

Fall 11-13-1987

## **Miner unfazed he missed Supreme Court (Times Union)**

Timothy F. Schick

# Miner unfazed he missed Supreme Court

By Timothy F. Schick

Staff writer

U.S. Court of Appeals Judge Roger J. Miner of Hudson, who had been mentioned as a possible nominee for the U.S. Supreme Court, said Thursday he is not disappointed that President Reagan has three times chosen other men.

"I feel very good about having had my name mentioned," Miner said during an appearance at Albany Law School, adding he had no comment on the Senate rejection of Robert H. Bork and the withdrawal of Douglas H. Ginsburg.

But Miner suggested he may not have the proper conservative ideology to win White House backing.

"Being a judge means keeping an open mind, being subject to persuasion, weighing, listing, studying, reasoning ... avoiding rigidity and ideology," Miner said. "This approach to judging I'm told may be the reason I didn't draw the winning ticket in Washington."

Miner was touted by several other speakers at the law school as worthy of a seat on the U.S. Supreme Court.

"Had this good man been nominated he would have been appointed and he would be one of the greatest judges

## Says ideology a possible barrier

that court ever had," said Domenick Gabrielli, chairman of the Albany Law School trustees and a former member of the state Court of Appeals.

Miner told the law students the federal judiciary must adopt "proper respect for the state court system."

He said the nation's court system is based on dual state and federal levels, which sometimes have overlapping jurisdictions. The overlap causes tension that can best be relieved by turning many of these cases back to state courts, he said.

The overlapping jurisdiction is found in several types of cases, including those involving persons from different states, habeas corpus rulings, civil rights cases and criminal law.

In an often technical discussion of the history and legal precedents of the tension that stems from the dual system, Miner cited the writings of the founding fathers, congressional debate almost two centuries old and Supreme Court rulings.

Miner said the longstanding practice of allowing federal courts to handle cases involving individuals from dif-

ferent states — known as diversity cases — should be eliminated by an act of Congress.

Diversity cases are often handled at the same time that identical cases are working their way through state courts, he said. Supreme Court rulings require federal judges to apply state laws to these matters.

Miner said the argument that state courts would be biased in favor of the person who lives in the state no longer holds up.

"Diversity cases are more trouble than they are worth," Miner said.

The Supreme Court has given conflicting rulings on when the federal courts can abstain from diversity cases, Miner said. Often a federal court ends up with an opinion different from what the state courts would come up with.

"The total elimination of diversity jurisdiction is the best prescription," Miner said.

Miner also called for limits on the use of federal writs of habeas corpus — ordering the release of an individual.

"Whenever a single federal judge grants a writ of habeas corpus releasing a state prisoner whose conviction was affirmed by the state's highest court, there is a ... strain in the dual court system," Miner said.

The federal judge is sending the message "although you have sworn to uphold the Constitution of the United States, you have failed to correct a violation of the federal constitutional rights of the defendant and the fact that the U.S. Supreme Court has denied ... review makes no difference," Miner said.

Restricting federal review would eliminate many frivolous cases and cut the federal court case load, he said.

"It makes no sense for the lowest court in the federal system to be telling the highest court in the state what to do," Miner said.

In civil rights cases, federal courts must allow state proceedings to be exhausted before they get involved.

In criminal cases, Miner said, it is unfair for persons to be tried separately in state and federal courts for the same offense. Though some states have barred dual prosecution, some prosecutors manipulate the system so the state courts handle a case in advance of the federal government, evading the restrictions, Miner said.