

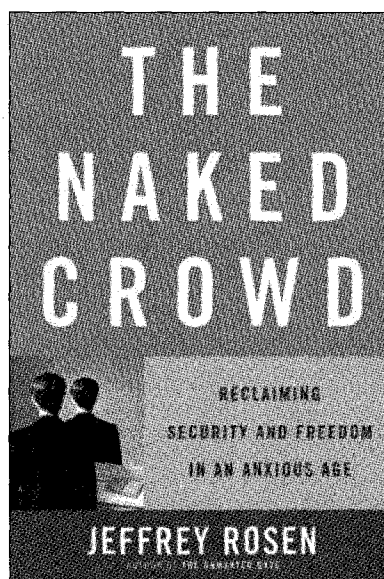
Eyes on the Pries

Why surveillance technology should worry even those with nothing to hide.

By Stephen Pomper

The World Trade Center attacks scared us into buying duct tape and plastic sheeting—and that's just for starters. As Jeffrey Rosen describes in *The Naked Crowd*, fear of future attacks also created a huge demand for new surveillance technologies.

Some of the things under development are quite amazing. For example, there is a biometric face scanner that can pick out known bad guys in a crowd. The Transportation Department is reportedly considering the development of a "dataveillance" program (in Rosen's terminology) that will review travelers' real-estate histories, living arrangements, and similar personal data, so that it can assign them color-coded risk levels—red, green, and yellow. There are fingerprint scanners, iris scanners, and even brainwave scanners somewhere in the pipeline, which can be hooked up to sophisticated databases or lie detectors as the case may be. And up atop the indignity index sits a machine tested by Orlando International Airport that would deliver a buck-naked image of each passenger who wanders under its microwave gaze.



The Naked Crowd: Reclaiming Security and Freedom in an Anxious Age

By Jeffrey Rosen

Random House, \$24.95

Are you outraged at the thought? I have to confess that I'm really not. Like many Americans, my first reaction to this James Bond-style technology is to embrace it, in the hopes that someday it will save my skin. As for the intrusion, it hardly bothers me; I figure I have nothing to hide. This is a trusting, optimistic, intuitive view of the world. The question

posed by *The Naked Crowd* is whether that view is very smart.

The book seems to have inspired by a challenge posed by Rosen's fellow law professor, Lawrence Lessig, who several years back, called Rosen a technophobic "Luddite" for expressing concerns about the widespread installation of surveillance cameras in Great Britain following the wave of I.R.A. terror in the early 1990s. Lessig suggested that, rather than reflexively resisting the spread of such new technologies, Rosen should pour his efforts into designing a technological and legal approach to surveillance that would protect both security and liberty. In answering this challenge, Rosen concluded that his first order of business should be to persuade skeptics that a balanced approach is actually necessary.

As a skeptic myself, I have to say, he's pretty convincing. Part of the trick here is that Rosen steers almost entirely away from partisan arguments, instead approaching the subject with courteous engagement. (Memo to Hannity, Lowry, Coulter, Moore, Franken, et. al.: You'd be surprised at how far this gets you.) But the bigger trick is in the breadth of Rosen's approach.

Rosen starts with the demand side of the equation, observing that the drive for increasing levels of surveillance is fundamentally driven by public opinion. That's generally consistent with democratic principles—but as a practical matter Rosen argues that this can produce some very bad decision-making. "[P]ublic fear," he writes, "leads people to react to remote but terrifying risks in emotional rather than analytic terms." Borrowing from the work of sociologists and psychologists, Rosen argues that the public doesn't really understand probability or statistics. Instead, it focuses on dramatic images—like a plane crash or collapsing tower—and panics. The government responds in kind by producing regulations that ineffectually address visually memorable past events—for exam-

ple, by banishing nail clippers from commercial air travel after September 11—while ignoring more significant but ordinary perils like the double fatburger you are about to eat for lunch.

But, the skeptic asks, so what if panic drives us to over-surveillance? Are the costs that great? And aren't there checks and balances to protect us?

