



# Jack Davies, retired judge and former Minnesota State Senator

## Current legislative procedures harm citizens, Legislature

A Civic Caucus Review of Minnesota's Legislative Process Interview

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### Present

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### Summary

The current Minnesota Legislature is not working as it should, due to procedural changes and committee structure changes over time, according to retired judge and former long-time legislator Jack Davies. He outlines a number of his concerns about the process currently used at the Legislature: (1) violation of the single-subject legislative bill requirement; (2) abandonment of subcommittees; (3) abandonment of use of the Committee of the Whole; (4) need for more lawyers at the Legislature; (5) overuse of fiscal notes; and (6) unbridled use of cell phones by legislators.

Although Minnesota's Constitution requires that legislative bills embrace only one subject, Davies says the Legislature is violating that provision by combining substantive policy legislation in the same bill with appropriations legislation. He is also concerned about the recent abandonment of legislative subcommittees—which he thinks have many benefits—even though any committee chair can call for the formation of a subcommittee.

He laments the abandonment of use of the Committee of the Whole, which he thinks is very efficient and offers legislators a chance to debate a bill, offer amendments and recommend whether or not the bill should pass. Davies also states that the Legislature could benefit from having more lawyers, as it used to have. He points out that America's founders were, to a significant extent, lawyers.

And he decries the use of fiscal notes—which are supposed to tell legislators how much a particular bill will cost—because agencies can expand or shrink the estimated costs for a bill. And agencies do not put into fiscal notes the projected savings that the bill will accomplish, giving agencies the power

to kill or pass a bill. The final concern Davies discusses is legislators' constant use of cell phones, distracting them from the business at hand.

## Biography


Jack Davies is a retired Minnesota Court of Appeals judge, serving from 1990 to 2000, and a former DFL state senator, representing Minneapolis from 1959 to 1982. He is now a citizen lobbyist at the Minnesota Legislature, working on adding a parole board back into the state's criminal justice system and eight other bills. As he has done that, he has become aware of the need to reform the legislative process.

Davies has served on the Minnesota Commission on Uniform State Laws since 1966.

When he was a state senator, he served as chair of the Senate Judiciary Committee from 1973 to 1982 and as president of the Senate from 1981 to 1982. He was a private-practice attorney from 1960 to 1965 and a professor of law at William Mitchell College of Law (now Mitchell Hamline School of Law) from 1965 to 1989.

Davies grew up on Minnesota's Iron Range. He received his B.A. degree from the University of Minnesota in 1954 and his J.D. degree from the University of Minnesota in 1960. He is married to Pat Davies, a member of the Civic Caucus interview group.

## Background

Since September 2015, the Civic Caucus has been undertaking a review of the quality of Minnesota's past, present and future public-policy process for anticipating, defining and resolving major community problems. On Nov. 27, 2016, the Caucus issued its report based on that review,  *Looking Back, Thinking Ahead: Strengthening Minnesota's Public-Policy Process*. The Civic Caucus interviewed retired Minnesota Court of Appeals Judge and former Minnesota State Senator Jack Davies to get his views on the current state legislative process and how that process has changed over time.

## Discussion

Retired Minnesota Court of Appeals Judge and former State Senator Jack Davies has a number of concerns about the current workings of the Minnesota Legislature:

1. Violation of the single-subject legislative bill requirement;
2. Abandonment of subcommittees;
3. Abandonment of use of the Committee of the Whole;
4. Need for more lawyers;
5. Overuse of fiscal notes; and
6. Constant use of cell phones by legislators.

**1. Single-subject requirement:** The single-subject rule for legislation is contained in Article 4, Section 17 of the Minnesota Constitution: "No law shall embrace more than one subject, which shall be expressed in its title."

**Davies' concern: The Legislature has set up procedural changes and committee structure changes over time that have facilitated the violation of the single-subject provision.** The Legislature has combined substantive policy legislation with budget work, he said. Both policy and the appropriation are now combined in a single committee bill.

Each such combined-function legislative committee is tempted to insert substance into its budget bill, especially if a policy proposal is controversial, Davies said.

Another practice, he said, is for such combined-function committees to have a hearing on a bill and then have the bill lie over for possible inclusion in an omnibus bill. By definition, he said, an omnibus bill almost certainly is a single-subject violation. At that point, the chair can slip in amendments to the bill and the committee has no chance to vote for or against them.

Committee members are even discouraged from making the fix-up amendments that almost any legislation needs, he said. "A committee should struggle through the quality of a proposal rather than have it deferred for an omnibus bill," Davies said.

