Case Studies

Will Access Restrictions Hold Up In Court? The FBI'S Attempt to Use the Braden Papers At the State Historical Society of Wisconsin

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Abstract: This article describes a legal challenge which tested the right of the donor of a collection of private papers and the State Historical Society of Wisconsin to control access to that collection. It analyzes the arguments used by both sides in the case, the implications of the court's decision for future litigation of a similar nature, and the potential impact on the ability of archives to collect politically sensitive material.

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IN MAY 1966 CARL and Anne Braden made the initial donation of their personal papers to the State Historical Society of Wisconsin. These papers were accepted with a five-year renewable restriction granting access only with the donor's written permission. The donor has continued to exercise this renewal option. Similar restrictions had been employed at the Society many times both before and since the Braden acquisition. Indeed, this type of selective, donor-controlled access is common among manuscripts repositories.

Not quite twenty years later, in the spring of 1986, the Federal Bureau of Investigation sought Anne Braden's permission to use the collection to defend itself in a law suit brought by an organization to which Braden belonged. Braden refused, but the FBI did not accept that refusal. They subpoenaed the desired files, setting in motion a series of pleadings, hearings, and court orders which fully explored the right of historical agencies and their donors to control access to private archival material.[1]

The Braden access case is unprecedented. While courts had been asked to open restricted public records, they had never before been asked to order access to private papers in the hands of an archival repository. Thus the background of this case, the arguments used by all concerned parties, and the ultimate court rulings have important implications for archivists. The case contains lessons for those who counsel donors on the extent to which they can control access once they turn over their collections to a historical agency. It suggests strategies in the event that another repository is faced with a subpoena for a restricted collection. Finally, and most importantly, the case has implications for the very ability of archivists to collect contemporary materials, especially the materials of individuals and organizations involved in controversial issues and movements.

The challenge to the Braden restriction had its origin in a suit brought in 1980 against the FBI by the National Committee Against Repressive Legislation (NCARL), and its long-time executive director Frank Wilkinson. NCARL is a political organization devoted to the defense of civil liberties, formed by Wilkinson in 1960 as the Committee to Abolish the House Un-American Activities Committee (HUAC). The suit filed in 1980 alleged that, over a period of many years, the FBI had conducted an illegal investigation of NCARL intended to harass NCARL and Wilkinson and deny them First Amendment rights of free speech.[2]

Carl Braden, who died in 1975, and his wife Anne were and are long-time civil rights and civil liberties activists from Louisville, Kentucky. In 1958 Carl Braden and Frank Wilkinson were subpoenaed to testify before HUAC. They refused to answer questions, were indicted for contempt of Congress, and served nine months in prison. The Bradens were active in the National Committee to Abolish HUAC from its founding, and in 1963 Anne Braden authored a widely circulated anti-HUAC pamphlet.[3] Anne Braden has for many years been one of the approximately fifteen vice-chairs of NCARL. Before his death Carl Braden was also a vice-chair of the organization.

[1]Those interested in the case may also want to see John A. Neuenschwander, "Federal Judge Grants FBI Access to Sealed Papers," *Oral History Review* 21 (Spring 1987): 1, 6–7.

[2]*Frank Wilkinson, et. al. v. Federal Bureau of Investigation, et al.*, Case No. CV 80-1048 AWT (TX), U.S. District Court, Central District of California. All legal documents cited in this article were filed in the above suit. Copies are in the files of the Reference Archivist, State Archivist, or Director, State Historical Society of Wisconsin. For more information on the suit see Frank Wilkinson, "Why I Won My Case Against the FBI," *Human Rights Quarterly* 15 (Summer 1988):39–41, 53–55.

[3]Anne Braden, *House Un-American Activities Committee: Bulwark of Segregation* (Los Angeles: Committee to Abolish HUAC, 1963).

Anne Braden, Carl Braden, and Frank Wilkinson entering the Federal Courthouse in Atlanta, Georgia, on May 1, 1961, where Carl Braden and Wilkinson began serving prison terms for refusing to testify before the House Un-American Activities Committee. Photograph courtesy of the State Historical Society of Wisconsin.