The discussion of costs is a particular strength of *The Naked Crowd*. Rather than simply assert that surveillance technologies are "creepy"—the standard fallback of privacy advocates—Rosen lays out the threats that inadequately restrained surveillance can pose, even to those who have nothing much to hide.

Rosen is concerned about the potentially dangerous concentration of information in government hands. He worries that by eroding the old barriers of law and technology that historically discouraged the prosecution of trivial offenses, we will begin to feel like we live in a police state. (This sounds hyperbolic, but if you have ever received a ticket from a stop-light surveillance camera, you know there's some truth to it, at least at the emotional level.) But most of all, he is concerned about the possibility that vast government databases will classify citizens by risk category, and that these classifications will affect our freedom of movement and even our equality of opportunity.

Think about the huge life events and decisions that hang on the strength of your credit rating. Now, what if the government were to give us similar ratings? And what if for some seemingly arbitrary reason (a skinny-dipping citation, a few unpaid parking tickets, or an expired dog license) you wind up in a second- or third-tier classification? In a sense, argues Rosen, "risk profiles extend harms similar to those imposed by racial profiling across society as a whole, creating electronic layers . . . that determine

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who is singled out for special suspicion by state officials."

That actually sounds worse than creepy. And as Rosen describes the situation, not enough stands between us and that future. For one thing, he argues that the exhibitionist strain in contemporary American culture reinforces popular indifference to privacy. And even though many surveillance technologies could be rendered privacy-friendly with just a little tweaking, he notes that technology companies don't develop them because there is insufficient demand. Finally, he points out that because constitutional doctrine in this area is less far-reaching than one might imagine (the law doesn't demand that a search's scope be proportionate to the severity of a crime, and doesn't recognize any privacy interest in data held by third parties), the courts probably won't, and in Rosen's view shouldn't, get ahead of public opinion as champions of privacy.

This leads Rosen to look toward Congress as the last and best hope for striking an appropriate balance between security and privacy. He would like to see a congressional committee permanently empowered to review executive branch surveillance for effectiveness and intrusiveness. This committee would be charged with investigating alternative technologies which could produce similar benefits with lower privacy costs. In short, it would supply the

checks and balances on the government's surveillance powers that are missing in the current system.

This seems like an appealingly sober, balanced, non-hysterical recommendation. If there's a problem with Rosen's analysis, then, it lies in his point-blank assertion that there is no appropriate role for the courts in this area even if Congress fails to act. "The excess of the crowd are the Achilles heel of democracy to which there is and should be no judicial remedy," he asserts.

Well, not exactly. The Constitution was written to ensure that public opinion cannot simply trump certain minority rights unless it is amended through a pointedly burdensome supermajority procedure. And while Rosen makes the good point that judicial law-making in areas like abortion has provoked unfortunate political backlash, it's not at all clear that this situation requires the same interpretive leaps that the Supreme Court made in its reproductive rights cases. Indeed, one would think that there may be some room for leadership by the courts in this area. After all, the Fourth Amendment prohibits "unreasonable searches and seizures," and the Framers did intend it to limit broad, untargeted intrusions into the private sphere. There's also a question about whether public opinion is as polarized on this issue as abortion. As Rosen himself suggests in *The Naked Crowd*, the public may just be poorly informed.

But of course, that's what makes Rosen's contribution so worthwhile. Drawing on law and science, psychology and sociology, *The Naked Crowd* tells a convincing story about the world we live in, and a cautionary one of the world we may be entering. It is all the more laudable for doing so in a steady, nuanced voice that one hopes will rise above the noise of the crowd.

Stephen Pomper is a lawyer in Washington, D.C.

For whom Zell tolls

How not to forge the next Democratic coalition.

