

Uncertainty About Trump Doesn't Dampen Optimism at Federalist Society Convention

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Optimism, both cautious and unreserved following the election of Donald Trump, flowed through crowded halls of Washington's Mayflower Hotel on Thursday as the conservative Federalist Society opened its annual national convention.

Josh Blackman of South Texas College of Law described as a "wake" the atmosphere four years ago, as President Obama would begin his second term.

That mood has shifted. "Definitely," Blackman said.

The reason for much of the optimism, cautious or not, is the U.S. Supreme Court vacancy, lawyers at the convention said.

"Despite a general wild card, this is one issue we feel we dodged a bullet," said Ilya Shapiro, senior fellow in constitutional studies at the Cato Institute. "We're hearing good news."

The "good news" stems from comments by the Federal Society's executive vice president Leonard Leo after a visit Wednesday to Trump Tower, according to a number of convention attendees.

Leo said the president-elect intends to fill the high court vacancy created by the death of Justice Antonin Scalia from two lists of 21 potential nominees that he released during his campaign. The lists are dominated by conservative federal and state appellate judges.

Nine judges whose names appear on the lists are set to moderate panels at the convention.

Shapiro compared this week's convention to 2004, when the mood was "uniformly ebullient." On Wednesday, Shapiro described the mood this way: "cheerful and waiting to hear what happens."

Baker Botts' Aaron Streett, chairman of the firm's Supreme Court and constitutional law practice, said the atmosphere at his firm was "cautiously optimistic, hope mixed with reality." There is particular optimism on the energy front, he said.

Justice Samuel Alito Jr. delivered the welcoming remarks Thursday, offering a mix of humorous and sentimental remembrances of Scalia, whose jurisprudence and legacy are the main focus of this year's three-day convention. Alito did not mention Trump, and he did not talk about the Supreme Court vacancy.

Alito noted that lawyers arguing before the high court are speaking with more and more confidence about legislative history, which Scalia thought was useless in interpreting statutes.

“I find myself reflexively looking to where Nino sat” when they raise legislative history, said Alito, and waiting for Scalia’s would-be sharp questions: Was that a colloquy on the senate floor? Was anybody there? Did the president sign it?

Alito also spoke about “constitutional fault lines” that exist today. “Sometimes the earth starts to tremor and people get worried,” he said.

More than 40 senators, he noted, have proposed an amendment to the First Amendment to give greater free speech rights to “elites who control the media than to anybody else.”

Freedom of religion is “in even greater danger,” Alito said. He noted the denial of review by the high court in a case that involved a challenge to a Washington state law requiring pharmacists, despite religious objections, to fill prescriptions for contraceptives.

“The Supreme Court did not even think that case deserved review,” said Alito, one of three justices who, in January, wanted the court to take the case.

Referring to the “melting pot” of New York in which Scalia grew up, Alito said the phrase in the University of California system is a “micro-aggression.” And Scalia, he noted, was taught by Jesuits “before they discovered liberation theology. I’m going to cover all the bases this morning.”

Alito also talked about the impact of Scalia’s views on originalism and textualism, his growing discomfort with the judiciary’s deference to federal agencies and his landmark Second Amendment decision in *District of Columbia v. Heller*.

After Alito’s comments, the standing-room-only crowd spilled into the Mayflower’s hallway, and there was talk, again, about the government positions Trump’s transition team will fill.

In attendance were two lawyers whose name have come up in Washington legal circles as possible nominees for U.S. solicitor general: Williams & Connolly’s Kannon Shanmugam and Texas Solicitor General Scott Keller.

As one lawyer noted, the only certainty was that all speculation about Trump nominations and appointments would be “settled soon.”