

# Tennessee AG Skrmetti Speaks Out on Border Shenanigans and Lawfare



by Roger L. Simon

It's difficult for a journalist/author to keep up these days with the incoming emails. For me, sometimes it's like the "Sorcerer's Apprentice," as it is for many. A lot can slip by.

But I always stop to read the releases from Tennessee Attorney General and Reporter Jonathan Skrmetti's office, because what *General* Skrmetti, as he's known in the parlance, is up to—whether it's something as seemingly picayune (it's not) as defending us from enforced electric stoves or something as titanic as dealing with our open Southern border—he invariably is on the right side, has telling recommendations and, alone

or in concert, does his best to act on them.

That being the case, we shouldn't hold against him that he went to [Harvard](#). I can assure you, having met him several times, he isn't a plagiarist. To me, he's that increasingly [rara avis](#)—the very best of public servants.

On this occasion, the specific reason I trucked down to the John Sevier State Office Building in downtown Nashville was to question him on his work—and that of his fellow AGs—regarding our open border crisis.

But I began with something else.

## **On Pervasive Lawfare**

Roger Simon: I'll start by asking you a macro question you are certainly free not to answer. A lot of us are beginning to think there are just too many lawyers in this country—that the ensuing “lawfare” has become, you know, the real pandemic. What do you think about that?

Tennessee Attorney General Jonathan Skrmetti: I think it's true. You look at what we do here: Everything in American life is tinged with potential litigation risk. If you're running a business, every step of everything you do is thick with attorneys. If you're trying to build something, you know, there was a time when if you wanted to build a bridge, you built a bridge. And granted, there were all sorts of problems, other environmental problems, that were an occupational safety problem. So I think there's a happy medium. But I feel like we have swung beyond that, and it's become increasingly difficult for anybody to do anything. And the drag on productivity, I think, is part of why you're seeing a demoralization of the country, because we're just not as capable of achieving things as we once were. And that's a self-inflicted wound.

There are important roles for lawyers to play. But we should not be governing everything from how you fight a war, to how you build a transportation network, to how you educate your kids. I mean, there are people out there who are good at doing what they do. And what they need is guard rails and not

micromanagement.

Mr. Simon: How do we unwind that? I mean, it seems like it's reached this critical mass.

Mr. Skrmetti: Well, I don't know. You know, some of the historians say there's a cyclical overproduction of elites that's driving the academic and legal bubbles. And then, because it's cyclical, eventually the cycle resets. And we don't have that same level of, I guess, a service-oriented approach to things. You know, we're a democracy, we're a republic, but we're a republic where the people rule. And ultimately, we have decided on this course for ourselves, and it's going to take the people or very major structural changes that forced the issue to move things in a different direction.

Mr. Simon: Are the law schools helping?

Mr. Skrmetti: There are a lot of law schools these days. There are plenty of people who go to law school who don't practice law; I've got some good friends who are businesspeople. And I know there are plenty of sports writers and academics and other people. I think there's value in getting the rigorous training and how to think and analyze that comes from law school, maybe. But there are a lot of law schools, and there are a lot of people who obtained law degrees, and then they need to find a way to monetize that. And so you get these entrepreneurial lawyers who are creating niches at the expense of everybody else.

## **Illegal Immigration and the States' Sovereign Interest in Public Safety**

Mr. Simon: You are one of the 27 AGs who have banded together in support of Gov. Abbot of Texas's actions defending our Southern border. Do you see this as a constitutional issue?

Mr. Skrmetti: I think it is a constitutional issue. I mean, you see the AGs lineup—they're lining up behind their governors for the most part. You know, in some states, that's not the case. But in most it is. In Tennessee, it's not my job to make policy. It's my job to give legal advice and look at

the law. But our governor very quickly was getting behind Gov. Abbott in Texas. Gov. Lee was right there, he was just down at the border. And I legally concurred with his right to do so since we live in a federal system.

Both the federal government and the state governments are sovereign governments and powered by the people. And the Constitution makes the federal government a government of limited powers. All the other powers are reserved for the states or the people. And there are times when both the federal government and the state governments have parallel authority. So, for instance, in criminal justice, you may have someone who's prosecuted federally who's also prosecuted by the state. And constitutionally, that's just fine because both of those entities have a sovereign interest in criminal justice.

Well, here we're talking about public safety and law enforcement. And even though the federal government certainly has laws, and the federal government has the primary responsibility for protecting our border, states maintain a sovereign interest in public safety and law enforcement. And if there was a clash between the federal government and the state government and how to do it, the Supremacy Clause kicks in.

But here we're in this weird situation where the federal government is, to a significant extent, abdicating its responsibility to enforce the law. And what they're pushing for is, it's almost like an inversion of the [Nullification Clause](#). So in the 19th century, the states were trying to nullify federal law at the expense of the federal government. Now, it looks like we have the federal government trying to nullify federal law at the expense of the states.

And, you know, the Constitution gives the president the duty to take care that the laws are faithfully executed. And separate, and apart from whatever you want to say about Congress, there's plenty of room for Congress to make improvements in this structure. The enforcement has changed substantially as a result of policy decisions between the last

administration and the current administration. And the executive branch is in a position to help push back against this incredible swell of illegal entries, if they just chose to do so.

And by passing the buck to Congress and saying that's what it's going to take to solve things, I think they're ignoring the fact that we do have laws. They might have problems, to some extent, but we have laws that have been effectively enforced in the past. And we have to think, well, why are those same laws not having the same impact now? We can do things to secure the border; we can put up physical barriers to secure the border; we can enforce the laws more aggressively. We've been reforming our asylum laws to make them extremely loose in a way that's not consistent with the traditional application of those laws, and I think runs afoul of the congressional intent, which was clearly stated that these are supposed to be narrow exceptions.

