

News in Brief @ Yale Law School

LAW AND TECHNOLOGY



Journey of Discovery

First-year students learn procedure and help shape a new generation of discovery rules

FIVE YALE LAW STUDENTS sat in a room in the Judicial Conference Center, Washington, D.C. In front of them was a U-shaped table where the nearly two dozen members of the Advisory Committee on Rules of Practice and Procedure of the Judicial Conference sat, receiving public comment on proposed modifications to the rules of evidence that govern electronic discovery. Beside the students were about a dozen other speakers, mostly representatives of large corporations or trade organizations.

The students—Mike Heidler, Rudy Kleysteuber, Joseph Masters, Steven Shepard, and David Tannenbaum—are all in their first year, just out of the information maelstrom of their introductory semester.

But why were five students with a cumulative experience of a few hours studying

First-year students Kleysteuber, Tannenbaum, Heidler, Shepard, and Masters (from left) used their background from Procedure class and their generational knowledge of information technology to provide public comment to the Judicial Conference regarding the rules of evidence that govern electronic discovery.

the discovery rules sitting among trial lawyers and judges who have spent lifetimes sifting the code's intricacies? In addition to a newcomer's excitement about the law, the students brought the experience of a generation that grew up with the computer technology that these rule changes sought to address.

Masters says he has been programming professionally for more than ten years and has a hacker's interest in reverse engineering. "So, when I get to read these rule amendments, I think, 'How can you manipulate this language?'" he says. He outlined several scenarios to the committee. For instance, Rule 34 (b) requires respondents to a discovery request to provide data in an "electronically searchable" format. But Masters could think of several ways that a programmer could meet this requirement, and yet still make it expensive or time-consuming to access the data.

He told the committee: "If I were asked to produce 100,000 emails, I could give you a program that had those encrypted in the program and would allow you to read, say, each email. You could search, say, each email. But you couldn't search the whole body of emails.... And then I could also make it scroll so you couldn't actually read it at your own rate. I can make it scroll one line every thirty seconds, every minute."

Judge Shira Ann Scheindlin asked: "And

your language suggestion to prevent people from playing that game would be?”

Masters: “To say you want an ‘electronically searchable file format,’ not just an ‘electronically searchable’ format.”

Tannenbaum identifies another quality that made the students’ testimony more than a curiosity: their independence. He notes that the hearing overall “mirrored

committee’s chair, spoke to all the first-year students about the work of the committee, and encouraged students to submit comments. The students were similarly encouraged by their Procedure professors, Judith Resnik and Harold Hongju Koh.

Shepard said that his class discussions on disclosure had prepared him for “the battle that discovery can be...and how you

consequences had worked on these rules. They had been written before computers played any role in litigation, but had become axes of dispute over what kinds of digital data defendants in a lawsuit could be compelled to produce. As Shepard made his recommendations to the committee about electronic discovery, he had the sense that they all had to be cautious because “one of those words could turn out to be something unanticipated.”

Tannenbaum says he found just observing the experts on the committee and the lawyers who testified to be edifying. He adds, “First semester you do these oral arguments in your Constitutional Law class or whatever small group you have, and it’s kind of a play thing... Then to actually have to face the committee was very intimidating, but then once the talks started happening it was actually incredibly fun.”

“When I get to read these rule amendments, I think, ‘How can you manipulate this language?’”

the adversarial system of the court.” Large corporations favored the changes that made it easier to defeat discovery requests, while class action lawyers (the corporations’ regular foes) opposed those changes. “So it was cool that we were coming from academia, which is a space where you can have some sort of distance from these issues.”

