Having established that the principal case has added Missouri courts to the growing list of jurisdictions applying the doctrine of forum non conveniens as a limitation on forum-shopping, the only remaining consideration is the propriety of using a liberal interpretation of the instant case as a model for applying the doctrine in future litigation involving transitory tort actions. As mentioned previously, all the states, save one, that apply the doctrine do so generally as a method for promoting convenience to the parties rather than primarily as a device for judicial selectivity.[27] The immediate effect of using one standard in preference to the other is merely to determine which party shall have the burden of showing whether the court should or should not exercise jurisdiction. It is believed, however, that differentiating in favor of the New York public convenience standard produces the ultimate result of reducing possible uncertainty as to when the doctrine will be applied,[28] and provides a more consistent and more efficient dissemination of justice without accompanying prejudice to the interest of the litigating parties. The utilization of the public convenience standard will encompass not only all cases that would be included by an application of the private interests standard, but will also cover situations such as the principal case that otherwise might escape the discretionary power of the court and cause both unnecessary expense and prolonged delay in judicial administration.

CRIMINAL LAW—"TAINTED TESTIMONY" AS BASIS FOR AWARD OF NEW TRIAL

Mesarosh v. United States, 352 U.S. 1 (1956)

Shortly before the Supreme Court was to review petitioners' convictions for conspiracy to violate the Smith Act,[1] the Solicitor General informed the Court that his office had recently received information that one of the government witnesses, a paid informer, had given highly dubious testimony[2] in other proceedings concerning matters

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27. See text supported by notes 13, 16-18 *supra*.

28. Uncertainty regarding the applicability of forum non conveniens in any particular suit has been one of the primary objections to extension of the doctrine. See Dainow, *supra* note 2, at 888-89. This uncertainty is lessened, if not eliminated, however, by the establishment of a uniform policy to decline jurisdiction on forum non conveniens unless special circumstances warranting deviation from this policy are presented to the court.

1. 18 U.S.C. § 2385 (1952) provides that anyone who knowingly advocates or actively promotes the violent overthrow of the United States government shall be subject to fine or imprisonment, or both, and shall be ineligible for government employment for five years following conviction.

2. All but one of the other proceedings occurred subsequently to the trial of petitioners. The witness in the principal case was said to have (1) testified before the Senate Permanent Subcommittee on Investigations that one Louis Bortz had been delegated the job of assassinating Senator Joseph McCarthy; (2) filed a petition in a state court to set aside a previous plea of guilty to charges

relating to his employment. The Solicitor General thereupon moved to remand the case to the district court to determine the trustworthiness of the witness' testimony against petitioners, conceding that two of the convictions could not stand if the testimony was false. Petitioners entered a counter-motion for a new trial. The Court held that the witness' testimony, having been wholly discredited by the government's disclosures, constituted "tainted testimony"[3] and so "tainted" the entire proceeding that maintenance of the integrity of the judicial processes required a new trial.[4]

The award of a new trial based upon newly discovered evidence—including that of perjury—has two aspects: procedural and substantive. Procedurally, the power to grant a new trial is generally within the discretion of the trial judge,[5] whose determination will not be disturbed on appeal unless it can be shown that there was a clear abuse of discretion.[6] If a motion for new trial is entered in an appellate court while an appeal is pending, that court has no jurisdiction to entertain the motion.[7] Substantively, the type of evidence offered to support the motion determines the standard which the trial judge will apply in considering the motion. If the evidence of false testimony consists of the recantation of a witness under oath, the trial judge, before granting the motion, must be satisfied that a new trial

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of adultery and bastardy, alleging that such plea was entered only at the insistence of his superior in the FBI, which allegation was denied under oath by a special agent of the FBI; (3) testified under oath that in 1948 the Communist Party, pursuant to orders from the Soviet Union, was planning an armed invasion of the United States and assassinations of specific senators and congressmen, and that he had been trained to blow up bridges, poison water reservoirs, handle arms and ammunition, and employ tactics of sabotage and espionage; (4) testified that he had been placed in the Army under auspices of the FBI for the purpose of observing a certain Communist Party member, which assertion was entirely false; and (5) testified that he had never been arrested when, in fact, he had been arrested several times.

3. See note 12 *infra*.

4. Mesarosh v. United States, 352 U.S. 1 (1956). The scope of this comment is limited to the award of new trials in the federal courts on the basis of newly discovered evidence of false testimony.

