The “Good Old #3 Club” Gets a New Member

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It has been said that serving on the U.S. Supreme Court is like being a member of an exclusive club. Yet within this club, there are even more exclusive clubs that only a small number of Justices are permitted to join. These shadowy associations are unseen by the public, receive no publicity, and are not even known to the Justices who are excluded. The existence of these secretive organizations has recently been revealed through the release of Justice Harry Blackmun’s papers at the Library of Congress. This article is the first serious attempt to research the existence, membership, and practices of these clandestine alliances. Ultimately, as with many High Court practices, these newly uncovered connections may be in need of reform, and I offer a number of solutions to define membership criteria and improve their functioning.

Introduction

When Justice Sandra Day O’Connor announced her retirement on July 1, 2005, little did anyone know that one such club—“the good old #3 club”—was about to get a new member. Justice Samuel Alito, who was confirmed 58–42 by the Senate on January 31, 2006, was President George W. Bush’s third choice for O’Connor’s seat, following the official nominations and withdrawals of U.S. Court of Appeals Judge John G. Roberts, Jr. and White House Counsel Harriet Miers. Of course Roberts was withdrawn so that he could be nominated for the Chief Justiceship. Still, as the President’s third choice, Alito joins a rather limited club—one shrouded in mystery, where members ruefully debate membership criteria and remind each other of their rather humble ascension to the nation’s highest tribunal.

Like membership on the Court itself, membership in these hidden groups is a product of the appointment process, where nominations and confirmations are subject to political pressure. Successful appointees who follow failed nominees make up these private clubs in which the more failure you follow, the more exclusive club you join. Successful nominees who do not follow failure, such as Chief Justice Roberts, need not apply.
Blackmun may in fact be a member of the #4 Club, not the #3 Club, as he believed. It depends on whether one counts President Lyndon Johnson’s attempt to appoint Attorney General Homer Thornberry to Abe Fortas’s seat while Fortas was being (unsuccessfully) proposed for Chief Justice. Blackmun (pictured, with #1 Club member Stephen Breyer) was appointed to Fortas’s seat after the nominations of Clement Haynsworth, Jr., and G. Harrold Carswell were rejected by the Senate.

While there have been 152 official nominations to the Supreme Court, Alito is only the 110th person to serve. Nominees have been withdrawn, have been formally rejected or postponed by the Senate, and have even declined the appointment after Senate confirmation. As a result, Presidents have had to resort to their second, third, fourth, and—in one case—fifth choice to fill a single Supreme Court vacancy. These successful nominees have banded together to form four selective groups: the #2, #3, #4, and #5 Clubs.

Good Old #3 and #4 Clubs

Determining who belongs in the #3 Club has proved problematic. Failure to properly consult historical sources and the lack of a clear-cut definition has made even members of the Court mistakenly welcome those that have not merited admission. Take, for example, a 1987 exchange between Justices Blackmun and Anthony Kennedy. Following the Senate’s 42–58 rejection of President Ronald Reagan’s first nominee, U.S. Court of Appeals Judge Robert Bork, and the withdrawal of his second choice, U.S. Court of Appeals Judge Douglas Ginsburg, Kennedy was the compromise third pick. Before Kennedy’s confirmation vote, Justice Blackmun sent him a note. Blackmun had been President Richard Nixon’s third choice after the rejections of U.S. Courts of Appeals Judges Clement Haynsworth, Jr., 45–55, and G. Harrold Carswell, 45–51. Blackmun wrote the new nominee:

Dear Tony: You have my sincere congratulations on your nomination as an Associate Justice of the Supreme Court of the United States. You should, I feel, have comparatively little difficulty on the road to confirmation. I look forward to your being here. Your chambers will be next to mine. Please do not hesitate to let my secretaries or me know if we ever can be of assistance to you. The transition will be a major one, but Dottie and I survived. You will, too. I told Richard that I am a founding member of a very exclusive organization called “the good old #3 club.” You now qualify for this unusual but worthy distinction. It happened to me in 1970, and it has served to keep me a little humble whenever Dottie suggests that I might be getting too “judgie.” The other characters around here do not qualify. Good luck with the days ahead. You will enjoy being here and will make a worthwhile contribution to what is a common calling for us. Sincerely, Harry
Joseph Story and John Archibald Campbell are both members of the #4 Club because they were nominated after three other candidates declined, withdrew, or were rejected.

