

Guide to Congressional Seating

The 2026 midterms have brought attention to the process for seating new members of Congress. The U.S. Constitution gives each chamber of Congress the power to judge the elections, returns, and qualifications of its members. This power is almost always exercised through a widely accepted process in the House and Senate, with each chamber seating the certified winners of state-administered federal elections without issue. This process includes a series of well-established procedures: (1) voters cast ballots for the candidates of their choice; (2) local election officials count ballots through the process set out by state law; (3) state officials certify the results and transmit the certificates of election for the members-elect to the appropriate House and Senate officials; (4) the appropriate House or Senate official prepares a roll of members-elect; and (5) members are sworn in pursuant to federal law, House and Senate rules, and traditional practices.

What follows is a guide to the standard process for seating House and Senate members and the traditional mechanisms for resolving extended disputes about the proper winners.

Process For Congressional Seating

Under Article I, Section 4 of the Constitution, federal elections for Congress are administered by the states subject to potential regulation by Congress.¹ Article I, Section 5 further specifies that “Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members....”

In practice, this has meant that congressional elections are conducted primarily under rules set by state and local administrators and relying heavily on the certifications that emerge from these rules and procedures.

Congressional elections are held on Election Day as determined by federal statute.² As the Supreme Court recently affirmed, this serves as the date by which voters must make a choice.³ States are free to permit voters to cast their ballots prior to Election Day and to accept mail ballots received after Election Day, as long as the votes were cast before polls closed (as many states do). Then, ballot counting routinely extends beyond Election Day.

After the initial ballot count, local election officials complete the post-election official canvass,⁴ and any required additional procedures (such as recounts, contests or audits), and submit results to the state official responsible for certifying the results. For House seats, that official is specified by state law and is typically the Governor, Secretary of State, or a state election board. For Senate

¹ “The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law, make or alter such Regulations, except as to the Places of choosing Senators.”

² 2 U.S.C. §7.

³ *Watson v. Republican Nat’l Comm.*, 609 U.S. ___, 146 S.Ct. 2165 (2026).

⁴ In this context, “canvass” refers to “aggregating or confirming every valid ballot cast and counted, which includes absentee, early voting, Election Day, provisional, challenged, and uniformed and overseas citizen.” U.S. Election Assistance Comm’n, “Guide to the Canvass” (Mar. 2022), available at [https://www.eac.gov/sites/default/files/electionofficials/postelection/Guide to the Canvass_FAC.pdf](https://www.eac.gov/sites/default/files/electionofficials/postelection/Guide%20to%20the%20Canvass_FAC.pdf).

seats, the governor and the Secretary of State are both charged with issuing the certificate of election.⁵ Once issued, the certificate of election is sent to the appropriate House and Senate officials to compile the roll of members-elect for the new session of Congress in preparation for the swearing-in of new members.

Thus, state election law sets out the process for electing members of Congress and certifying the results of those elections. Ultimately, though, it is widely accepted that the power to decide who is seated belongs to the House and Senate, respectively.⁶ If a dispute from the general election over a congressional seat cannot be resolved by state processes (which can include review in state or federal courts), it is typically resolved by the members of the new Congress in the relevant chamber.

House of Representatives

The House is not a continuing body so all members' terms expire every two years, and members-elect must be sworn in at the beginning of the new Congress. The Clerk of the House prepares a list of members-elect (the "roll") for opening day (January 3 at noon unless the House specifies otherwise⁷) and these members-elect go on to select a Speaker and are then sworn in *en masse*.

The Clerk acts according to custom and a statute (2 U.S.C. §26) that directs the Clerk to include those members-elect "whose credentials show that they were regularly elected in accordance with the laws of their States respectively, or the laws of the United States." This is a ministerial function: The Clerk is verifying that the certificate of election is validly issued – i.e., issued by the proper official pursuant to the state's law – not inquiring into any disputes about the election itself. Once that verification has taken place, the Clerk has a mandatory duty to place individuals with valid certificates on the provisional roll of members-elect.⁸

These members-elect are issued electronic voting cards and admitted to the House chamber on opening day. At this point, the nascent House is operating pursuant to parliamentary law and House precedent.⁹ The Clerk presides on opening day and during "organization" of the House, to oversee a vote by the members-elect to elect a Speaker. Once a Speaker has been elected, the

⁵ 2 U.S.C. §1(a), (b).

