
CASE STUDY

Case History: *Downs v. United States*

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INTRODUCTION

The tragic consequences of inexperience, lack of an established base of knowledge and training, combined with poor situational judgment during a hostage incident in 1971, resulted in significant changes in the application of the Federal Tort Claims Act to allegations of negligence on the part of crisis negotiators. The incident, as a glaring example of everything *not* to do in a hostage event, has influenced the subsequent development of fundamental knowledge, training, and skills for police crisis negotiations.

FACTUAL BACKGROUND¹

On October 3, 1971, George Giffe called the office of Big Brother Aircraft, Inc. to inquire about chartering an airplane to Atlanta, Georgia.

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At about 5:00 p.m. on that same day he made a personal visit to the facility to make an advance payment for the trip. He made three additional trips to the hangar area to drop off luggage, including a small metal box. He indicated that he wanted to depart at 1:00 a.m. on the following morning with two other passengers.

On October 4, 1971 at approximately 1:30 a.m. he arrived with his wife, Susan Giffe, and Bobby Wayne Wallace. As the trio approached the aircraft his wife began screaming and attempted to leave. Giffe indicated to observers that he was a physician and that the woman was a mental patient under his care and was being transported to Atlanta for hospitalization. When the co-pilot, Randall Crump, stated his concern to the pilot, Brent Q. Downs, about flying with the woman in a hysterical condition, Giffe produced a pistol and ordered the pilots, his wife, and Wallace to enter the aircraft. The chartered plane began its taxi from the terminal at 2:00 a.m. This series of events was witnessed by another employee of the charter airline who immediately notified airport security police who in turn notified the control tower. The aircraft was advised to hold its position on the runway and two security police vehicles were dispatched to intercept the aircraft before it could take off. As the vehicles converged on the aircraft, Giffe ordered the pilots to takeoff immediately. Through a radio-electronic protocol, the pilot confirmed that a hijacking was in progress. As they left Nashville, Giffe pointed to the metal box and announced that he had brought aboard 12 and one-half pounds of plastic explosive material with a detonation system that required re-setting every ten minutes to prevent an explosion.

After conferring with his armed associate, Giffe announced that he wanted to be flown to Freeport, Bahamas. Downs responded by saying that he did not have enough fuel to reach that destination. He was directed to fly a southerly route and calculated an arrival in Jacksonville, Florida at approximately 5:00 a.m.² During the flight the kidnapped pilot notified the Jacksonville air traffic control tower that fuel, floatation gear, maps for a flight to Freeport, Bahamas, and an engine starter were being demanded by the hijacker.

At 4:05 a.m., Special Agent James O'Connor received a telephone call about the situation from Special Agent Russell J. Pardee who was serving as the night duty officer at the Jacksonville office of the Federal Bureau of Investigation. O'Connor directed Pardee to notify various FBI personnel who possessed the skills to handle this crime to report to the airport.

At 4:15 a.m., Pardee informed O'Connor that the hijacked airplane was now scheduled to arrive at 5:15 a.m. and that it would be directed to

a private aircraft storage area operated by Air Kaman. O'Connor departed for the airport in his family car, which was equipped with a two-way radio.

O'Connor arrived at the airport at 4:50 a.m. and drove directly to the Air Kaman hangar. Shortly afterward, O'Connor was joined by Special Agents Francis A. Burns and George Murphy who had arrived together in an FBI radio-equipped vehicle. Burns went to the flight control tower to monitor radio communication with the hijacked aircraft. O'Connor was now able to use the two-way radio in the FBI car to communicate with Burns by telephone in the flight control tower. However, O'Connor could not directly monitor communications between Burns and the hijacked aircraft.

At 5:10 a.m. Burns notified O'Connor that the hijacked aircraft was preparing to land. At approximately the same time Pardee notified O'Connor that the two men who had committed the hijacking had dragged a woman aboard the aircraft. He also informed O'Connor that the woman was the wife of one of the hijackers and that the couple had a long history of marital discord. This information had been obtained by FBI personnel in Nashville who were relaying it on to the Jacksonville office.

At this point O'Connor and Murphy drove to a corner of the Air Kaman hangar and turned off the car headlights. The aircraft taxied into the area and stopped with the engines still running. Meanwhile FBI Special Agents James McBride and Dalton Mayo arrived and stationed themselves behind a gasoline truck about 200 yards from the aircraft. Radio exchanges alerted O'Connor to the positions of the FBI personnel.

Meanwhile, Burns contacted the aircraft by radio and directed the pilot to turn off the engines. Burns also notified O'Connor and stated that the pilot had repeated his requests. O'Connor directed Burns to continue refusals for any fuel or equipment. The pilot stated that the hijacker possessed over 12 pounds of plastic explosive.

O'Connor advised the surrounding FBI personnel that the situation had developed into a "waiting game" and gave special instructions that all FBI personnel were to maintain their positions until he gave further orders. At this point the left engine was shut down to allow the co-pilot, Randall Crump, to leave the aircraft. Crump indicated that two armed men were aboard the plane and that one of them had announced that he possessed an explosive device. He also said that the woman had been hysterical earlier but was calm now. Neither O'Connor nor any other FBI personnel requested further information about the hostages, the hi-

jackers, or the physical layout of the aircraft. O'Connor dismissed the information about the explosive device as "a bunch of malarkey."³

Shortly afterward, Bobby Wayne Wallace departed from the aircraft to re-state the demands. Armed with a loaded pistol which had been tucked into his pants, he was disarmed and arrested for air piracy. Consistent with then current FBI policy, Wallace was not questioned further when taken into custody.