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<thead>
<tr>
<th>Club</th>
<th>Year Founded</th>
<th>Total Membership</th>
<th>Active Membership</th>
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<tr>
<td>#5</td>
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<td>#4</td>
<td>1811</td>
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<td>#2</td>
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Kennedy replied, “Dear Mr. Justice Blackmun: You are most gracious to write. Mr. Justice Story was also in the No. 3 club, and I hope to be successful in joining its ranks. When the confirmation process is ended, whatever the result, I look forward to visiting with you. Best personal regards. Yours, Anthony M. Kennedy.”

In his post-retirement oral history, Blackmun remarked of Kennedy, “[W]e prop each other up every now and then by sympathizing with the other for not being number one.”

Despite Kennedy’s attempt to place Story in the #3 Club, however, history shows that Story is a member of the slightly more exclusive #4 Club. The death of Justice William Cushing on September 13, 1810 provided President James Madison with his first chance to shape the Court. He first selected President Thomas Jefferson’s former Attorney General Levi Lincoln, who was confirmed by the Senate but declined the commission, citing his rapidly failing eyesight and poor health. Madison next turned to Connecticut Republican party leader Alexander Wolcott, who had served as U.S. collector of customs. Wolcott came under immediate criticism for his vigorous enforcement of protectionist trade policies and his relatively slight legal experience. He was rejected by the widest margin in confirmation history: 9–24. Madison’s third choice was John Quincy Adams. Son of former President John Adams and Abigail Adams, John Quincy had served in the Senate and was unanimously confirmed by his former
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<th>Table 2</th>
<th>U.S. Supreme Court Good Old Club Membership List</th>
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<td>Member</td>
<td>Nominating President</td>
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<td>Robert C. Grier</td>
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<td>Joseph Story</td>
<td>Madison</td>
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<td>Harry Blackmun</td>
<td>Nixon</td>
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<tr>
<td>Samuel Alito</td>
<td>G.W. Bush</td>
</tr>
</tbody>
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**Good Old #5 Club (1846)**
- Edward King (Postponed)
- Edward King (Withdrawn)
- John M. Read (No Action)
- George W. Woodward (Rejected)

**Good Old #4 Club (1811)**
- Levi Lincoln (Declined)
- Alexander Wolcott (Rejected)
- John Quincy Adams (Declined)

**Good Old #3 Club (1845)**
- Reuben H. Walworth (Withdrawn)
- Caleb Cushing (Withdrawn)
- John Jay (Declined)

**Good Old #2 Club (1790)**
- Jeremiah S. Black (Rejected)
- Ebenezer R. Hoar (Rejected)
- Edwin M. Stanton (Died)

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| James Iredell | Washington | Newly Created Seat | Robert Harrison (Declined) |
| William Paterson | Washington | Thomas Johnson | William Paterson (Withdrawn) |
| Oliver Ellsworth | Washington | John Jay | William Cushing (Declined) |
| John Marshall | Adams | Oliver Ellsworth | John Jay (Declined) |
| John McLean | Jackson | Robert Trimble | John Crittenden (Postponed) |
| Philip P. Barbour | Jackson | Gabriel Duval | Roger Brooke Taney (Postponed) |
| John McKinley | Van Buren | Newly Created Seat | William Smith (Declined) |
| Samuel F. Miller | Lincoln | Peter Daniel | Jeremiah S. Black (Rejected) |
| Joseph P. Bradley | Grant | Newly Created Seat | Ebenezer R. Hoar (Rejected) |
| William Strong | Grant | Robert C. Grier | Edwin M. Stanton (Died) |
| Stanley Matthews | Garfield | Noah Swayne | Stanley Matthews (No Action) |
| Samuel Blatchford | Arthur | Ward Hunt | Roscoe Conkling (Declined) |
| Owen J. Roberts | Hoover | Edward T. Sanford | John J. Parker (Rejected) |
| Anthony Kennedy | Reagan | Lewis Powell | Robert Bork (Rejected) |

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*Though John Quincy Adams nominated Crittenden, Jackson ultimately filled the vacancy.