⁶ See, e.g., *Roudebush v. Hartke*, 405 U.S. 15, 19 (1972) ("Which candidate is entitled to be seated in the Senate is, to be sure, a nonjusticiable political question—a question that would not have been the business of this Court even before the Senate acted."); *Morgan v. United States*, 801 F.2d 445 (D.C. Cir. 1986) (Scalia, J.) (holding that Elections Clause precluded jurisdiction to hear contests related to election for House seat in Indiana 8th, involving candidates McCloskey and McIntyre); *McIntyre v. Fallahay*, 766 F.2d 1078 (7th Cir. 1985) (same).

⁷ U.S. Const., amend. XX, § 2.

⁸ The Clerk almost always insists that there be a certificate of election in place for a member-elect to be placed on the provisional roll. However, in 1933 the Clerk included a member-elect from Maine after the Governor of Maine explained that the certificate was delayed but would be provided soon. Even so, the move was controversial. (1 Deschler's Precedents Ch. 2 § 3.4). In a more recent 2003 case, a member-elect whose certificate was not ready but whose race was not in question was allowed to appear on the roll and vote in the Speaker election after the Clerk sought and received unanimous consent to do so. (Precedents of the United States House of Representatives, Wickham Ch. 2 § 2). In 1859, the Clerk also refused to enroll a member-elect who had a certificate of election but had not yet reached the minimum age under the Constitution to serve in the House. The member-elect was subsequently enrolled and sworn in after reaching the minimum age.

⁹ Both the House and Senate rely heavily on precedents that are organized in formal treatises. (Precedents of the U.S. House of Representatives, available at

<https://www.govinfo.gov/collection/precedents-of-the-house?path=/GPO/Precedents%20of%20the%20U.S.%20House%20of%20Representatives>); Riddick & Frumin, Riddick's Senate Procedure: Precedents and Practices, S. Doc. No. 101-28, 101st Cong., 2d Sess., 1992, available at <https://www.riddick.gpo.gov/>)

members-elect are sworn in as a group. These newly sworn members go on to elect other officers, adopt rules for the new congress, and otherwise set in motion the new congressional House term.

Senate

The Senate is a continuing body, with only one-third of the seats up for election every two years. Candidates compete for those seats and usually resolve disputed outcomes under state laws. Senators who are not up for election retain their authority (including to take permitted actions on the Senate floor as soon as the new Congress begins) and do not need to be sworn in again.

For those Senate seats that are up for election, federal law requires that the Governor and Secretary of State from each state sign the certificate of election for the winning candidate. The law directs that these state officials certify the election to the President of the Senate, but in practice it is the Secretary of the Senate who compiles and reviews the election certificates. On opening day, the U.S. Vice President (acting as President of the Senate) or the president pro tempore of the Senate¹⁰ (currently Senator Grassley of Iowa) announces the receipt of the certificates of election and presides over the swearing in of new and re-elected senators.¹¹ Senators are typically sworn in by groups of four, composed alphabetically.

Those new senators then join the continuing members to constitute the new Senate. Because the Senate is a continuing body, they do not need to pass or re-pass rules but traditionally will elect new officers and vote on an organizing resolution that lays out certain procedures for the new term.

Contested Races

Disputes about the proper winner of a congressional seat are primarily conducted in the immediate aftermath of the election, according to state laws and procedures. These rules provide for recounts or other processes to resolve contested outcomes, with courts resolving some disputed issues. These proceedings are usually sufficient to resolve who is entitled to the House or Senate seat in question, almost always in time for the beginning of the new session in January.

For those races that remain contested past January 3, the newly elected Speaker or majority may simply wait for the resolution under state laws, then swear in the new member once the dispute is resolved and a certificate of election awarded. A recent example was the 2020 election of Rep. Claudia Tenney (NY). Due to errors and delays in post-Election Day counting, the race was not decided by state officials until February 5, 2021. The seat remained vacant until that occurred and her opponent conceded; Tenney was then sworn in on February 11, 2021.¹²

If those state-based mechanisms do not suffice, there are additional procedures to resolve disputes that rely on the constitutional power of each chamber to judge the elections of its own

¹⁰ The president pro tempore is the second highest ranking official in the Senate (after the Vice President) and is elected by the Senate as a whole. See U.S. Const. Art. I, § 3, cl. 5. Traditionally, the Senate has elected the longest-serving member of the majority party.