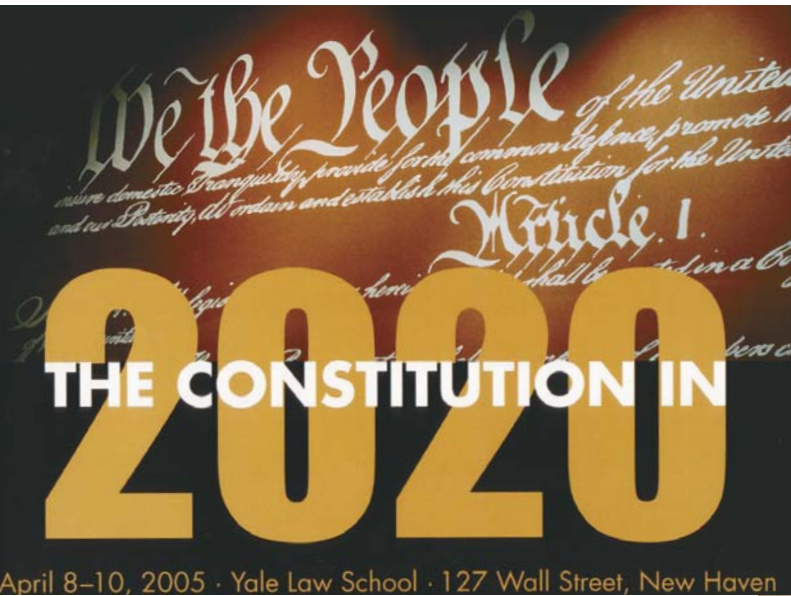
Each student had a slightly different take on how the proposed rules would play out in future law suits and business strategies. Tannenbaum’s testimony focused on his concerns that some of the rules’ attempts to deal with new technologies would end up affecting businesses’ decisions about how to retain data. Heidler says he favored the rule changes more than his classmates, because, “The burdens created by technology obsolescence and data restoration distinguish electronic information from paper documents in a significant way, and the rules should recognize that distinction.”

The five students’ trip to Washington started when Judge Lee Rosenthal, the

can use the rules not in the spirit in which they seem to be written to help the court reach the truth but as tools...to just make life as difficult as possible for your adversary.” But as he researched the provenance of Rule 26 (b) (2) and Rule 26 (C), he says he saw how powerfully the law of unintended



Ronald S. Sullivan, Jr., was presented with the first annual Yale Law School Teaching Award in May. Sullivan is an associate clinical professor and founded the Samuel and Anna Jacobs Criminal Justice Clinic at Yale Law School. Associate Registrar Beth Barnes also received the YLS Staff Award.



This year's Liman Colloquium, held as part of the ACS conference, discussed Constitutional Lawyering and Public Interest Lawyering: Inventing Again, moderated by Liman Program Director Deborah Cantrell (third from left).



CONFERENCES AND SYMPOSIA

The Constitution in 2020

MEMBERS OF THE LEGAL academy, leaders of progressive organizations, practitioners, policymakers, and students from across America came together for “The Constitution in 2020,” a conference at Yale Law School providing an opportunity for participants to articulate **progressive constitutional values** for the 21st century.

The event was the brainchild of the Yale Law Chapter of the American Constitution Society, a national organization committed to progressive legal reform, and was co-sponsored by ACS, Yale Law School, The Center for American Progress, the Arthur Liman Public Interest Program at Yale Law School, and the Open Society Institute. Distinguished conference participants included Judge Guido Calabresi '58 and former Judge Patricia Wald '51, former Solicitors General Drew Days '66 and Seth Waxman '77, former Dean of Stanford Law School Kathleen Sullivan, ACS Executive Director Lisa Brown, President and CEO of the Center for American Progress John Podesta, and leading constitutional scholars including Professors Bruce Ackerman '67 and Cass Sunstein.

Many of the participants will be contributing to a book on the Constitution in

2020, reprising many of the ideas shared at the conference, currently being edited by Professors Jack M. Balkin, Knight Professor of Constitutional Law and the First Amendment, and Reva Siegel '85, Nicholas deB. Katzenbach Professor of Law.

The Yale Chapter of the American Constitution Society remains an active leader in the national organization's ongoing project on the constitution in the 21st century. Alumni who are members of ACS or who would like to get involved in progressive issues should email david.tannenbaum@yale.edu, or visit www.law.yale.edu/acs.

In addition...