5. Holt v. United States, 218 U.S. 245 (1910).

6. Howell v. United States, 172 F.2d 213 (4th Cir.), *cert. denied*, 337 U.S. 906 (1949); Fogel v. United States, 167 F.2d 763 (5th Cir.), *rev'd on other grounds*, 335 U.S. 865 (1948).

7. The appellate court may, however, remand the case for consideration of the motion by the district court. Heald v. United States, 175 F.2d 878 (10th Cir.), *cert. denied*, 338 U.S. 859 (1949); Evans v. United States, 122 F.2d 461 (10th Cir.), *conforming to mandate*, 312 U.S. 651 (1941), *cert. denied*, 314 U.S. 698 (1942); Wagner v. United States, 118 F.2d 801 (9th Cir.), *cert. denied*, 314 U.S. 622 (1941). The appellate court, however, should not remand the case unless the district court has indicated that it intends to grant the motion for a new trial. United States v. Minkoff, 181 F.2d 538 (2d Cir. 1950); Rakes v. United States, 163 F.2d 771 (4th Cir. 1947). Furthermore, before the case is remanded there must be a showing that the lower court would be justified in granting the motion. Zamloch v. United States, 187 F.2d 854 (9th Cir. 1951); Isgrig v. United States, 109 F.2d 131, 134 (3d Cir. 1940). The trial court may hold a hearing on a motion for new trial while the case is being considered on appeal, but it cannot act on the motion until the case has been remanded. Rakes v. United States, *supra*; Dession, *The New Federal Rules of Criminal Procedure*, 56 YALE

might result in a different verdict.[8] If there is only an allegation of false testimony, based upon evidence other than the witness' recantation, the trial juge must be satisfied that a new trial *would probably* result in a different verdict.[9] Furthermore, evidence offered in support of a motion for a new trial must not be merely cumulative or impeaching.[10] Regardless of the type of evidence offered, generally the denial of a new trial will not be held an abuse of discretion if there is sufficient independent evidence in the record to sustain the verdict.[11]

The principal case marks the second instance in which the Court has employed the "tainted testimony"[12] concept. In *Communist Party v. Subversive Activities Control Bd.*,[13] petitioner appealed from a ruling requiring it to register as a subversive organization. While the appeal was pending, petitioner moved in the appellate court for leave to introduce additional evidence before the Board. Affidavits were offered in support of this motion alleging that three government witnesses had committed perjury in other proceedings while testifying on substantially the same subject matter; that this evidence would establish that the witnesses were completely untrustworthy; and, that their testimony before the Board was false.[14] Instead of denying the allegations, the government contended that there was sufficient independent evidence to support the Board's ruling. The Board itself stated in the appellate court that it would arrive at the same result even if the questioned testimony were completely excluded.[15] Stating that the ruling

L.J. 197, 232 (1947). Holding of such a preliminary hearing has been generally recognized as an exclusive function of the trial court. United States v. Johnson, 327 U.S. 106 (1946); United States v. Troche, 213 F.2d 401 (2d Cir. 1954); United States v. Rutkin, 208 F.2d 647 (3d Cir. 1953).

8. The trial court must also find that the testimony was material; that it was in fact false; that the movant was surprised by the introduction of the false testimony; and that he was either unable to meet it, or discovered its falsity subsequent to the trial. Larrison v. United States, 24 F.2d 82, 87-88 (7th Cir. 1928).

9. Johnson v. United States, 32 F.2d 127 (8th Cir. 1929). An allegation of false testimony must also meet the following requirements: "(a) The evidence must be in fact, newly discovered, *i.e.*, discovered since the trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) the evidence relied on, must not be merely cumulative or impeaching; (d) it must be material to the issues involved . . . ." *Id.* at 130.

10. See note 9 *supra*; see also United States v. Johnson, 142 F.2d 588 (7th Cir.), *cert. dismissed*, 323 U.S. 806 (1944). The Court in the principal case recognized this rule, but summarily dismissed it as inapplicable. 352 U.S. at 9.

11. Kramer v. United States, 147 F.2d 202 (9th Cir. 1945); United States v. Parker, 103 F.2d 857 (3d Cir.), *cert. denied*, 307 U.S. 642 (1939).

See United States v. Johnson, 327 U.S. 106 (1946), United States v. Troche, 213 F.2d 401 (2d Cir. 1954), and Harrison v. United States, 191 F.2d 874 (5th Cir. 1951), holding that the denial of a motion for new trial, supported by the sworn recantation of a material witness, was not an abuse of discretion.