¹¹ Senate Stories | When a New Congress Begins, Senate Historical Office, (2020), <https://www.senate.gov/artandhistory/senate-stories/when-a-new-congress-begins.htm>; 2 U.S.C. § 21.

¹² Shawna Chen, *New York certifies Claudia Tenney's win in last open U.S. House race*, Axios (Feb. 8, 2021), available at <https://www.axios.com/2021/02/08/claudia-tenney-anthony-brindisi-concedes>.

members. In both cases, it is the members of the new Congress – not the lame duck Congress – that are empowered to settle contested races.

House of Representatives

For the House of Representatives, there are two distinct but sometimes overlapping tracks to determine who is entitled to a contested seat.

Federal Contested Elections Act (FCEA)

The first route is the Federal Contested Elections Act (2 U.S.C. §§ 381-396). This 1969 statute sets a series of rules for how House election outcomes can be challenged and adjudicated in the House Administration Committee in the newly seated Congress.¹³ These rules relate almost entirely to procedure and do not establish substantive standards for determining who should hold a contested seat. The FCEA allows a losing candidate to contest the election of a member-elect. The contest must be filed with the House Clerk within 30 days of the official results (as declared by the appropriate state official or canvassing board), and must state specific grounds for the challenge. Only a losing candidate is eligible to make a challenge under the FCEA, and they bear the burden of proof to show they are rightfully entitled to the seat. So, for example, it would not be enough to show that there were irregularities or fraud in the election, but rather that any such problems would have changed enough votes to result in a different outcome.¹⁴

Typically, the member-elect who has been certified is seated even while disputes are adjudicated under the FCEA in the House Administration Committee. A recent example is the 2020 race for Iowa's 2nd District. Republican Mariannette Miller-Meeks won by a reported 6 votes and was awarded a certificate of election by the state. Miller-Meeks was provisionally seated at the outset of the new session, even as a pitched battle over the seat under the FCEA consumed the House Administration Committee for several months.¹⁵ Eventually, the Democratic candidate withdrew her challenge.¹⁶

Objections by members.

Another avenue to challenge the seating of a member-elect occurs early on in the new session, after a Speaker has been elected and prepares to swear in the members-elect *en masse*. Members-elect can be asked to “step aside” for the group oath in response to an objection by another member-elect. This practice has most often been directed at a single member, but can be used to dispute the seating of multiple members or an entire delegation. Once the remaining members are sworn in, they might refer the dispute to the House Administration Committee with the objected-to member(s) in question potentially being provisionally seated pending the outcome of that inquiry.

Members can also resolve the issue immediately by a majority vote, without a referral to committee.

¹³ R. Sam Garrett, L. Paige Whitaker, Christopher M. Davis, Cong. Rsch. Serv., IF11734, The Federal Contested Election Act: Overview and Recent Contests in the House of Representatives, (2022). <https://www.congress.gov/crs-product/IF11734>

¹⁴ *Id.*

¹⁵ Ally Mutnick, Sarah Ferris, and Melanie Zanona, *Dems sound alarm at prospect of overturning Iowa race*, Politico (March 22, 2021), available at <https://www.politico.com/news/2021/03/22/democrats-iowa-race-477497>.

¹⁶ Barbara Rodriguez, *Iowa Democrat withdraws challenge to congressional election results*, The 19th (March 31, 2021), available at <https://19thnews.org/2021/03/hart-miller-meeks-iowa-challenge/>.

Members-elect may even act before the group oath of office, and avoid the “step aside” process. This happened in 2021, when Rep. Chip Roy (TX) challenged the right to be sworn in of all Members-Elect from Arizona, Georgia, Michigan, Nevada, Pennsylvania, and Wisconsin.¹⁷

After the challenge was made, Rep.-Elect Steny Hoyer (MD) immediately introduced a resolution directing the Speaker to administer the oath of office to all the members-elect. It passed overwhelmingly. Even the six challenged delegations were allowed to participate in that vote and they went on to be sworn in at the same time as the other members-elect.¹⁸

On the other hand, permanent or provisional seating is not guaranteed: in January 1985, Democrat Jim Wright of Texas challenged the seating of Republican Rick McIntyre who had been certified by the state as the winner of his race in Indiana’s 8th Congressional District. In that case, Democrats refused to seat McIntyre, even provisionally. The seat remained empty for several months, and was eventually awarded to Democrat Frank McCloskey after prolonged proceedings in the House Administration Committee and a House floor vote.¹⁹ That was highly unusual, however; members-elect with a state-issued certificate of election are almost always seated even if an investigation of the race ensues.