Much of the time from 1980, when the NCARL suit was filed, until 1986, when the Braden collection became an issue, was spent in "discovery," the legal term applied to the process whereby both sides in a suit seek to ascertain facts about the case in the possession of their opponents and third parties. During this period NCARL made extensive use of the Freedom of Information Act to gain access to official FBI files. The FBI, on the other hand, engaged in what has become known as "reverse discovery" by conducting extensive research in NCARL's records, including a large unrestricted NCARL collection at the State Historical Society of Wisconsin. During several visits to the Society, the FBI became aware of the Braden papers and the fact that the descriptive register to the collection mentions several files specifically on the National Committee to Abolish HUAC and NCARL.

In the early months of 1986, the FBI tried informally to arrange access to the Braden papers. Failing this, they secured a subpoena *duces tecum* on 25 March 1986 which required Anne Braden to appear at a deposition on 1 April with "all documents pertaining to the National Committee Against Repressive Legislation (NCARL) in [her] possession, custody, or control."[4] NCARL's lawyers immediately

[4]Quoted in "Memorandum Decision and Order," (28 July 1986): 2.

filed for a protective order to keep Braden's papers out of FBI hands.

The argument for denying access to the FBI was made by attorneys representing Braden and NCARL (the same attorneys represented both) and by two amicus curiae (friends of the court) briefs. One amicus brief was prepared by the Center for Law in the Public Interest on behalf of a group of oral historians, librarians, and historians; the other was filed by the Wisconsin Attorney General on behalf of the State Historical Society of Wisconsin. The Society of American Archivists was asked to join in the amicus brief prepared by the Center for Law in the Public Interest, but declined to do so.[5]

Three themes emerge from reading the filings of Braden's attorneys and their supporters: 1) that allowing access would violate Braden's First Amendment rights of association, free speech, and privacy; 2) that the Braden papers should be protected by an "archival privilege," not unlike a lawyer-client privilege, which would protect the material from subpoena; and 3) that requiring Braden to go through her 240-box collection was unduly burdensome and redundant in that the search was unlikely to uncover any NCARL material not available in NCARL's own records.

The third argument is specific to the Braden situation and has few broader implications. The first two arguments, however, have wide applicability. The first argument asked the court to conclude that allowing the FBI access to the papers would violate Braden's right to privacy and her rights of free speech and association. Braden clearly viewed the FBI's effort to gain access to her papers as both harassment and an attempt to continue the same type of surveillance and interference that had prompted NCARL's suit in the first place. She made this argument for herself, and for the others whose names and activities would be described in her files. This was a very logical argument from Anne Braden's perspective, since much of her life has been spent fighting for causes unpopular with the government and, in particular, with the FBI. Her prime motive in restricting her papers was to prevent the government from using them to harm her, her associates, and the movements for which they worked. For her, the refusal to allow FBI access to her papers was based on the same principles as her husband's refusal, nearly thirty years earlier, to testify before HUAC. "The essence of the constitutional right to privacy," argued Braden and her attorneys, "is protection of the individual from governmental abuses." As precedent for this argument Braden cited a number of cases involving civil rights organizations where subpoenas for records had been limited because the disclosure of the names of members and donors to those organizations would expose those members or donors to hostility, violence, and loss of employment.[6]

For the second major argument, Braden was seeking the creation of an archival privilege. A privilege in this context is essentially an exception from the types of information and interchanges susceptible to subpoena. Similar established privileges

[5]Amici represented by the Center for Law were Sarah Cooper, Director of the Southern California Library for Social Studies and Research; Dale Treleven, Director of the UCLA Oral History Program; Ronald J. Grele, Director of the Columbia University Oral History Record Office; Arthur A. Hansen and Debra Gold Hansen, editors of *Oral History Review*; Clay Carson, Professor of History at Stanford; Howard Zinn, historian and political scientist at Boston University; the Nation Institute; and Stanley Sheinbaum, a regent of the University of California. SAA's role was recounted by Shonnie Finnegan, SAA president in 1986, in comments at the SAA session where this paper was originally presented.