So, you know, I think enforcement is the cornerstone. I mean, every country has a border, and every competent country enforces its laws at the border. And perhaps the single-most primal function of government is to control who has access to the territory. I mean, that is just the first step out of the state of nature, if you're looking at it from that perspective. There's, maybe no more formal function for government, period.

And in the end, this is not just an American problem. You're seeing in Europe very similar loosening of border controls. And there's a huge backlash brewing. That's really bad for people who have immigrated into those countries. And, you know, there's an assimilation process that has to happen over time. And our country is not in a great place to assimilate. We're having trouble making Americans proud to be Americans, and then having a huge influx of people on top of that, with no legal infrastructure, it's a problem.

And I don't mean to rant here, but this is not good. The evidence is just overwhelming at this point. You know, it used to be a partisan issue. And now it is rapidly becoming bipartisan as people see this is a real problem.

So you look at New York, where they had so many migrants that they were putting people up in luxury hotels, they were putting people up in public schools, they had tent cities—all these radical moves to the detriment of the people who lived there. Look at Chicago—and, by the way, New York was a proud sanctuary city, Chicago, a sanctuary city—they had people living in city buses because they didn't have anywhere else to put them. You look at Washington, DC, yet another sanctuary city. They tried to call up the National Guard to deal with their immigration crisis. And it's all a result of having a wide-open border.

And I realize it's a challenging problem. But I think if we were serious about solving this problem, we'd be putting a lot more resources toward it. We would see an executive branch that was working with the states rather than against them to secure the border. They wouldn't be fighting over how to put up physical barriers. They'd be allocating resources such that everything was covered to the fullest extent possible. You know, we need to reform it. The rapidly loosening asylum laws ... is important [to address]. It is critically important that people who are going to be murdered in their home countries have a safe place.

Mr. Simon: I read this morning Homeland Security has dropped off, I think, 573 refugees in a hotel in the Brentwood-Franklin area. [These are upscale Nashville bedroom communities about 20-25 minutes south of where we were meeting.]

Mr. Skrmetti: So we're still trying to get all the information on that. We've been suing the Department of Homeland Security. And we're gathering information from them to try to understand

exactly how this is working, because we're trying to figure out if litigation can help. And that's something that Republican AGs collectively have been doing for years, with some limited success and some prominent not success. But you know, it's part of this Operation Horizon, which is essentially the administration's broad plan to integrate all these migrants into communities across the country without really communicating clearly with the local leaders.

Mr. Simon: You don't ever get advance warning?

Mr. Skrmetti: It was about a year ago, I want to say, the governor's office got a call saying there were buses coming up from the New Orleans detention facility. And the governor's office pushed back hard. There was some relationship between the Department of Homeland Security and some nongovernmental organizations. And it was not clear at the time, and we're still figuring out exactly what the contours of this program looked like. But that was the first inkling anybody had that this was happening.

And then we get sporadic reports of buses just dropping people off in, you know, very out-of-the-way places, I mean, rural communities. There'll be a bus just dropping people off at, say, a Pilot gas station. The folks getting dropped off don't speak English. They don't really know where they are. Some of them say they have family coming from a major city a few hours away to pick them up. It's strange. And it seems to me like it's really putting those folks at risk. They're very vulnerable when they get dropped off. So this is not just about the safety of the people who are here now. This is a lousy way to take care of other people whose safety is ostensibly your purpose.

And, of course, we have immigration laws. And the opacity of this program does not give any confidence that it's consistent with our immigration laws.

Mr. Simon: Take us through the Texas issue on the barbed wire.

We haven't seen anything like that in years—27 AGs versus the federal government.

Mr. Skrmetti: I'm not going to say it's a constitutional crisis yet. But it could blossom into one. And we're in a weird place now. So there was a lot of talk about how the states were defying the Supreme Court. But all the Supreme Court said was the federal government could continue cutting Texas wire, continue removing that. So Texas putting it up isn't violating any court order. It's just the Feds are authorized to turn around and take it down.

You know, we have legal structures in place that are supposed to govern these interactions. But those rely on both sides acting in good faith and doing their jobs. And here, it's the vacuum created by the federal government's less-than-enthusiastic enforcement of our border security laws that's prompting the state to step up. And Texas and all of the allied states are saying this is a big problem. Somebody has to do something about it. If the federal government won't, then we will.

And you've got what is almost like a dormant take care clause approach, where the Dormant Commerce Clause jurisprudence, if the federal government hasn't acted, there are still limitations on what the states can do here. It's the same approach to just basic law enforcement where the theory appears to be if the federal government isn't acting then the states are precluded from acting. But as separate sovereigns with their own public safety interest, there's a strong legal argument that the states can act here as well. You know, if the courts resolve it, then we'll have guidance as to what the law requires. Right now, there's a gray area. You see the federal and state interests butting against each other.

It is my fervent hope this resolves in favor of enforcement, and, I think, as you see, people like Sen. Fetterman come out and say having a secure border is not a partisan issue, and



it's just a fundamental to having a country.

Mr. Simon: But he's a one-off in a way.

Mr. Skrmetti: Well, he would be maybe the tip of the spear unless there's partisan advantage to be had here. But the interest of the country is more important than partisan advantage. And rather than wait for an election, and see if things go the right way, it's much better to expand the tent of people who want to secure the border and actually get something done. Because every day more and more people are coming in. And it is a huge stressor in our society at a time when we have so much existing stress on our polity. And we need to lower the temperature in this country a little bit or something's going to snap.

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