Protest or Petition

Since its enactment in 1969, the Federal Contested Elections Act has been the primary vehicle for challenging congressional seating in the House - either alone or in connection with the “step-aside” process. Historically, there has been an additional but rare route to challenge seating: a “protest” or petition filed by an individual (other than the losing candidate) seeking to have the House Administration Committee adjudicate the race. This has happened several times in the last century, but there are no recent examples.²⁰

Senate

There are fewer established rules or procedures for contested Senate seats.

There is no statutory equivalent to the Federal Contested Elections Act for Senate races. Instead, challenges come to the full Senate and are typically referred to the Senate Rules Committee. Challenges can come from outside the Senate, such as from the losing candidate.²¹ Alternatively,

¹⁷ Rep. Roy was protesting that some members were disputing presidential results from those states while accepting the congressional outcomes. Juliegrace Brufke, *Chip Roy challenges seating of House members from six presidential battleground states*, The Hill (Jan. 3, 2021), available at <https://thehill.com/homenews/house/532460-chip-roy-challenges-seating-of-members-in-arizona-georgia-michigan-nevada/>.

¹⁸ However, a member who is not sworn in would not be able to participate in a subsequent floor vote (after the oath of office) concerning their seating.

¹⁹ A special task force established by the House Administration Committee used GAO auditors to conduct its own recount - which showed a narrow victory for McCloskey - but one that used different rules than state election officials had applied and were controversial. See, *House Battles Over Contested Indiana Seat*, CQ Almanac (1985), available at https://library.cqpress.com/cqalmanac/document.php?id=cqal85-1146635#_

²⁰ Paige Whitaker, Cong. Rsch. Serv., RL33780, Procedures for Contested Election Cases in the House of Representatives,, p.9-10, fn 60 and 61 (2016). <https://www.congress.gov/crs-product/RL33780>

²¹ See, e.g., The Election Case of Mary Landrieu v. Louis “Woody” Jenkins of Louisiana (1997), Senate Historical Office, at https://www.senate.gov/about/origins-foundations/electing-appointing-senators/contested-senate-elections/Landrieu_Jenkins.htm

they can be raised by a Senator in the new session.²² Even challenges raised before January 3 are adjudicated by the members of the new session, after opening day.²³

The full Senate takes initial—and in some cases final—action on such challenges.

A challenged Senator may be allowed to take the oath at the regular time or asked to “step aside” from the regular swearing in proceedings and be sworn in separately. Where they are allowed to take the oath of office, it may be on a permanent or “provisional” basis. A “provisional” seating means that they are allowed to take the office without prejudice to the final disposition of the seating dispute.²⁴ These questions—whether to seat provisionally or permanently, and when they can take the oath—are decided by majority vote.²⁵ A valid state-issued certificate of election is considered *prima facie* evidence that the senator-elect is entitled to the seat in question.²⁶

A recent example of such provisional seating is the case of Louisiana Senator Mary Landrieu, who was provisionally seated at the outset of 1997, while her election was investigated by the Senate Rules Committee and eventually affirmed.²⁷

In other cases, the Senate has left seats vacant while disputes are resolved, including by state and judicial processes.

In the extremely close and complicated 1974 New Hampshire Senate race between Republican Louis Wyman and Democrat John Durkin, Wyman was awarded a certificate of election by the state in late December on the strength of an apparent two-vote margin. But Durkin lodged a challenge with the Senate that was referred to the Senate Rules Committee in the new session. Neither candidate was seated as the dispute bounced between the Rules Committee and the full Senate. Eventually both candidates agreed to support a new election in the state. The Senate voted 71-21 to declare the seat vacant, and Durkin won a special election and took office in September of 1975.²⁸

In the very close 2008 Minnesota Senate race between Al Franken and Norm Coleman, Franken was not seated until July after extensive state reviews of the race and the state Supreme Court declaring him entitled to the seat.²⁹ In that case, Governor Pawlenty refused to issue a certificate of election while court disputes over the cases continued.