*Though Congress technically created Bradley’s seat, it was in effect a reinstatement of the seat abolished when James M. Wayne died.

*Stanton was confirmed by the Senate but died before taking office.

*Though Douglas Ginsburg was announced by Reagan and began meeting with individual Senators, his nomination was never submitted to the Senate.
Table 3 Proposed Good Old Club Membership Rules and Bylaws

1. Membership is limited to Justices of the Supreme Court of the United States.
2. Membership is limited to Justices who were nominated subsequent to formally nominated candidates who failed to serve on the Supreme Court due to withdrawal, Senate rejection or postponement, or declining the appointment.
3. Formal nominations occur when the Senate receives the nomination from the President.
4. Recess appointments count as filling a vacant seat.
5. Nominees who are nominated more than once for the same seat may count prior nominations as failures.
6. Any existing member must formally welcome new members upon their meeting the qualifications for membership in the club. Failure to welcome new members may result in impeachment and removal from the club, upon the concurrence of two-thirds of all living club members.
7. Club membership is non-transferable and ends at death.

colleagues. But the ambitious Adams declined the commission, viewing the position as “taxing and dull,” and missed an opportunity to found the good old #3 Club. Instead, Adams had to settle for serving as Secretary of State and President of the United States.

Madison waited seven months to make his fourth selection for Cushing’s seat. Though pressed by Jefferson to choose U.S. Postmaster General Gideon Granger of Connecticut, Madison instead infuriated the former President by selecting 32-year-old legal whiz Joseph Story. While serving in the House of Representatives, Story incurred Jefferson’s wrath when he voted to repeal the trade embargo. Despite the reservations of Jefferson and a number of Senate Republicans, however, Story was unanimously confirmed by voice vote on November 18, 1811. The agonizingly long process to fill Cushing’s seat, which had been vacant for over one year, was finally over. And while Story is still the youngest person ever to sit on the Supreme Court, he is, more importantly, the founding member of the good old #4 Club.

The only other member of the #4 Club is Justice John Archibald Campbell, who succeeded Justice John McKinley. Lame-duck Whig President Millard Fillmore first tried to fill the seat with the nomination of prominent New Orleans lawyer Edward A. Bradford on August 16, 1852, but the Democrat-controlled Senate took no action before the close of the session. On January 10, 1853, he then turned to U.S. Senator and former Navy Secretary George E. Badger of North Carolina, but on February 11 the Senate voted to postpone the nomination of one of their colleagues, 26–25 because Badger resided outside the judicial circuit that included Alabama, Mississippi, and Louisiana—the region that Justice McKinley was from—and because President-elect Franklin Pierce, a Democrat, was about to take office. Fillmore next offered the nomination to Whig Judah P. Benjamin, newly elected U.S. Senator from Louisiana, but Benjamin declined and instead recommended his law partner, prominent New Orleans attorney William C. Micou. Fillmore nominated Micou on February 24, but once again the Senate took no action, and Fillmore was unable to fill the vacancy. Campbell, a noted advocate before the Supreme Court, was Pierce’s only appointment to the Bench after an unprecedented request by the Justices for his selection. Campbell won confirmation by voice vote on March 25, 1853, four days after his
official nomination, joining Story as the only members of the old #4 Club.

Indeed, not only was Kennedy wrong about Story’s membership in the #3 Club, Kennedy himself may not truly be a member. It depends on how one defines the terms for membership. Since many candidates have been promoted, floated, and asked to serve without having an official nomination sent by the President to the Senate, it seems reasonable to exclude those who are not officially nominated. And though President Reagan publicly announced the nomination of Douglas Ginsburg, and though Ginsburg began meeting with individual Senators, his nomination was never officially transmitted to the Senate. So under this strict membership criterion, Kennedy can only be a member of the far-less-exclusive #2 Club. Yet because an existing member of the #3 Club, Justice Blackmun, welcomed Kennedy to that Club’s membership, Kennedy has a strong claim to belonging—particularly if he has extended the same welcome to Alito. However, should Kennedy fail to recognize Alito’s #3 Club membership, Kennedy may be in jeopardy of being stripped of his already tenuous attachment to that group.

