effectively consented to cede its own authority through its own legislation, in the process deferring to the unbounded discretion of American sovereign power in these spaces. Bill C-23 itself then, is both an architect of and a response to the uncertain architecture of the preclearance area as it already exists. This is because as Rumford (2008) argues, in the context of contemporary security politics it is ambiguity, strangeness, and uncertainty that have themselves become organizing principles of security

governance. Additionally, it is in these types of border spaces where forms of governance that rely on ambiguity, strangeness and uncertainty have both emerged and continue to reproduce themselves.

In other words, attempts to reassure and domesticate the "strangeness" of preclearance areas end up reproducing them as "spaces of wonder" that have an "unsettling, destabilizing or disorienting effect in the sense that they are difficult to comprehend or assimilate into existing understandings of political topography" (Rumsford 2008, 639). It is in these spaces where uncertainty and ambiguity become modalities by which American sovereign power comes to assert its jurisdiction over individuals who are simultaneously rendered abject in them. The purpose of the Canadian legislation in response to American preclearance areas is less intelligible as an attempt to *regulate* them. Rather, the role of the Canadian legal architecture around preclearance areas is more comprehensible as part of a general need to reassure and domesticate the strangeness and ambiguity of these uncertain spaces, just as

> … Global threats have occasioned a range of solutions which themselves have heightened a sense of insecurity and threat. This is true of the nationalisms which seek to defend the authenticity of a culture at the same time as portraying that same culture as being under terminal threat from external forces, and it is also true of the gated communities which offer commoditized safety at the same time as working to remind inhabitants that the world beyond the gates is a violent unpredictable and fraught with danger. Globalization has resulted in an institutionalization of strangeness… and the strangeness.. has resulted in new opportunities for governance … which work to offer solutions to every day trepidation (Rumsford 2008, 642).

From this perspective, we can see that Bill C-23 was never meant to "regulate" preclearance areas, which were already a *fait accompli* by virtue of their ongoing presence as American imperial formations. Rather, Bill C-23 is there to perform, for Canadians, artifices of Canadian

sovereign power where it no longer exists. It is meant to render "the 'spaces of wonder' constituted by [responses] to global terror… explicable, manageable and amenable" (Rumsford 2008, 637) to those rendered abject there. Canadian legislation will never "make sense" of preclearance areas, precisely because their architecture is designed to confuse us.

References

Agnew, J. 1994, "The Territorial Trap: The Geographical Assumptions of International Relations Theory," *Review of International Political Economy*, 1(1): 53- 80

Amoore, L. 2006, "Biometric borders: Governing mobilities in the war on terror" *Political geography*, 25(3): 336-351

Aradau, C., & Van Munster, R. 2007, "Governing terrorism through risk: Taking precautions,(un) knowing the future" *European journal of international relations* 13 (1): 89-115

Basaran, T. 2008, "Security, law, borders: Spaces of exclusion," *International Political Sociology* 2(4): 339-354

Connolly, W. E. 2004, "The Complexity of Sovereignty" in J. Edkins, V. Pin-Fat and M. J. Shapiro (eds), *Sovereign Lives: Power in Global Politics* New York: Routledge, 23-40

Doty, R. L. 2007 "States of Exception at the Mexico-US Border: Security 'Decisions', and Civilian Border Patrols" *International Political Sociology* 1(2): 113-137

Dyer, Evan (August 6, 2017) *Ottawa gets an earful on proposed expansion of U.S. border pre-clearance powers,* CBC.ca Politics https://www.cbc.ca/news/politics/pre-clearance-u-s-travellers-bill-c-23-reaction-1.4213797

Government of Canada, 42nd Parliament, 1st Session, *Preclearance Act, 2016*- Bill C-23, As passed June 21, 2017 http://laws-lois.justice.gc.ca/eng/acts/P-19.32/page-1.html

Hansen, T. B., & Stepputat, F. 2006, "Sovereignty revisited." *Annual Review of Anthropology*, 35 (1): 295-315

Isin, E. and Rygiel, K. 2007, *"Of Other Global Cities: Frontiers, Zones, Camps,"* in Drieskens, B. Mermier, F. and Wimmen, H. (eds) *Cities of the South: Citizenship and Exclusion in the 21st Century.* London, UK: Saqi, 170–209

Mountz, A. 2011 "Where asylum-seekers wait: feminist counter-topographies of sites between states" *Gender, Place & Culture* 18(3): 381-399

Muller, B. J. 2009. "Borders, Risks, Exclusions" *Studies in Social Justice* 3(1): 67-78

Neuman, G. 1996. "Anomalous Zones" *Standford Law Review* 48(5): pp 1197-1234

Pedwell, T. (Feb 22, 2107) *Bill C-23: Justin Trudeau Defends Border Preclearance Bill,* Huffington Post Politics https://www.huffingtonpost.ca/2017/02/22/trudeau-preclearance-bill_n_14933560.html

Rajaram, P. K., & Grundy-Warr, C. 2004 “The irregular migrant as homo sacer: Migration and detention in Australia, Malaysia, and Thailand” *International Migration* 42 (1): 33-64

Rumford, C. 2008, “Social policy beyond fear: the globalization of strangeness, the ‘War on Terror’, and ‘Spaces of Wonder’” *Social Policy & Administration* 42(6): 630-644

Salter, M. B. 2007, “Governmentalities of an airport: heterotopia and confession” *International Political Sociology* 1(1): 49-66

Simbulan, R. G. 2010, “The Pentagon's Secret War and Facilities in the Philippines” *Peace Review: A Journal of Social Justice* 22(2): 150-157

Stockdale, L. P. D. 2013, “Imagined futures and exceptional presents: a conceptual critique of ‘pre-emptive security’” *Global Change, Peace & Security* 25(2): 141-157.

Stockdale, L. P. D. 2015, “Taming an Uncertain Future: Temporality, Sovereignty, and the Politics of Anticipatory Governance” Rowman and Littlefield: London

Stoler, A. L. 2006, "On degrees of imperial sovereignty." *Public Culture* 18(1): 125-146

Vaughan-Williams, N., 2009. *Border Politics: The Limits of Sovereign Power: The Limits of Sovereign Power*. Edinburgh University Press.

Villazor, R. C. 2010, “Sanctuary Cities and Local Citizenship” *Fordham Urban Law Journal* 37(2): 573-597

The White House Archives (Sept 19, 2002) *Joint Statement by Prime Minister Jean Chrétien and President George W. Bush on Implementation of the "Smart Border" Declaration and Action Plan.* Detroit, Michigan

The White House Archives (December 6, 2002) *US-Canada Smart Border/30 Point Action Plan Update*, https://georgewbush-whitehouse.archives.gov/news/releases/2002/12/20021206-1.html