The Law School hosted a conference on **U.S. Colombia Policy** in February, held in anticipation of the five-year anniversary of Plan Colombia, a major U.S. foreign assistance package to the country. The conference, entitled “U.S. Colombia Policy at a Crossroads: Recent Experiences and Future Challenges,” provided an opportunity to build consensus across the political and professional spectra.

Also in February, the **Rebellious Lawyering** conference covered subjects from “Challenging the Constitutionality of

the Juvenile Death Penalty” to “Don't Ask, Don't Tell Policy in a World after *Lawrence*.” Another panel addressed the subject of industrial farming, which hadn't been discussed at *Rebellious Lawyering* in a number of years.

A symposium on **same sex marriage**, “Breaking with Tradition: New Frontiers for Same Sex Marriage,” held in March, examined how the debate over same-sex marriage has challenged traditional notions of marriage, and how the issue is likely to develop in coming years.

In April, Yale Law School's **Information Society Project** hosted “The Global Flow of Information: A Conference on Law, Culture, and Political Economy.” The conference explored the emerging patterns of information flow, and their political, economic, social, and cultural consequences. Policymakers, academicians, legal practitioners, and high-technology industry leaders discussed the flow of information across borders and the attempts by various entities to control it, and what role the law can play in securing freedoms and rights for individuals, groups, and nations during this struggle for control.



Joey Fishkin (left) and Joshua Hawley (right) “debate the debate” for ACS and the Federalist Society.

ACS and Federalist Society Debate

The American Constitution Society invited Calvin Johnson, the Andrews and Kurth Centennial Professor of Law at the University of Texas, to discuss his book, *Righteous Anger at the Wicked States: The Meaning of the Founders’ Constitution*, on April 21. The Federalist Society asked Gary Lawson ’83, the Abraham and Lillian Benton Scholar at Boston University School of Law, to respond. The *Yale Law Report* asked two students involved in organizing the program to tell us how the debate went.

Could you each summarize the points of the speaker invited by your organization?

Joey Fishkin ’06, ACS: Calvin Johnson is primarily a tax scholar who has also done very interesting work on constitutional history and federal powers. Lately he has been looking into early tax history, and this has led him to some pretty strong conclusions about what the framers of the Constitution were trying to accomplish. He argued that you can’t just read the words of a document like the Constitution: you have to look at it in terms of what program the people who wrote it were trying to enact. And his argument is that they were trying to enact a nationalizing program. He started with this very vivid example of the requisition from the states to try to pay the Revolutionary War debt. They needed several million dollars and they came up with \$663. The result was that they had to come up with a more centralized way of collecting taxes, and that’s the first power listed in the Constitution. Professor Johnson argues that the framers’ “anger” at “wicked” states such as Rhode Island that vetoed taxes and important legislation under the Articles prompted the Founders to enact their nationalizing program. So, his argument is that this should guide the way we interpret the Constitution now. He would say that the

original intent you should look at is not what the Federalists were saying when they were going around to these ratifying conventions and trying to downplay what they did in order to get support, but instead you should really look at what programs they were trying to enact.

Joshua Hawley ’06, Federalist Society: Professor Gary Lawson has written extensively on the Constitution of 1787 and the proper way to interpret that Constitution. He’s an originalist and a founding member of the Federalist Society. Professor Lawson said to us when he first visited with Professor Johnson on the telephone and read Professor Johnson’s manuscript that he didn’t have any substantive disagreements in terms of the history—there probably was anger at the states that was a primary motivation for the Constitution of 1787—but where there was some disagreement was in how you cash that out in terms of interpretive method. Not to put words in either of their mouths, but I think the real disagreement is over the question of enumerated powers. Professor Johnson is implying that enumerated powers are a very weak restraint on the federal government, because the Constitution was intended as a nationalist document. Professor Lawson argues, quite to the contrary, those enumerated powers are very

binding, and while the document certainly was intended to be a nationalizing instrument, nevertheless, the commands that it laid out in Articles One, Two, and Three, all mean what they say.

Fishkin: This dispute cashed out when they had an exchange about the power to issue passports, which is not an enumerated power. The power to issue passports is an example of an unenumerated power that we think the government nonetheless has, because the founders obviously intended for the federal government to issue passports.