Indeed, Blackmun could have made an argument for membership in the more exclusive #4 club, but obviously chose not to. Blackmun filled the seat vacated by Justice Abe Fortas, who resigned on May 5, 1969 amid allegations of financial impropriety. Yet prior to Nixon’s nominations of Haynsworth and Carswell to fill the Fortas seat, lame-duck President Lyndon Johnson made an attempt to fill it with U.S. Court of Appeals Judge Homer Thornberry when he tried to elevate Fortas to the Chief Justiceship in the middle of the presidential race on June 26, 1968. Because Fortas’s nomination was filibustered and withdrawn no action was taken on Thornberry. Blackmun could have argued that since he was the fourth person officially nominated for the Fortas seat, he should be admitted to the good old #4 Club.

A quick check of the membership lists reveal that Chief Justice Oliver Ellsworth can make a claim to being the founder of the old #3 Club. Ellsworth was confirmed and served after the Senate rejected John Rutledge 10–14 and Justice William Cushing declined the post after his Senate confirmation, citing ill health. If Rutledge’s recess appointment and nearly six-month service as Chief are not counted as filling Jay’s vacant seat, then Ellsworth can claim to be the originator of the #3 Club. If, however, one considers Ellsworth as filling Rutledge’s seat, rather than Jay’s, then he is relegated to the #2 Club. That leaves Justice Samuel Nelson, former chief justice of the New York Supreme Court, as the founder of the good old #3 Club. Democrat President John Tyler first nominated a member of his cabinet, John C. Spencer, but the Senate rejected him 21–26. Tyler then turned to New York Chancellor Reuben H. Walworth, but with the 1844 presidential election nearing, Whig Senators voted 20–27 to postpone the nomination. After Democrat James K. Polk won the presidency, Tyler withdrew Walworth’s nomination in January 1845 and nominated Nelson. Over one year after Spencer’s initial nomination, Nelson was confirmed by voice vote in the Senate on February 14, 1845.

It took nearly thirty years for the old #3 Club to gain its second member. After the death of Chief Justice Salmon P. Chase on May 8, 1873, Grant—now in his second term—first turned to one of his cronies, Roscoe Conkling. But Conkling immediately declined the nomination, and on December 1 Grant chose another of his confidants, former U.S. Senator George H. Williams of Oregon, his Attorney General. Williams was approved by the Judiciary Committee, but due to opposition from the full Senate and sentiment from the organized bar that an attorney from the frontier was ill-suited for the Chief Justiceship, Williams asked that his name be withdrawn, and Grant complied on January 8, 1874. The next day Grant picked another close friend, 74-year-old former diplomat and Attorney General Caleb Cushing, but, like Williams, Cushing asked that his nomination be withdrawn.
Ronald Reagan selected Anthony Kennedy (pictured on the day of his investiture) for the Supreme Court in 1987 after his first two nominees—Robert Bork and Douglas Ginsburg—were not confirmed. Harry Blackmun, who had been Richard Nixon’s third choice, sent Kennedy a note welcoming him as a member in the “Good Old #3 Club.” However, because Ginsburg’s commission was never sent to the Senate, an argument can be made that Kennedy belongs to the much larger #2 club.

after opposition in the Senate. Grant complied on January 13 and proceeded to offer the post to three others, without officially nominating any of them: U.S. Senator Timothy P. Howe of Wisconsin, U.S Senator Oliver P. Morton of Indiana, and Secretary of State Hamilton Fish. Morrison R. Waite, who had gained national prominence as one of three United States counsel at the Geneva Arbitration Tribunal, was Grant’s official third choice, and he was confirmed 63–0 on January 21, two days after his nomination.