[6]"Notice of Motion and Motion for Protective Order; Memorandum of Points and Authorities...." (n.d.): 5–11; "Declaration of Anne Braden," (3 April 1986): 2; quote from "Reply Memorandum of Points and Authorities in Support of Motion for Protective Order," (21 April 1986): 10.

include those between lawyers and clients, and between husbands and wives, where communications within those relationships are not subject to court scrutiny. A privilege of this type need not be absolute, and indeed Braden was not arguing that her collection, or any other restricted collection in an archives, should be absolutely immune from subpoena. Rather, she said the FBI should have to show a higher than normal degree of relevancy before she could be compelled to turn over documents. For this argument Braden and her attorneys drew precedents and authority from academic freedom litigation, cases that recognized a "researcher privilege," and, again, from the First Amendment right of free speech. The actual argument for an "archival privilege" was without precedent in the law. Federal courts, however, such as the United States District Court for the Central District of California, where this case was heard, have the authority to create new privileges, and this is exactly what Braden and her supporters were asking.[7]

The crux of the "archival privilege" justification is also the heart of the archival community's concern in this case; namely that without the ability to restrict collections we will be unable to collect, and important historical information will be lost to this and future generations. The First Amendment component of this argument is the accepted legal principle that the "right of free expression embraces not only the right of the speaker to speak but also of the listener to hear."[8] Thus, damaging the ability of archives to collect important historical data will inhibit the free flow of information and be detrimental to the public interest. Here Anne Braden's lawyers also drew upon the concepts of academic freedom and researcher privilege by pointing to cases where private researchers were not compelled to testify about the sources of their information and the results of their research. Archives and libraries, according to the amicus brief filed by the Center for Law in the Public Interest, play an "indispensable role" in the academic and research process, "for they are the repositories for the stock of human knowledge" and therefore are "entitled to the same First Amendment protection."[9] They went on to argue that an archival privilege was implicitly recognized under federal law and the laws of the state of Wisconsin. Federal law, they pointed out, recognizes the right of the National Archives to accept collections subject to restriction agreements, and Wisconsin statutes specifically give the State Historical Society of Wisconsin the right to impose restrictions agreed to by a donor and the Society. The Wisconsin statute, according to the state attorney general, was enacted specifically to facilitate the collection of private papers by the Historical Society.[10]

Braden also anticipated a potential logical inconsistency in her argument. Namely, if the free flow of information was her goal, why restrict the collection at all? Her response was that allowing selected scholarly researchers access to the collection represented the proper balance between the right to privacy and the equally important principle of the free flow of information and academic inquiry.[11]

The heart of the FBI's opposition to Braden's motion for a protective order was the simple yet compelling legal principle that "the public—the judicial process is entitled

[7]"Memorandum Decision and Order," 8.

[8]"Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Protective Order," (21 April 1986): 7. This is the amicus brief filed by the Center for Law in the Public Interest.

[9]Ibid., 8–9.

[10]"Reply Memorandum of Points and Authorities in Support of Motion for Protective Order," 13–17; "Memorandum of Law, Bronson C. La Follette Attorney General, State of Wisconsin as Amicus Curiae," (13 May 1986): 4.

[11]"Reply Memorandum of Points and Authorities in Support of Motion for Protective Order," 11.

to 'every man's evidence.'" Essentially this means the court will bend over backwards before it extends a privilege to potentially relevant evidence. The FBI also addressed Braden's argument for an archival privilege. Without conceding any principle of archival privilege, they compared the privilege sought to the marital and lawyer-client privileges and cited cases where the disclosure of information outside those relationships canceled the privilege. Indeed, over the years the Bradens had granted access to a substantial number of scholars. Thus, reasoned the Bureau, allowing third-party researchers into the collection canceled the privilege asserted by Braden.[12]