"This is evolutionary," Davies said of the move away from following the single-subject requirement. We can't blame one party, because it evolved over a period of time, he said. "There weren't long-serving people around who could raise objections."

He noted the case pending before the Minnesota Court of Appeals dealing with the single-subject requirement. The case has been brought by State Auditor Rebecca Otto. [Lori Sturdevant's May 7, 2017, column in the Star Tribune](#) addresses the single-subject rule, the Otto lawsuit and Davies' work to stop the single-subject violations. The column also discusses the weakening of the governor's veto power when substantive bills are attached to the must-pass budget bill, giving the governor little option to veto policy changes with which she or he might disagree.

Davies explained to the Civic Caucus that there are two issues in the Otto case: (1) Does the Legislature have the authority or power to change the role of the Constitutional Office of State Auditor? (2) Can Otto's office be treated this way in an appropriations bill in violation of the single-subject rule?

Davies has signed on to an ACLU *amicus* brief supporting the second issue in Otto's case. "If she prevails on the single-subject rule part of the case, that will help us," he said. An interviewer noted that Otto is suing on the basis of her office, not as a citizen, and that the *amicus* brief is saying we don't want things done this way in the Legislature.

When asked what he thinks the outcome of the lawsuit will be, Davies did not want to hazard a guess. But he noted that the court system is reluctant to confront the Legislature on its procedural misbehaviors.

**Davies offered several possible solutions to the single-subject problem:**

- Perhaps the governor could refuse to sign any bills that violate the single-subject requirement.
- Amend the provision in every budget bill that says every appropriation lapses at the end of the fiscal biennium. Instead, it could be amended to say that every—even any non-money—provision of each budget bill lapses at the end of the fiscal biennium. That would include policy provisions contained in budget bills, as well as appropriations. He has arranged for the reviser of statutes to draft such an amendment.
- The DFL could make legislative procedure a major election issue in 2018. "Win or lose, that would bring forth a response to the single-subject issue," he said. There is a precedent for that, Davies noted. In 1971 and 1972, the DFL made legislative procedure a major issue. "It was quite successful," he said. "If that became a campaign issue in 2018, legislators would respond."
- More wisdom.

In response to an interviewer's suggestion that we amend the state Constitution, Davies said, "We don't have to change the Constitution to get a powerful tool to deal with the single-subject problem." He noted that all other states, but not Congress, have single-subject rules and they follow them.

The interviewer asked several questions: "Why, if the single-subject requirement is in the Constitution, is it not thought of as other rights are, such as freedom of religion? Shouldn't it be interpreted tightly? Isn't this an individual right that every resident of Minnesota has?"

"All citizens deserve legislation that has one subject," Davies responded. "The judiciary looks at it as a very important rule, but should the judiciary interfere with the procedures of the legislative branch? Free speech is a little different from inside baseball." The judicial branch has respect for the Legislature as a coordinate branch of government, he said, and is "reluctant to butt into its procedures."

## **2. Abandonment of subcommittees in the Legislature.**

**Davies' concern: The Legislature has abandoned the use of subcommittees, even though they still could be used.** It's a real problem that the Legislature has adopted a number of procedures that interfere with the educational part of the legislative process, Davies said. "The education of legislators in the passing of a bill is so important."

"During my 24 years in the Legislature, my most joyous times I spent were in meetings of three or five people in a subcommittee," he said. "You get more work done if people have a chance to give input and help shape a bill. As soon as you start talking about actual words and suggesting how actual words will affect society, there's less ideology. It's so much fun and the morale of the subcommittee members rises as they feel this impact. They quickly become better legislators."

"You discover more wisdom in legislative members in subcommittees than they get to show otherwise," he said. "Any person who wins elected office has something to contribute."

"New freshmen at the Legislature are twiddling their thumbs now, because there's no room for their input without subcommittees," Davies said. An interviewer commented that not having subcommittees

reduces the knowledge of the Legislature. Davies said having a subcommittee expands the amount of time spent considering and polishing a bill.

Yet another interviewer asked whether the legislative leadership would allow subcommittees. Davies responded that if a committee chair wants to have a subcommittee, nothing can stop him or her. A few committee chairs, he said, have to be persuaded to ask a handful of people—a subcommittee—to think about a complicated bill and how it will affect the community. "We need a couple of chairs to do that and then explain to other chairs why it works so well," he said.

### **3. Abandonment of use of the Committee of the Whole.**

**Davies' concern: The Legislature no longer uses the Committee of the Whole, a procedure that he sees as efficient and that offers legislators a chance to offer their insights on a bill.**

The Minnesota House no longer has a Committee of the Whole. While the Senate still has authorization to use the Committee of the Whole, Davies said it has not used the procedure in the last few legislative sessions.