The third member of the old #3 Club was Justice Edward D. White of Louisiana. Following Justice Samuel Blatchford’s death on July 7, 1893, President Grover Cleveland first selected William B. Hornblower on September 19, 1893. As a member of the New York City Bar, Hornblower had led an investigation into election irregularities for a seat on the New York Court of Appeals that cost Isaac H. Maynard a judgeship. Maynard’s ally, powerful U.S. Senator David B. Hill of New York, led the opposition to Hornblower’s High Court nomination, and the Senate rejected him 24–30 on January 15, 1894 after Hill invoked senatorial courtesy. Cleveland next turned to prominent New York attorney Wheeler H. Peckham, nominating him on January 22. As with the previous nominee, Hill also opposed Peckham, who was rejected by the Senate 32–41 on February 16 after Hill invoked senatorial courtesy for the second time. Cleveland then turned to another New Yorker, Frederic
In 1894, Grover Cleveland finally turned to Edward Douglass White (above), the Senate majority leader, after his first two choices were rejected. It would be three-quarters of a century before the next member of the #3 Club would join the Court.

Cleveland finally looked outside New York and nominated White, who was Senate majority leader. His colleagues immediately confirmed him by voice vote the day of his official nomination, February 19, 1894. The old #3 Club did not gain another member for three-quarters of a century, until Justice Blackmun joined their ranks.

The Good Old #5 Club

While Story and Campbell are the only members of the rarified #4 Club, there is an even more elite status. The good old #5 Club is so special that there has been only one member in the 217-year-history of the Supreme Court: Allegheny County district judge Robert C. Grier, who won confirmation by voice vote on August 4, 1846, the day after he was nominated by President Polk. It had been President Tyler who first tried to fill the seat over two years before by turning to James Buchanan, but the future President of the United States declined the nomination. Tyler’s first official nomination for the seat came on June 5, 1844, when he selected president judge of the Philadelphia Court of Common Pleas Edward King, but, lacking support from both the Whigs and his own party, the Senate voted to postpone King’s nomination 29–18. Tyler renominated King on December 4, and the Senate voted to postpone his nomination again on January 23, 1845. Tyler finally relented and withdrew King’s nomination on February 7. Tyler then turned to John M. Read, but the Senate failed to act on Read’s nomination by the close of the Twenty-eighth Congress. Tyler’s successor in the White House, President Polk, first turned to Buchanan, as Tyler had before him. Buchanan vacillated and eventually declined the nomination for a second time. Instead, Polk

Robert C. Grier is a member of the Court’s #5 Club, a category to which he alone belongs. President John Tyler made three attempts to fill the seat before President James Polk appointed Grier as his second choice in 1846.
selected former president judge of Pennsylvania’s fourth judicial district and failed U.S. Senate candidate George C. Woodward to fill the vacancy on December 23, 1845, but the Senate rejected Woodward a month later, 20–29. Grier finally filled the seat, becoming the first and only member of the good old #5 Club.

The Good Old #2 Club

The good news for Oliver Ellsworth is that if he is excluded from the #3 Club, he can claim to have founded the #2 Club, though that is debatable as well. James Iredell is the first in line to make the case for originating this group. Iredell was nominated after Robert Harrison, one of Washington’s initial six appointments to the High Court who had also been selected as chancellor of New Jersey, became ill, wrote Washington to decline the appointment, and died while en route to the Court’s first meeting in New York City. Because he followed Harrison, Iredell has a strong claim to originating the group. But because students of the Court often forget Harrison, and because Iredell was one of the original six Justices, William Paterson can argue that he founded the #2 Club. Paterson’s initial nomination to replace Justice Thomas Johnson on February 27, 1793 was withdrawn one day later by President George Washington because Paterson, then the chancellor of New Jersey and a U.S. Senator, had four days remaining in his Senate term. Washington re-submitted Paterson’s name on March 4, and he was confirmed by voice vote the same day.

The #2 Club is the least exclusive, with fourteen members. Chief Justice John Marshall joined the #2 club in 1801 after former Chief Justice John Jay, then Governor of New York, declined the appointment. Justice John McLean joined its ranks after lame-duck President John Quincy Adams’ nominee, former U.S. Senator John J. Crittenden of Kentucky, permanently stalled when President-elect Andrew Jackson’s supporters in the Senate voted 23–17 to postpone the nomination. President Jackson later filled the seat with McLean, who perennially sought the presidency from the Bench. Justice Philip P. Barbour, a former House Speaker, became the next member of the old #2 Club when he followed the unsuccessful nomination of Jackson’s controversial former Attorney General and Treasury Secretary Roger Brooke Taney. On the last day of the session, the Senate voted to postpone Taney’s nomination, as well as to abolish the vacant seat. But the House failed to join the Senate in doing away with the seat, and Taney went on to be Chief Justice following the death of John Marshall.