The FBI also stressed Braden's standing in the case. She was, they pointed out, a vice-chair of NCARL. While not one of the five named plaintiffs, she was one of the "plaintiff class," a group of approximately thirty sustaining members of NCARL certified before the court. As such, according to the Bureau, she stood to gain should NCARL win its suit.[13]

On 28 July 1986, Judge A. Wallace Tashima issued a "Memorandum Decision and Order" on the motion for a protective order. In this ruling he supported the FBI on almost all counts. Regarding arguments that access would violate Anne Braden's rights of free speech and association, Tashima ruled that Braden's assertion was too broad, and that she did not have the right to assert these claims on behalf of third parties who might be mentioned in her papers. The cases she cited, according to the judge, only protected "information at the core of the group's associational activities," particularly membership lists and lists of contributors. On this basis he denied the broad assertion of privilege, but did give Anne Braden the limited right to assert privilege to "specific" documents raising "core associational concerns."[14]

The decision totally discounted the archival privilege issue. The court ruled that the academic freedom precedents cited did not apply. Even the broadest precedents were narrow applications which only protected names and votes in specific tenure decisions. A researcher privilege, while not universally accepted by courts, might be applicable to specific files if Anne Braden were a third-party researcher or an academic. Judge Tashima also rejected arguments that the Wisconsin legislature intended to create an archival privilege. Moreover, a federal court is not bound by state law. Federal legislation, particularly the 1978 Presidential Records Act, specifically mandates that records covered by the act be made available to the judicial process regardless of access restrictions. Thus, he concluded, "the situation before the Court is one where a member of the plaintiff class seeks to insulate otherwise discoverable documents from disclosure simply by virtue of the fact that she has placed them in an archive under an agreement restricting access. . . . In such a case, the access restriction agreement must yield to the judicial process' search for truth."[15]

Judge Tashima gave Anne Braden thirty days to examine her papers and assert claims of privilege to individual documents. After that she was to consent to production or copying of all non-privileged documents. For each privileged document she was to provide a brief description and justification. On a more positive note from Braden's perspective, he continued an earlier ruling that the FBI could use Braden documents only in the specific case before the court (*Wilkinson v. the FBI*) and could not incorporate them into any index or investigative file.[16]

[12]"Opposition to the Motion for a Protective Order Filed by Plaintiffs and Anne Braden," (13 May 1986): 1, 8–10.

[13]Ibid., 12.

[14]"Memorandum Decision and Order," 5–7.

[15]Ibid., 8–20.

[16]Ibid., 23.

Unfortunately there was enough ambiguity in the 28 July order to allow the adversaries to adopt differing interpretations of its scope. The FBI interpreted the ruling as applying to the entire 240-box collection of Braden papers at the Society, while Braden's lawyers assumed it applied only to the NCARL files within the Braden papers. Establishing the true meaning of that ruling is crucial for judging the archival implications of the case. The ruling itself is twenty-seven pages long. The last sentence of text states that after the thirty-day examination period, Braden was to consent to the production or copying of "all documents in the Braden collection" not considered privileged.[17] A literal reading of that sentence supports the FBI position. Placing that sentence in the context of the preceding twenty-two pages of discussion, however, clearly supports the interpretation of Braden's attorneys. In the body of the order, Tashima writes that "the court is not striking down the access restriction agreement in its entirety, thereby permitting the government . . . to rifle at will through Braden's files. . . . The Court stresses that the access restriction agreement will still be fully enforceable as against . . . the government, if it merely wishes to search through the files unconnected with the specific litigation brought by the plantiffs."[18] The limited-scope interpretation is reinforced by the text of the original subpoena and by transcripts of the hearing where the protective order was requested. The subpoena required production not of the 240 boxes of Braden papers, but only documents related to NCARL. At the hearing, a Braden attorney charged that the FBI was trying to gain access to all the papers, to which the judge replied: "they don't want that, they just want records pertaining to NCARL."[19]