12. The precise expression "tainted testimony" has been used only once by the Court. 352 U.S. at 9. The usual language is that the witness' testimony is "discredited," and hence the entire proceeding is "tainted."

13. 351 U.S. 115 (1956).

14. *Id.* at 120; see also *id.* at 128 (dissenting opinion).

15. *Id.* at 126 (dissenting opinion).

was supported by sufficient independent evidence, the court of appeals denied the motion and affirmed the Board's ruling. The Supreme Court nevertheless reversed and remanded, stating that it could not pass on a record containing such challenged testimony.[16] The remand was accompanied by alternative directions: the Board was either to hold a hearing to determine the validity of the petitioner's allegations, and, if found to be true, to exclude the "tainted testimony" from the record; or it was to assume the truth of the allegations and strike the testimony from the record without a hearing. In either situation, the Board was required to reconsider its original ruling in the light of the record from which the "tainted testimony" was to have been excluded.[17]

The Court in the principal case advanced two reasons for granting a new trial rather than remanding as it had done in the *Communist Party* case. It was stated that it would be unreasonable to expect the trial court to determine that the witness had testified falsely in the other proceedings, as shown by the government's evidence, but had testified truthfully in the instant case.[18] In effect this was a conclusive finding that the testimony was "tainted," whereas, in the *Communist Party* case, it was held that the testimony would be "tainted" *if* the Board found that the petitioner's allegations were true.[19] Secondly, since the "tainted testimony" was to be excluded, the Court felt that remanding the case would be futile. The Court reasoned that only the jury could determine what the result would be on a different body of evidence and that the jury could not be reconvened to render a new decision after the exclusion of the testimony. On the other hand, the Board in the *Communist Party* case could be reconvened to determine this issue.[20]

16. *Id.* at 124-25.
17. *Id.* at 125.
18. 352 U.S. at 13.
19. The finding of the Court was apparently based upon the fact that, in the instant case, it was the government which questioned the witness' testimony, while in the *Communist Party* case, the defense had made the allegations. See *id.* at 9-10. See also *id.* at 12 n.6, where the Court distinguished United States v. Flynn, 130 F. Supp. 412 (S.D.N.Y. 1955), in which the defense had moved for a new trial based on the sworn recantation of a government witness. In the *Flynn* case, however, the government charged that the recantation was false. The Court stated that the government's denial of the recantation in the *Flynn* case presented a "factual issue" for initial determination by the trial court, while in the principal case there was no conflict between the challenged testimony of the witness and the evidence offered by the government impeaching his credibility. Therefore, the Court said that it would "express no opinion" on the judge's action granting new trials only to those defendants whose convictions could not stand without the challenged testimony.

In the principal case, the majority's assumption that the witness' lack of trustworthiness was conclusively shown may have been the reason why Justice Frankfurter, who wrote the opinion in the *Communist Party* case, dissented in the principal case.

20. 352 U.S. at 12. The dissent, however, contended that the case should have been remanded since it should be determined prior to the grant of a new trial whether the witness' other testimony so reflected upon the credibility of his

On the basis of these two cases, some tentative conclusions can be drawn concerning the attributes and legal effect of admitting "tainted testimony." An attempt will also be made to point up how this effect deviates from established precedent normally governing the award of new trials on the basis of newly discovered evidence. It appears that testimony will be "tainted" only if the witness has established a relationship with the government involving regular appearances as a government witness.[21] In addition, while appearing before the other tribunals, he must have testified about substantially the same subject matter.[22] It must also appear that some of the other testimony was false,[23] although the technical requirements of perjury need not be satisfied.[24] Finally, it seems that the untruthfulness must be expressly[25] or impliedly[26] admitted by the government.[27]

The effect of admitting "tainted testimony" is to require an entirely new factual determination, rigidly excluding "tainted testimony," in all cases in which the testimony was "significant."[28] This is true even though there may be substantial independent evidence supporting the findings.[29] This necessarily removes from the trial judge any discretion to deny a new trial on the ground that the judgment could be independently supported by other evidence.[30] Further, if the government initiates the challenge, the trial judge is apparently precluded

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testimony in the instant case that a new trial would be justified. It was argued that such determination of a witness' credibility has always been the function of the trial judge. *Id.* at 22.

21. This aspect of the problem was not discussed in the *Communist Party* case, although the petitioner's motion referred to "professional informers." 351 U.S. at 120. In the principal case, however, there are repeated allusions to this type of witness such as "paid informer" and "undercover informer."