Can you describe something that the other side said that was particularly powerful or convincing to you?

Hawley: I actually am very sympathetic to Professor Johnson’s interpretive method. He was attempting to apply the method of Quentin Skinner, who is an intellectual historian at Cambridge University. I’ve actually long thought that it could be used for legal interpretation, and so I was excited to see Professor Johnson attempting to do that. And one of the key moves in that method begins with attempting to figure out what the document is doing in context, and then begin to work backwards from that to find what the authors were intending to do. It’s an attempt to find intent, but to find it within the corners of the text itself.

Fishkin: I think Professor Lawson’s response was as interesting as it could have been, because instead of trying to push back against the broad historical conclusions, he really laid out a textualist, rather than originalist, critique. While I’m not sympathetic to it myself, I think that the stark contrast he was able to set up between a version of textualism and a version of originalism was really illuminating, since I had often encountered those two methodologies mixed. ∞

YLS Professor Graetz Co-Chairs Report on Social Security

A REPORT ON potential reforms to the Social Security system, published by the National Academy of Social Insurance, looks beyond much of the current debate to ask how money from personal accounts would be paid to retirees. Michael Graetz, Justus S. Hotchkiss Professor of Law at YLS and co-chair of the panel that wrote the report, says that though money from such

they be required to purchase an annuity? Will people have access to their accounts if they become disabled? How will the accounts be handled in divorces? Will payout of traditional Social Security benefits have to change? For each question, the report describes the advantages and disadvantages of various approaches.

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accounts wouldn’t be paid out for dozens of years, questions about payout “have to be answered in the legislation that establishes the private accounts. You can’t wait until the people retire.”

In examining how to structure the payout on such accounts, the panel identified a host of important questions, such as: Will retirees be able to take a lump sum payment from their accounts, or will

ing risks: investment risk on accumulated capital, for instance; or the risk of outliving savings; or the inflation risk. These risks mean that the payout aspect of any new policy has to be carefully orchestrated. Says Graetz, “You have to think about dealing with risks after retirement the same way that you think about risk-spreading through diversification of investments pre-retirement.”

The panel worked for more than two years on the 200-page report, titled *Uncharted Waters: Paying Benefits from Individual Accounts in Federal Retirement Policy*, which is available through the NASI website at www.nasi.org.

Law School Deanship Endowed by Goldman Charitable Trusts

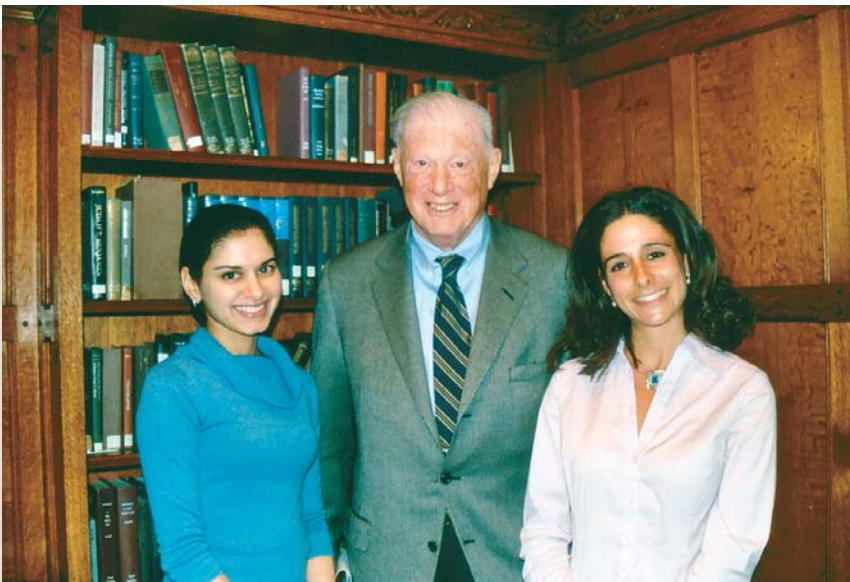
THE LILLIAN GOLDMAN Charitable Trust and the Sol Goldman Charitable Trust announced a grant of \$5 million to Yale Law School to endow the deanship of the School.