Early in the case, Anne Braden and several associates had spent a week at the Historical Society, searching her collection and copying all NCARL-related documents. The copies were sent to her attorney in Los Angeles. At the end of the thirty-day period, in accordance with her interpretation of the court order, Anne Braden told the FBI they could view copies of her non-privileged NCARL documents at her attorney's office. She also asserted privilege to some 1,058 specific documents totaling probably 3,000 pages, or about one-half of her NCARL files.[20]

Upon receiving Braden's response, the FBI asked the court to compel Braden to open *all* her papers. The Bureau charged that Braden and her attorneys had completely failed to comply with the Court's 28 July order, that she ignored the judge's definitions of what could be considered privileged, and that she was, in effect, still trying to assert a blanket privilege to virtually all her NCARL-related files. They also charged that the list of privileged documents did not meet the court's requirements because it did not provide the information required to justify privilege. Finally, they made the argument that the 28 July order had been intended to permit access to all Braden's files, not just the NCARL records.[21]

On 21 October 1986, a clearly angry Judge Tashima ruled that Braden and her attorney's actions relating to the 28 July order had been "either obstructionist or entirely too cavalier." He found that the claims

[17]Ibid.

[18]Ibid., 20.

[19]"Quoted in "Plaintiffs' and Anne Braden's Memorandum of Points and Authorities in Opposition to Defendants' Motion for Order Compelling Production and Awarding Expenses and Sanctions," (September 1986): 4.

[20]"Response of Anne Braden to Subpoena Duces Tecum Pursuant to Memorandum Decision and Order filed July 28, 1986; exhibit," (3 September 1986).

[21]"Notice of Motion and Motion for Order Compelling Production and Awarding Expenses and Sanctions; Memorandum of Points and Authorities in Support of Motion; Exhibit," (12 September 1986): 1–7.

of privilege were insufficient and ordered that all 1,058 documents be given to the FBI. More significantly, he ruled that Braden should open to the FBI her entire 240-box collection at the State Historical Society of Wisconsin. Based on his experience with Braden's list of privileged documents, the judge inferred that Braden probably made decisions on what might be relevant in the case "on the same obstructionist or cavalier basis." In other words he was no longer willing to trust Anne Braden and her attorneys to determine what parts of her collection concerned NCARL and thus were relevant to the suit! Now the FBI could examine all documents and make their own decisions on relevancy. Judge Tashima did not rule on the FBI's assertion that the 28 July order had been intended to open all the Braden papers.[22] There was no need, since the 21 October order opened all the papers for other reasons.

Braden obtained a temporary stay of the 21 October order, after which the legal maneuvering with respect to access to the Braden papers ceased. Both sides shifted their attention toward achieving an out-of-court settlement to the original case (*Wilkinson v. the FBI*). A settlement was achieved and approved by the court on 24 August 1987. One stipulation of the settlement was that the FBI would not seek enforcement of the court orders in regard to the Braden papers.[23]

Thus the case ended. Except for the copies provided in response to the 28 July order, the FBI never gained access to the Braden collection. But the court orders were left standing, and a precedent was established.

What lessons does this case have for the archival community? First, the court's ruling obviously indicates that the access restrictions commonly employed by manuscripts repositories will not, as a matter of course, protect collections from subpoena. This simply confirms what archivists already knew but have been hesitant to publicize. In Wisconsin, the vulnerability of collections to subpoena was recognized by the early 1950s and confirmed by a 1961 attorney general's opinion.[24] In addition, the basic manual on archives and law states quite clearly that restrictions are no bar to a subpoena.[25] In a technical legal sense, the rulings of Judge Tashima are not binding outside his own court. His order of 28 July 1986, however, has been published, and would no doubt be cited and used in any similar case.[26]

In considering the precedent established, it is important to draw a clear distinction between the court order of 28 July, which mandated a limited opening of the collection, and the order of 21 October, which required the complete opening. Regardless of how the FBI chose to interpret it, the 28 July order required Anne Braden to allow the FBI access to only her NCARL files, except those containing membership lists, lists of contributors, or other core associational material. Moreover, this order allowed Anne Braden the right to go through her massive manuscript collection to determine what related to NCARL and was thus relevant to the case. If Anne Braden and her attorneys had made what the judge interpreted as a good-faith effort to do these things, the 21 October order would never have been issued. The 21 October order,

[22]"Memorandum Order Compelling Production by Anne Braden," (21 October 1986): 1–4.