By Ruy Teixeira

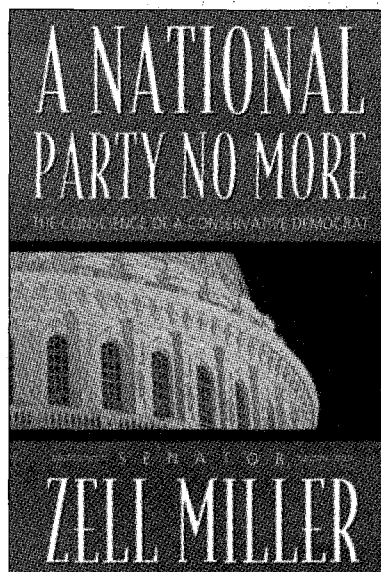
These two books have a couple of things in common. Both argue that the Democratic Party needs some fundamental changes, and both invoke the spirit of John F. Kennedy. But they diverge sharply in describing where they want the Democratic Party to go. Stanley Greenberg, a prominent Democratic pollster and consultant who helped guide Bill Clinton to victory in 1992, argues that the Democrats are on the verge of a political breakthrough from the stalemate of "the two Americas." They can achieve that breakthrough, he believes, by advocating a bold program which moves toward the "opportunity society" envisioned by John F. Kennedy. But Sen. Zell Miller (D-Ga.), a former Georgia governor and Democratic apostate, argues that his party is on the verge of a complete meltdown and can only save itself by turning drastically to the right and becoming more like, well, JFK—which in Miller's opinion looks much the same as becoming more like Zell Miller. One thing we know for sure: They can't both be right. Let's try to sort it out, starting with the Miller book.

A National Party No More would be a bit easier to discuss if it was entirely a bad book. But it's not. The first quarter or so, which describes Miller's childhood and his rise in Georgia politics, is really interesting. Talk about retail politics: Here's how Miller, then a college professor, first ran for the Georgia State Senate in 1960 at age 28: "I got up before day-

break to visit the early-rising mountain families around Owl Creek, Gum Log, Scataway, Bugscuffle, Bearmeat and the other isolated communities throughout the county. I'd be back at the college by nine o'clock to teach my first class. There was an old custom that if you woke up a man at night, it would emphasize to him just how important you thought his vote was: I woke up dozens. I'd always carry a gun on those excursions because feelings ran high and I traveled alone often on dark, lonely, dirt-rutted roads."

But *A National Party No More* is in most ways a bad book—indeed, a rather dreadful one. Most of the chapters are a toxic combination of corny folkisms, over-the-top jeremiads against fellow Democrats, and wonky recountings of Miller's policy innovations and accomplishments. That makes for some pretty tough slogging, especially given Miller's disjointed prose style, which piles one story or observation on top of another, without a clear narrative structure.

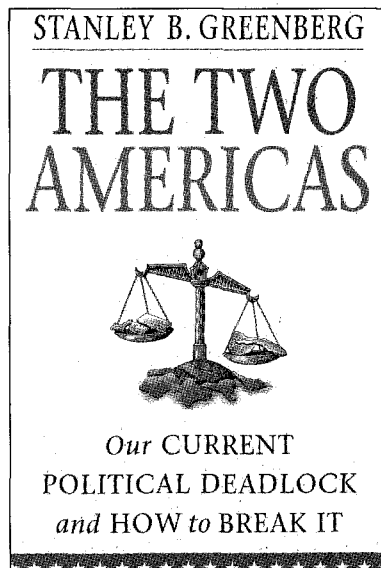
So who would slog through it? Well, probably some of Miller's newfound conservative friends, who would find his observation that "I could probably count on one hand those [environmentalists] in Washington who are real outdoorsmen, the ones who would know the difference between a pine and a poplar, the ones who have, excuse me, ever 'pee'd' in the woods" a trenchant critique of the environmentalist movement. (One expects that the five leading conservatives who provided dust-jacket blurbs—Sean Hannity, Jack Kemp, Lawrence Kudlow, Newt Gingrich, and Robert Novak—also gave it the old college try.) Who else? Perhaps those among the party he still nominally belongs to who wish to figure how on earth he became the GOP's cat's-paw in the Democratic Party. Back in 1992, after all, Miller was a moderate Southern Democrat who declared, in a keynote speech at that summer's Democratic convention, that Bill Clinton was "the only candidate for president who feels our



**A National Party No More:
The Conscience of a
Conservative Democrat**

By Zell Miller

Stroud and Hall, \$26.00



**The Two Americas: Our Current
Political Deadlock and How to
Break It**

By Stanley B. Greenberg

Thomas Dunne Books, \$25.95