The charitable trusts are named for the late New York City philanthropists Sol Goldman and his wife, Lillian, who was a longtime friend and benefactor of the School.

Income from the endowment will support the activities of the dean in all areas. “Our gift to Yale Law School continues the tradition of giving to the School started by our parents, Sol and Lillian Goldman,” said sisters Amy and Jane Goldman. “The Goldman family believes strongly in the values and ideals inherent in a Yale Law School education and hopes that this contribution will assist the current dean and future deans in their efforts to build upon the School’s prominence in legal studies and public policy.”

Yale Law School Dean Harold Hongju Koh said, “The generosity of the Goldman family will further Yale Law School’s mission of excellence and humanity in legal education. The School is deeply grateful to the Goldman family for its critical assistance over the years in helping us to provide a truly distinctive educational experience for our students.”

The Goldman family has been a major supporter of the School for many years. A contribution by Lillian Goldman in 1994 during the Law School’s extensive renovation project supplied funds for the expansion and extensive renovation of the library, which was renamed the Lillian Goldman Law Library in memory of Sol Goldman. Funds were also used to establish need-based scholarships for students interested in the study of women’s rights.



Avani Mehta Sood '03 and Sari Bashi '03, shown here with Robert L. Bernstein, were awarded one-year Bernstein Fellowships this spring. Avani will work with the International Legal Program of the Center for Reproductive Rights to help advance the reproductive rights of women in India. Sari will spend the year in Israel helping to establish a new organization, the Center for the Legal Protection of Freedom of Movement, designed to provide legal representation for Palestinian residents of the occupied territories confined by travel restrictions.

APPOINTMENTS

YLS Faculty Named to New Chairs

Amy Chua was appointed John M. Duff, Jr. Professor of Law. Her work has focused on contracts, international



business transactions, law and development, ethnic conflict, and globalization and the law. Her 2003 book, *World on Fire: How Exporting Free Market*

Ethnic Hatred and Global Instability, was a *New York Times* bestseller. Before joining the Yale faculty in 2001, she was a member of the faculty at Duke University.

Roberta Romano was named the inaugural Oscar M. Ruebhausen Professor of Law. She is a specialist in corporate law and finance, financial market regulation, and corporate governance. She is also the founder of the Law School's Center for the Study of



Corporate Law. She has written extensively on takeover regulation, state competition for corporate charters, and the regulation of financial

instruments and securities markets. She was named the Allen Duffy/Class of 1960 Professor of Law in 1991.

Alec Stone Sweet was named the Leitner Professor of International Law, Politics and International Studies. His appointment is one of three new



international, interdisciplinary chairs at the Yale Center for International and Area Studies. He joined the Yale faculty in the fall of 2004, and

works in the fields of comparative and international politics, as well as comparative and international law.

Jonathan R. Macey was named the Sam Harris Professor of Corporate Law,



Corporate Finance and Securities Law. He joined the Yale faculty this past year after teaching at Cornell University since 1987. Macey has written

numerous articles for scholarly publications and the popular press on topics ranging from corporate governance of banks to corporate takeovers to insider trading.

The Weil, Gotshal & Manges Roundtable, sponsored by the Law School's Center for the Study of Corporate Law, included paper presentations by YLS Professor Jonathan Macey '82, Cornell SOM Professor Maureen O'Hara (see photo at right), and MIT Sloan School Professor Stephen A. Ross; followed by an afternoon panel on securities law. Alumni who want more information on activities of the Center for the Study of Corporate Law should visit www.law.yale.edu/ccl.

YLS Receives Award from Microsoft for Studies of Law and Technology

Yale Law School's Information Society Project received an award of more than \$500,000 from Microsoft Corp. for a variety of educational and research programs.

The Information Society Project focuses on the deeper social and technological challenges of the information society. It produces innovative thinking and scholarship about law and technology by bringing together a network of professors, young scholars, and law students.