²² About Electing and Appointing Senators: Contested Senate Elections, Senate Historical Office, at <https://www.senate.gov/about/origins-foundations/electing-appointing-senators/contested-senate-elections/>

²³ Riddick & Frumin, *supra* n.9, at 699.

²⁴ *Id.* at 709; Cong. Rsch. Serv., R40105, Authority of the Senate Over Seating Its Own Members: Exclusion of a Senator-Elect or Senator-Designate, at 2.

²⁵ These votes are subject to the filibuster, however, and could require a cloture vote of at least three-fifths of the sworn senators.

²⁶ See, Authority of the Senate Over Seating Its Own Members: Exclusion of a Senator-Elect or Senator-Designate, *supra* n.24, at 1.

²⁷ The Election Case of Mary Landrieu v. Louis “Woody” Jenkins of Louisiana (1997), Senate Historical Office, at https://www.senate.gov/about/origins-foundations/electing-appointing-senators/contested-senate-elections/Landrieu_Jenkins.htm.

²⁸ The Election Case of John A. Durkin v. Louis C. Wyman of New Hampshire (1975), Senate Historical Office, at https://www.senate.gov/about/origins-foundations/electing-appointing-senators/contested-senate-elections/137Durkin_Wyman.htm.

²⁹ Aaron Blake, *After eight-month fight, Franken to be seated*, The Hill, (June 30, 2009) available at <https://thehill.com/homenews/campaign/44914-after-eight-month-fight-franken-to-be-seated/>.

Potential Activity in the Lame Duck Congress

While law and precedent dictate that it is the new Congress that has the power to judge seating disputes for that session, the lame duck Congress may take some preliminary actions in connection with seating disputes.

In particular, the House congressional observer program has traditionally sent congressional staff members to select districts during the general election to observe voting processes to better understand election administration issues and in anticipation of potential disputes. This practice goes back to at least the early 1980s, and was recently codified in the Confirmation of Congressional Observer Access Act (COCOA Act).³⁰ The law specifies that official congressional observers are entitled to monitor the administration of federal elections, including post-Election Day counting procedures, but are prohibited from handling ballots or equipment or otherwise interfering with voters or election administrators.

In the past, this has been a bipartisan effort by House congressional staff, under the direction of the House Administration Committee chairman and ranking member. This year, Senate Democratic leaders have also announced plans to send staff observers to certain federal elections.³¹

The current House or Senate could also hold hearings, begin an investigation, or pass resolutions related to the elections and any disputed seats but these actions would not be binding on the new House or new session of the Senate after opening day.

About the National Task Force on Election Crises

The National Task Force on Election Crises is a diverse, cross-partisan group of more than 50 experts in election law, election administration, national security, cybersecurity, voting rights, civil rights, technology, media, public health, and emergency response. The mission of the nonpartisan National Task Force on Election Crises is to ensure free and fair elections by recommending responses to a range of potential election crises. The Task Force does not advocate for any electoral outcome except an election that is free and fair. The recommendations of the Task Force are the result of thoughtful consideration and input from all members and therefore do not fully reflect any individual Task Force member's point of view—they are collective recommendations for action. More information about the Task Force, including its members, is available at <https://www.electiontaskforce.org/>

³⁰ Confirmation Of Congressional Observer Access Act of 2024, Pub. L. No. 118-106, 138 Stat. 1591 (codified at 52 U.S.C. § 21083a).

³¹ Michael Gold, *Senate Democrats Will Train Staff as Election Observers*, The New York Times (June 25, 2026), available at <https://www.nytimes.com/2026/06/25/us/politics/senate-democrats-will-train-staff-as-election-observers.html>; Alex Padilla, *Padilla, Schumer Launch First-Ever Senate Election Observer Program To Protect 2026 Midterms As Trump Escalates Attacks On Free & Fair Elections* (June 25, 2026), <https://www.padilla.senate.gov/newsroom/press-releases/padilla-schumer-launch-first-ever-senate-election-observer-program-to-protect-2026-midterms-as-trump-escalates-attacks-on-free-fair-elections/>