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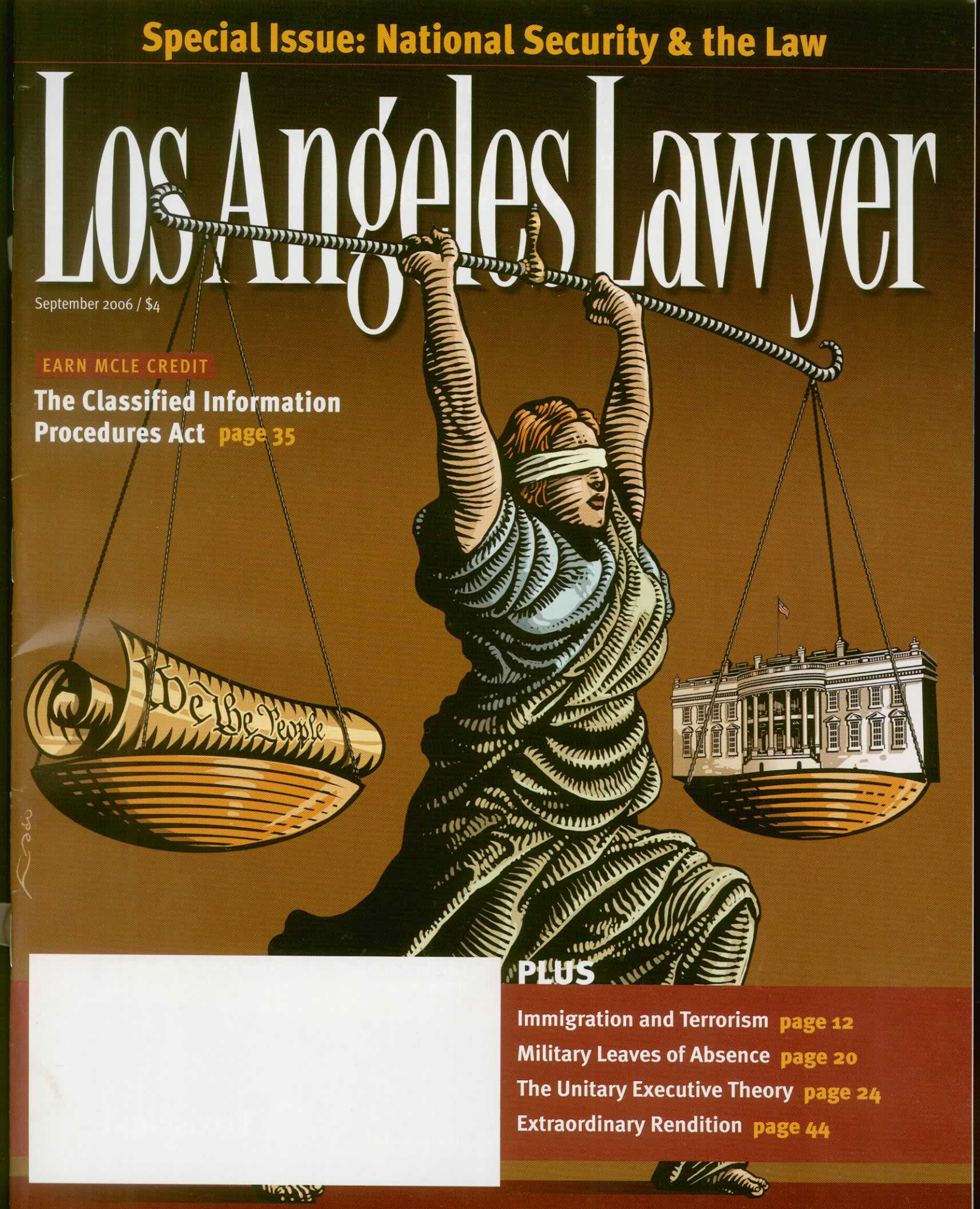

PLUS

BY ROGER CLARK

The Inalienable Right to Fly

IN *THE HIGH AND THE MIGHTY*, a 1954 film about a doomed airliner struggling across the Pacific from Hawaii to San Francisco, an angry husband pulls a handgun out of his coat pocket and threatens to shoot another passenger whom the husband suspects of having an affair with his wife. But before he can take the fatal shot the aircraft shudders as the outboard engine explodes in fire, and another passenger uses the distraction to take the pistol away. Amazingly, after calming down, the distraught passenger gets his pistol back.