"The new funding will enable us to provide fellowships for post-graduates and aspiring academics as well as summer grants for law students. In this way we can help some of the brightest and most ambitious students in the world carry out cutting-edge research on the information society," said ISP Director Jack Balkin, who is the Knight Professor of Constitutional Law and the First Amendment at Yale Law School.

The ISP will begin implementing the new programs in the 2005-06 academic year with summer grants, a new fellowship, and a speaker series. It will also expand its working group of young researchers with seven additional post-graduate fellowships over the next several years.



Finland Tops Environmental Scorecard, According to Yale Study

FINLAND ranks first in the world in environmental sustainability out of 146 countries, according to the latest Environmental Sustainability Index (ESI) produced by a team of environmental experts at Yale and Columbia Universities. The 2005 ESI, which was released at the

World Economic Forum in January in Davos, Switzerland, ranks Norway, Uruguay, Sweden, and Iceland from two to five respectively. Their high ESI scores are attributed to substantial natural resource endowments, low population density, and successful management of environment and development issues.

“The ESI provides a valuable policy tool, allowing benchmarking of environmental performance country-by-country and issue-by-issue,” said Daniel C. Esty ’86,

Clinical Professor of Environmental Law and Policy at YLS, and Professor of Environmental Law and Policy, School of Forestry and Environmental Studies and the creator of the ESI. “By highlighting the leaders and laggards, which governments are wary of doing, the ESI creates pressure for improved results.”

The ESI demonstrates that environmental protection need not come at the cost of competitiveness. Finland is the equal of the United States in competitiveness but

UPDATE

Military Recruitment Issues at YLS

Interest in military recruitment issues at universities and law schools intensified this year as a result of several court rulings surrounding enforcement of the Solomon Amendment, a 1995 federal statute which states that any school that refuses to allow military recruiters on campus could lose its government funding. Because Yale Law School has always permitted military recruiters on campus, the School maintains that it has always acted consistently with this law.

SOME HISTORY In 2002, the federal government began to implement a stricter interpretation of the Solomon Amendment, and informed Yale Law School that the School was no longer in compliance with the terms of the Amendment. Although YLS continued to provide the military with access to its students and the military were permitted on campus, the School continued its practice of not permitting military recruiters to participate in its off-campus interview program without signing the School’s nondiscrimination policy.

Faced with the threat of the loss of approximately \$350 million in federal funds that could be withheld from Yale University, the faculty of the Law School voted in 2002 to suspend temporarily and to the minimum extent necessary the application of the nondiscrimination policy to military recruiters, pending a legal resolution of the definitive interpretation of the Solomon Amendment.

After negotiations between the University and the federal government failed to achieve resolution of the matter, forty-five individual members of the faculty filed a lawsuit, *Burt et al v. Rumsfeld*, challenging the constitutionality of the Solomon Amendment. The U.S. District Court for the District of Connecticut recently ruled in favor of the faculty’s claim. (For more information on this and related cases, visit the Law School’s news website, “Currently @YLS,” at www.law.yale.edu.)

Following this decision and similar rulings in other suits around the country, Yale Law School returned to its decades-old policy of requiring employers to sign the School’s nondiscrimina-

tion policy before participating in its off-campus interview program.

“Yale Law School does not now ban military recruiters from campus, nor has it ever done so,” said Dean Harold Hongju Koh. “In fact, the Law School does not bar any employer from entering the building and meeting with interested students. For example, during the Law School’s Spring Interview Program, a student who wished to interview with the military met with a recruiter at length in the Law School dining hall.”

“Yale Law School students are free to meet with recruiters or any other employers who are unwilling or unable to abide by the School’s nondiscrimination policy. In addition, all of the information submitted by recruiters—including contact information—is made fully available to students,” the Dean continued. “The Law School’s policy withholds assistance, but not access, from employers who continue to discriminate.”