Senator John McKinley of Alabama gained admission to the #2 Club after former South Carolina Senator William Smith declined an appointment by Jackson. President Martin Van Buren selected Justice McKinley immediately after taking office, and he won confirmation by voice vote on September 25, 1837. Twenty-five years later, Samuel Freeman Miller joined the club after being nominated by President Abraham Lincoln and winning Senate confirmation by voice vote on the same day, July 16, 1862. A month before Lincoln took office, his predecessor, lame-duck President James Buchanan, tried to fill the seat with the nomination of his Secretary of State and former Attorney General, Jeremiah S. Black, on February 5, 1861. Sixteen days later, however, the Senate rejected Black 25–26.

President Ulysses S. Grant made two appointments to the #2 Club during his tenure in the White House. The first seat was technically a newly created seat. But it was really the seat vacated by the 1867 death of Justice James Wayne. Congress abolished the Wayne seat to prevent President Andrew Johnson from filling it, and re-established it after Grant won the presidency. Justice Robert C. Grier vacated the second seat on his retirement in early 1870. With two seats to fill, Grant selected his controversial Attorney General, Ebenezer R. Hoar, on December 15, 1869, and the popular former
Secretary of War Edwin M. Stanton five days later in an attempt to help with Hoar’s nomination, which was running into difficulty in the Senate. Stanton was easily confirmed 46–11 on the same day he was nominated, but he died four days later, before he could take his seat. After the bitter Senate fight, Hoar was rejected on February 3, 1870 by a vote of 24–33. On February 7, Grant made two more nominations, this time with better results. William Strong was confirmed 46–11 on February 18, and Joseph P. Bradley won confirmation 46–9 a month later on March 21, making them the first near-simultaneous members of the #2 Club in Supreme Court history.

A decade later, former U.S. Senator Stanley Matthews of Ohio joined the good old #2 Club after his first nomination by lame-duck President Rutherford B. Hayes on January 26, 1881 died in the Senate Judiciary Committee. Matthews was Hayes’s longtime friend and political ally, but the Senate was more concerned about Matthews’s cozy relationship with corporate financial and railroad interests, particularly Jay Gould. Matthews was renominated by new President James A. Garfield on March 14 and after two months of heated debate was confirmed by the Senate by the closest vote in history for any successful nominee: 24–23. One year later, U.S. Court of Appeals Judge Samuel Blatchford joined Matthews in the #2 Club. President Chester A. Arthur first selected his political mentor Roscoe Conkling, who had turned down a nomination for Chief Justice from President Grant in 1873. This time, Conkling was confirmed by his Senate colleagues 39–12 on March 2, 1882, but he declined the appointment. Arthur then turned to another member of the Senate George F. Edmunds of Vermont, but Edmunds declined. Blatchford was Arthur’s official second choice and was confirmed by voice vote on March 27, 1882.

The final two members of the good old #2 Club, Owen J. Roberts and Anthony Kennedy, both joined during the twentieth century. Roberts was appointed after President Herbert Hoover failed to win confirmation for his first choice, U.S. Court of Appeals Judge John J. Parker of North Carolina. The Senate rejected Parker 39–41 on May 7, 1930 after opposition from the American Federation of Labor and the National Association for the Advancement of Colored People. Roberts, who first gained national prominence as the U.S. attorney in the Teapot Dome Scandals, was selected two days later and confirmed by voice vote a little over a week later. Kennedy joined the club over a half century later, though, as discussed previously, Blackmun welcomed him to the good old #3 club.

ENDNOTES

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2 Harry A. Blackmun to Anthony M. Kennedy, November 12, 1987, Blackmun Papers, Box 1405, Manuscript Division, Library of Congress, Washington, D.C.

3 Anthony M. Kennedy to Harry A. Blackmun, November 16, 1987, Blackmun Papers.

4 “Justice Harry A. Blackmun Oral History,” Blackmun Papers.