Whatever its artistic merit, this movie is a classic celluloid time capsule. The passenger was not searched for weapons before he boarded. There was no security checkpoint, no magnetometer, no x-ray machine, and no bodily pat-down. The passenger was not arrested for carrying a weapon, assault with a deadly weapon, or attempted murder. He was not indicted for making terrorist threats. The incident simply passes without any suggestion of illegal conduct.

How things have changed! We still have, as we did in 1954, a "constitutionally protected right to travel."[1] However, today you cannot board a commercial airliner without first surviving a government-mandated gauntlet of electromagnetic surveillance and "secondary searches." Indeed, you would not even want to board the aircraft unless you knew the person in seat 14B had suffered through the same search. There is no need to show probable cause because the courts say you have given your implied consent to the search.[2]

In fact, poor taste in humor can now be prosecuted as a felony in our commercial airports, even when those around you know you are joking. Just ask John Barron, who joked he had a bomb in his shoe.[3] Or ask an angry Anna Mustafa, who, after receiving news that her father had died, and because she was concerned that she might miss her flight home due to the slow pace of the searches, sarcastically suggested, "Maybe I have a bomb in my purse. Nobody checked that."[4]

We all understand why we make these sacrifices. But it would serve us well to pause and think about how much our attitudes have changed over the past few decades, because if we forget where we came from we will never find our way back. Things began to change around 1968 when hijacking of commercial aircraft reached serious proportions. In 1970, President Richard Nixon announced a program to deal with airplane hijacking. As a result, on December 5, 1972, the Federal Aviation Administration ordered that searches of all carry-on items and magnetometer screening of all passengers be instituted by January 5, 1973.

We initially resisted the idea that someone had the right to look into our bags simply because we had entered an airport with the intent to take a flight.[5] And the courts were in accord: "[A]irport screening searches of the persons and immediate possessions of potential passengers for weapons and explosives are reasonable under the Fourth Amendment provided each prospective boarder retains the right to leave rather than submit to the search...."[6]

But this year, in *United States* v. *Daniel Kuualoha Aukai*, the Ninth Circuit explained, "The existence and scope of implied consent must be examined in light of all the circumstances, and such circumstances—and correlated societal expectations—may change over time."[7] The Ninth Circuit essentially said that in the post-2001 world the right of passengers to avoid a search by electing not to fly is no longer good law. The court reasoned that "allowing a passenger in Aukai's position to revoke his consent would...encourage airline terrorism by providing a secure exit where detection was threatened...and thus undermine the essential deterrent purpose of such airport screenings....The Fourth Amendment does not require that passengers be given a safe exit once detection is threatened."

We tolerate current security measures at airports and elsewhere only because they are temporary, not permanent.

Aukai underscores just how much our "societal expectations" have changed from 1973 when the court decided *Davis*. We now accept what is essentially a micro-police state in an airport, giving up our right of free speech and giving up our right to be free of search except upon probable cause. We do this to protect ourselves, and, for the most part, the self-protective measures we have taken are reasonable and necessary given the threats we face.

But *Aukai* also reminds us that our "societal expectations" have become a casualty of the war on terrorism. World War II, another era during which we sacrificed some of our civil liberties to defend ourselves, was over in less than four years. We are already into the fifth year of the war on terror, and there is no end in sight. So we must remember that we tolerate current security measures at airports and elsewhere only because they are temporary, not permanent—while we patiently await a more genteel era. And it would be helpful from time to time to remind ourselves what we once were by watching a celluloid time capsule like *The High and the Mighty*. ■

[1] Shapiro v. Thompson, 394 U.S. 618, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969).
[2] *See* United States v. Daniel Kuualoha Aukai, 440 F. 3d 1168 (9th Cir. 2006).
[3] Illinois v. Barron, 808 N.E. 2d 1051, (2004).
[4] Mustafa v. Chicago, 442 F. 3d 544 (2006). Mustafa was acquitted.
[5] *See* WAYNE LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT §10.6 at 636-37 (3d ed. 1996).
[6] *See* United States v. Charles Davis aka Marcus Anderson, 482 F. 2d 893 (9th Cir. 1973) *and* United States v. Moore, 483 F.2d 1361 (9th Cir. 1973).
[7] Aukai, 440 F. 3d 1168.

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