At approximately 5:30 a.m., O'Connor decided to prevent the hijackers and the aircraft from leaving. He directed two agents to move their car to block the plane's route down the runway. He also directed another agent to disable the plane's right landing gear by shooting the tire. After two shots failed to deflate the tire, O'Connor approached the aircraft, identified himself as an FBI agent, and ordered all occupants to leave the airplane. When two shots were fired from inside the aircraft in his direction, he directed an FBI sharpshooter to shoot the right engine. With the engine finally silenced, O'Connor heard moaning coming from the airplane. Inside the agents found two dead hostages, later identified as the pilot and the hijacker's estranged wife, and the fatally wounded hijacker.

LITIGATION

After the incident, the widow of the dead pilot filed a civil suit (382 F. Supp. 713) against the FBI under provisions of the *Federal Tort Claims Act* alleging that the handling of the situation resulted in the wrongful death of her husband. For a variety of reasons the United States District Court ruled that O'Connor's actions throughout the incident did not amount to negligence. The District Court concluded that his challenged decisions were not an unreasonable response when all the circumstances were considered.

The United States Court of Appeals, Sixth Circuit, ruled that the above finding was clearly erroneous and that there was "a better-suited alternative to protect the hostages' well-being" (522 F.2d 990). The court indicated that the preferred alternative "was not to intervene forcibly but to continue the 'waiting game'."

Although the case has been cited 87 times in *Shepherd's Citators*, these citations have only been used to address procedural matters such as plaintiff status, format, and jurisdiction. However, the following substantive issues were raised in the appeal:

1. What alternative options could have been exercised?

The Court indicated that the standard approach of extending the negotiation process would have been much more appropriate. For example, the simple technique of delaying until the plane ran out of fuel could have provided a greater range of rescue opportunities.

2. What principles of personnel management were disregarded for the sake of expedience to bring a quick conclusion to the incident?

The Court suggested that special circumstances mandate specialized preparation and responses in terms of personnel selection, training, assignment, and equipment. These responses have been summarized in several publications of tactical operations.

3. Does the increased training attach a higher level of performance by the response personnel?

The Court strongly stated a higher level of performance expectation is placed upon personnel who have received specialized training and who may possess a higher level of relevant experience.

RAMIFICATIONS FOR CRISIS NEGOTIATIONS

This incident provided several valuable lessons. First, the civil action initiated by the kidnapped pilot's wife indicated that the law enforcement community was not exempt from public criticism and legal scrutiny for mishandling a call, even with the best of intentions. Today's newspaper headlines are rife with criticism of public officials, but at the time such public criticism, although existing, was not so common. Good intentions are not a sufficient defense for operational failure. In this case and others like it the old adage that success has a thousand fathers while failure is an orphan can be modified to say that law enforcement success is expected while failure invites a lawsuit. Although many variables are outside the experience and control of the law enforcement responders, care must be exercised to avoid exacerbating the situation to an unmanageable condition. Hostage takers are predictably unpredictable enough to serve as a warning that the assault option should be employed only as a last resort and only when overwhelming superiority

either serves as a deterrent or is irresistible. It should never be used as an exploratory tool as seen in the *Downs* case.

Second, the event took place during an era when criminal activity was displaying marked changes in terms of frequency, variation, magnitude, and duration. In many instances the long established methods were inadequate and the Court took notice that special circumstances mandated special responses. While this warning may have been subject to a variety of interpretations, many law enforcement agencies have since recognized the need for continuous re-evaluation of their organizational structures, operational procedures, and personnel selection and training methods when dealing with crisis situations. By this warning the Court suggested a paradox. When specially selected and trained personnel are assigned to respond to crisis situations, a higher standard of performance is expected. Similarly, when the performance bar is raised for the individuals within the organization, the organization must provide the tools by which this bar is raised.

Finally, in this area of specialization among the various elements of the law enforcement establishment, each area of interest within the occupation is characterized by explicit standards of the industry. Unfortunately, many of these standards are borne of adversity and failure. In this particular instance, the failures of both the organizational policies (e.g., failing to question Crum and Wallace further as directed by the FBI's then current policies and procedures for hostage situations) and by individual shortcomings (e.g., O'Connor's decision to discontinue negotiations and his choice of a forcible assault when negotiations were proceeding reasonably well) had an immediate and harmful impact on the situation. However, the ultimate failure will be to not learn from this and other subsequent related incidents and to not improve our standards through increased research and training.

NOTES

1. The substantive material for the Factual Background was summarized from court records of the original lawsuit (382 F.Supp 713 [M.D. Tenn., 1974]) and its appeal (522 F.2d 990 [6th Cir., 1975]).

2. Downs told the hijackers that there would be approximately 30 minutes of fuel upon arrival in Jacksonville, but in actuality there would be 90 minutes of fuel remaining in the tanks.

3. Despite his dismissal of the possible threat, O'Connor later requested an explosive ordnance disposal unit to deal with any possible explosives.