[23]"Stipulation and Order," (25 August 1987): 7.

[24]Alice E. Smith to Leslie H. Fishel, 9 March 1961; John W. Reynolds to Leslie H. Fishel, 23 March 1961, "State Agency Correspondence" (Series 1048), box 2, folder 8, State Historical Society of Wisconsin.

[25]Gary M. Peterson and Trudy Huskamp Peterson, *Archives & Manuscripts: Law* (Chicago: SAA, 1985), 95.

[26]Telephone interview with Douglas E. Mirell, attorney for NCARL, 17 June 1987. Interestingly the 21 October court order has not been published, making it much less likely to be cited as precedent in any future litigation.

which opened the whole collection, was more a punishment than an expression of the judge's true opinion of justice. Thus, the precedent is not the complete opening of the collection, as might be inferred from the 21 October order, but rather the opening of a small and specific portion of the collection likely to be directly relevant to a case before the court.

The precedent is limited in some other ways as well. Anne Braden's identity as one of "the plaintiff class" was very significant to the court. Had she been an uninvolved third party, the rulings might have been different.[27] More importantly, the case did not, by any stretch of the imagination, strike down the Braden restriction. It remained, in the words of Judge Tashima's 28 July order "fully enforceable . . . against the general public, [and] researchers whom Braden does not wish to have access to the documents. . . ."[28] But for Braden's flawed response to the 28 July order, it would have also denied the FBI access to everything except specific files relating to NCARL. It is important to emphasize that neither of the judge's orders challenged the right of Anne Braden or the State Historical Society of Wisconsin to restrict access. They simply sought to compel Anne Braden to grant access in this one specific instance. The argument that Braden's allowing of selected researchers to use the collection canceled her right to restrict it to others was the FBI's only attempt to challenge the right to restrict. In his 28 July order, Judge Tashima specifically declined to rule on this argument.[29]

The case has practical implications for manuscripts repositories. First, it is incumbent upon archivists to be forthright with donors about the extent to which agreed-upon restrictions are enforceable. It is equally important to consider in advance what actions a repository might be willing to take to resist a subpoena, and to share that information with potential donors. In competitive collecting fields, there is great pressure to tell donors what they want to hear. But in view of the Braden case and other evidence, it is highly unethical to lead donors to believe that their papers could be completely protected by any particular access restriction.

The case also suggests some considerations for institutions soliciting collections which, for political or other reasons, might be the subject of a subpoena. In the Braden case, access to the collection was controlled by Anne Braden. Thus all legal action was directed at her. The State Historical Society of Wisconsin and the state attorney general kept a close eye on the case and filed an amicus brief, but were spared from the time and expense of litigation. The repository's position throughout was that, because no court order was directed at the Society, it would continue to honor its contract with Anne Braden. Another type of instrument of transfer might result in the repository incurring substantial legal costs. If, for example, the restriction had been absolute until some specified date, with no provision for Anne Braden to grant access, the Society rather than Anne Braden could have been the object of litigation.[30] Another strategy, which might protect an archives in a similar situation, is to accept potentially sensitive collections only on deposit, a standard practice for at least one institution.[31] There are a number of poten-

[27]Neuenschwander, "Federal Judge Grants FBI Access to Sealed Papers," 7.

[28]"Memorandum Decision and Order," 20.

[29]Ibid., 25.

[30]Peterson and Peterson's *Archives & Manuscripts: Law* states that an institution has no obligation to go to court to uphold a restriction in the face of a subpoena (p. 95). Unless this point is made clear in the negotiation process it seems likely that some donors would have different expectations. In the Braden instance the Society had agreed to "exhaust all available legal remedies to maintain" the restriction.