LEGISLATIVE UPDATE On May 2, 2005, the Supreme Court granted certiorari in *Rumsfeld vs. Forum for Academic and Institutional Rights (FAIR)*, in which the U.S. Court of Appeals for the Third Circuit held, parallel to the Bridgeport District Court, that the Government’s application of the Solomon Amendment to law schools with antidiscrimination policies similar to Yale Law School’s violated the First Amendment. The *FAIR* case will likely be argued before the U.S. Supreme Court in November or December.

In the *Burt* case, the YLS faculty plaintiffs have petitioned to the Supreme Court for a writ of certiorari before judgment, which would allow their case to be heard by the Supreme Court at the same time as the *FAIR* case. As the *Yale Law Report* went to press, the Supreme Court had not yet acted on the *Burt* plaintiffs’ petition.

“Yale Law School does not exclude any speaker or point of view,” said YLS Professor Robert Burt ’64. “The School also believes that, under the U.S. Constitution, no one may be required, as a condition of federal funding, to promote a message of employment discrimination. Recent court decisions regarding the application of the Solomon Amendment in the Third Circuit and the USDct for Connecticut have upheld that view.”

scores much higher on environmental sustainability and outperforms the U.S. across a spectrum of issues, from air pollution to contributions to global-scale environmental efforts.

Analysis of the ESI data also makes it clear that developed countries face environmental challenges, particularly pollution stresses and consumption-related

The ESI demonstrates that environmental protection need not come at the cost of competitiveness.



Margaret H. Marshall '76, Chief Justice of the Supreme Judicial Court of Massachusetts, with Saleela Khanum Salahuddin '06, who presented her with the Yale Law Women Alumni Achievement Award in April.

issues, distinct from those facing developing countries, where resource depletion and a lack of capacity for pollution control are dominant concerns.

“Fundamentally, we see the ESI helping to make environmental decision-making more empirical and analytically rigorous. Such a shift toward data-driven policy-making represents a potential revolution in the environmental realm,” said Esty, who directs the Yale Center for Environmental Law and Policy.

Comings and Goings at YLS


Kenji Yoshino '96 was named Deputy Dean for Intellectual Life, a newly created position that will focus on the intellectual needs of faculty and students outside the curriculum.

After almost fourteen years of dedicated service, Associate Dean **Natalia Martin '85** left the Law School to pursue new professional opportunities with Simpson Thacher. Dean Martin was first appointed by former Dean Guido Calabresi and continued serving as dean of student affairs during Anthony Kronman's ten-year tenure as dean.

Former Associate Dean **Ian Solomon '02** joined the staff of United States Senator Barack Obama this spring. Dean Solomon joined the Law School as Associate Dean in 2002. **Mark Templeton '99** succeeds Solomon as Associate Dean. Templeton comes to the law school after three years as a strategy consultant with McKinsey & Company in Washington, D.C.

Leslie West, Executive Director of the

Yale Law School Fund, and **Bernard Dickerson Logan**, Assistant Director of the Fund, also say goodbye to the Law School as they retire this summer. Leslie began her career at Yale almost thirty years ago, and has worked as the Fund's Executive Director since 1997. Bernard has worked with her closely as Assistant Director, and together they stewarded the Law School's annual giving program for many years. The Law School will pay a special tribute to them during the Alumni Weekend dinner on Friday, November 4.

Judith Miller '87 LLM, Dean's Chief of Staff and longtime Director for Academic Research Programs, also departed from the Law School at the end of the academic year to pursue new professional adventures. 

Professor Jack Balkin named to American Academy of Arts and Sciences



Balkin Named AAAS Fellow

Jack Balkin, Knight Professor of Constitutional Law and the First Amendment, was recently named a fellow in the American Academy of Arts and Sciences. Balkin is an expert on constitutional law, the First Amendment, and cyberspace law. He is the director of the Information Society Project at YLS, as well as the author of *The Laws of Change: I Ching and the Philosophy of Life*, *What Brown v. Board of Education Should Have Said*, and *Cultural Software: A Theory of Ideology*, among other books. He also founded the blog Balkinization. Balkin joins twenty-two current YLS faculty members in the law section of the AAAS.