The Committee of the Whole is the entire membership of the Senate acting as one large committee to consider bills listed on General Orders, which is a list of bills that have been recommended to pass by a committee, had their second reading and await action by the full Senate. The president of the Senate, a role in which Davies once served, may appoint another member to preside and act as chair of the Committee of the Whole. During that procedure, members debate the bill, offer and adopt amendments and vote to recommend that the bill pass, pass as amended or be rejected. Generally, the rules are less formal when the Senate meets as the Committee of the Whole.

"I don't know why the Senate has abandoned the procedure, but they have apparently forgotten its utility," Davies said. "It was so efficient. Members took up the bill and offered their insights. Then the bill is laid over until its final approval. It's fun, it's efficient and they don't do it anymore."

"Something's different now," an interviewer remarked. "The work is not getting done the way it used to get done. The world's more complicated, especially if you don't understand what you're doing."

### **4. Need for more lawyers.**

**Davies' concern: Lawyers need to contribute to the community by running for office and serving.** Davies said when he arrived at the Legislature in 1959, it met for 90 days every other year. Because the Legislature hadn't been reapportioned since 1913, it still had many "bright farmers and country lawyers. What a great thing!"

He said at one time, there were just 11 lawyers in the House, including the speaker, the majority leader, the minority leader, the chair of the Tax Committee and the chair of the Appropriations Committee. "Lawyers are very important," he said. "The country's founders were, to a significant extent, lawyers." An interviewer commented that, in the past, the Citizens League had many members who were lawyers. That's not true today, the interviewer said.

Davies said some people complain about the size of the State Senate. "But we need 60 Senators to get 12 good ones," he said.

## **5. Overuse of fiscal notes.**

**Davies' concern: Fiscal notes give agencies the chance to kill or pass a bill.** Davies made that remark when an interviewer asked about the practice of issuing fiscal notes on various bills. Any member in any legislative committee can ask for a fiscal note, which is supposed to tell legislators how much a particular bill will cost. "I hate fiscal notes," Davies said. "Agencies don't have to be honest in preparing the fiscal notes. They can expand or shrink the predicted costs of a bill." More disturbing, he said, is that agencies do not put into fiscal notes the projected savings that the bill will accomplish. All they look at is the cost and not the savings—the fiscal tradeoff. That gives agencies the power to kill or pass a bill.

"The way it should work," he said, "is for legislators to have some sort of idea about how much a bill will cost and an idea of whether it's worth it to take money out of citizens' pockets for it."

## **6. Constant use of cell phones.**

**Davies' concern: One of the real problems at the Legislature is members' constant use of cell phones, distracting them from the business at hand.** "The task of the Legislature is to look at real problems; cell phones interfere with that work," Davies said. "I have no idea how to deal with it. You can't tell legislators not to look at their phones. Maybe there could be a rule in subcommittees that people can't use cell phones."

Civic Caucus Chair Paul Ostrow, who formerly served on the Minneapolis City Council, agreed. "We had public hearings, where members of the public were out there speaking, and all the council members would be on their computers."

## **General Discussion**

**Today Democrats and Republicans in the Legislature can't talk to each other.** An interviewer made that comment and said when he moved to Minnesota 50 years ago, Democratic and Republican lawmakers could talk to one another and could arrive at a compromise that was best for the state.

Davies, a DFLer, responded that if he were in the Legislature today, "I would spend 95 percent of my time up where the Republican offices are."

**How do legislators view the University of Minnesota (U of M) as a source of learning?** An interviewer asked that question and another: What about the potential of using U of M expertise in subcommittee deliberations?

Davies responded that he's frustrated that the U of M does not flood the Legislature with ideas. In 1972, *Minneapolis Star* editorial page editor Steve Alnes wrote a piece quoting then-Senator Davies saying the Legislature needs ideas from the outside. It couldn't be expected to come up with all the ideas on its own.

As an example, Davies noted that the old Citizens League was "priceless in bringing ideas to the Legislature. They were ideas that had been worked through in a pragmatic way and had the politics taken out of them. They were just good ideas."

He mentioned the Metropolitan Council as one of those good ideas and said the Citizens League had done the Legislature a great service by promoting the Council, since, at that time, the Legislature was getting bogged down in metropolitan issues. The Legislature established the Met Council in 1967.

**Has basic human nature changed?** An interviewer asked that question and said he would argue that it hasn't. The interviewer said the Legislature worked before and asked if it can again. Davies responded that things haven't changed entirely. There are problems and proposed solutions. "That's education," he said, "pulling people away from their ideological ideas."