[31]Letter from Philip P. Mason, Director, Walter P. Reuther Library, Wayne State University, 18 July 1988.

tial problems any time an archives does not hold clear title to collections it houses. Still, a deposit strategy would have the effect of putting the legal burden of defending the restriction on the donor rather than on the archives.

Finally, the most important question—what impact might this decision have on our ability to collect important historical records? Judge Tashima thought it should have no particular impact. "A donor's documents," he wrote "would be equally discoverable . . . regardless of whether they were stored in a corner of her basement or donated to an archive, no donor will encounter an increased risk of disclosure simply by placing her documents in an archive."[32] It is true that the major incentives for donating material to an archives remain intact. The desire to perpetuate one's work is very strong. For someone like Anne Braden, placing papers in an archives is also a positive act intended to further the causes in which she believes. Each time a researcher uses her papers to write about the civil rights movement, the goals of that movement are advanced. However, the Braden access case certainly presents some disincentives to potential donors, even if the obviously illegal option of destroying subpoenaed documents is discounted. When the judge stated that no donor will encounter an increased risk of disclosure by placing her documents in an archives, he may have been right in a legal sense, but wrong in a practical one. Once in an archives, the general content of a collection, even when restricted, generally becomes public knowledge. The collection thus becomes more likely to be subpoenaed.

Had Anne Braden's papers been in her basement, the FBI would have had no firm basis for asserting that she had relevant documents. The simple facts of the case show that Braden incurred greater risk by placing her papers in an archives. She is one of fifteen vice-chairs of NCARL and a member of a plaintiff class that numbers twenty-five or thirty. Yet, she was the only one of this large group to be subpoenaed.[33] It is hard to believe that the fact that her papers were in a public institution and described in a detailed descriptive register played no role in that selection. For her part, Anne Braden says that prior knowledge of Judge Tashima's rulings would not have prevented her from donating papers and will not stop her from adding to the collection. She continues to recommend that colleagues and associates place their papers in archival repositories, although she also informs these acquaintances of her access fight with the FBI. However, she now wishes she had screened more thoroughly those files she donated.[34] Thus, it is possible that the Braden case will affect acquisitions—delaying some donations or causing some donors to remove controversial files.

In view of these issues' importance, it seems appropriate to consider what, if anything, the archival profession might do to counter the Braden access rulings. If a similar case comes before the courts again the Society of American Archivists should not sit on the sidelines. While it may be unlikely, it is possible that another court looking at the same issues would rule differently than Judge Tashima.[35] In preparing for another case, the Wisconsin statute authorizing restrictions and the Presidential Records Act should be carefully scrutinized. The Wisconsin Attorney General did

In retrospect Anne Braden has expressed a preference for a deposit-like agreement.

[32]"Memorandum Decision and Order," 20–21.

[33]The names of all members of the plaintiff class were not available to the author. A search of RLIN and NUCMC located the papers of one additional vice-chair in an archival repository.

[34]Letter from Anne Braden, 29 November 1988; telephone conversation with author, 8 December 1988.

[35]Neuenschwander, "Federal Judge Grants FBI Access to Sealed Papers," 7.

not prove that the Wisconsin legislature intended to make archival collections immune from subpoena. However, this issue may deserve more attention because of the cursory nature of the Attorney General's research. The statute was enacted at the State Historical Society's request, and internal Society staff memoranda make it clear the Society officials were looking for a way to resist subpoenas when they proposed the legislation.[36] The Presidential Records Act governs access to certain *public* records. It seems reasonable that the public and the courts should have greater access to public records than to indisputably private papers such as Braden's. Other strategies involve legislative action to secure from Congress or individual state legislatures specific recognition that a *limited* judicial privilege for restricted collections of private papers is in the public's best interests.

[36]Josephine L. Harper to Leslie H. Fishel, 6 March 1961; Barbara J. Kaiser to Fishel, 6 March 1961; Alice E. Smith to Fishel, 9 March 1961, "State Agency Correspondence" (Series 1048), box 2, folder 8, State Historical Society of Wisconsin.