22. See 352 U.S. at 13; 351 U.S. at 124.

23. 352 U.S. at 9. The Court in the *Communist Party* case stated that questioned testimony is discredited (see note 12 *supra*) if in fact the witness committed perjury in other proceedings on substantially the same subject matter. 351 U.S. at 124.

24. The Court stated that it is immaterial whether the falsity of the testimony in the other proceedings constituted perjury or was caused by a psychiatric condition. 352 U.S. at 9. See also note 23 *supra*.

25. See text supported by note 19 *supra*.

26. In the *Communist Party* case, the Court stressed the fact that petitioner's allegations of perjury were not denied by the government. See 351 U.S. at 124. *But see* Glasser v. United States, 315 U.S. 60, 87 (1942) (uncontested affidavits need not be accepted as controlling).

27. Since the award of a new trial is based upon the need to maintain the integrity of the judicial process, 352 U.S. at 3, it would seem that an admission by the government as to the falsity of the testimony in other proceedings will be retained as a prerequisite to finding the presence of "tainted testimony." If the government were to *deny* the falsity of the other testimony, the integrity of the judicial process would not be impaired by following the general rules governing the grant of a new trial. See text supported by notes 5 & 6 *supra*.

28. 352 U.S. at 10-11; 351 U.S. at 123-24. The precise meaning of the word as used here is vague. In the principal case the testimony was held to be "significant" as to all petitioners since it was *admitted* in evidence against all of them. 352 U.S. at 10-11.

29. 352 U.S. at 11; 351 U.S. at 124.

30. 352 U.S. at 12; 351 U.S. at 124.

from making any determination as to the witness' credibility.[31] Finally, allegations of false testimony in other proceedings normally would be considered as only cumulative or impeaching evidence of the witness' trustworthiness which has never been sufficient for the award of a new trial.[32] It is submitted, however, that in this instance the Court was justified in its departure from the general rule. Technically, the evidence offered by the government was impeaching evidence. On the other hand, where it is shown that the witness has appeared in the *same* capacity in other proceedings, and testified falsely therein on substantially the *same* subject matter, a much stronger inference arises that he also testified falsely in the present case than would arise where it is merely shown that his false testimony occurred in a totally unrelated proceeding.

In both the *Communist Party* and *Mesarosh* cases departures from established precedent were justified by the Court as vital to the maintenance of impeccable standards of fairness in federal judicial proceedings. Both cases relied heavily on the doctrine expressed in *McNabb v. United States*:[33]

> Judicial supervision of the administration of criminal justice in the Federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as "due process of law" and below which we reach what is really trial by force.[34]

For several years the *McNabb* doctrine was thought to be solely a rule of evidence pertaining only to the federal courts,[35] but its applicability to new situations has since been demonstrated. For example, in *Rea v. United States*,[36] the doctrine was invoked to enjoin a federal officer from either turning over to state authorities evidence seized in violation of federal law or testifying in a state court concerning such evidence. But it should be noted that in every case in which the rule had been invoked for the purpose of maintaining

31. See text supported by notes 18 & 19 *supra*.
32. See note 10 *supra* and text supported thereby.
33. 318 U.S. 332 (1943).
34. *Id.* at 340. Convictions secured by the use of testimony known by the prosecutor to be perjured violate due process. White v. Ragen, 324 U.S. 760 (1945); Pyle v. Kansas, 317 U.S. 213 (1942); Mooney v. Holohan, 294 U.S. 103 (1935).
35. See, *e.g.*, Burns v. Wilson, 346 U.S. 137, 145 n.12 (1953), where it is stated:
> The *McNabb* rule is a rule of evidence in the federal civil courts; its source is not "due process of law," but this Court's power of "supervision of the administration of criminal justice in the federal courts."

See also Malinski v. New York, 324 U.S. 401, 411 (1945) (rule does not apply to state courts); 18 U.S.C. § 3772 (1952) (Supreme Court given power to prescribe rules of procedure for the federal courts).
36. 350 U.S. 214 (1955). For other examples, see Offutt v. United States, 348 U.S. 11 (1954) (misconduct by a federal judge while on the bench); Ballard v. United States, 329 U.S. 187 (1946) (systematic exclusion of women in the selection of federal grand and petit juries).

"civilized standards of procedure and evidence" prior to the *Communist Party* and *Mesarosh* cases, misconduct on the part of a *federal officer* was also involved.[37] The two cases here under discussion have seemingly extended the rule to misconduct by persons *other* than federal officers, viz., government witnesses. Apparently, however, the rule will not be applied to *all* cases of misconduct by government witnesses. For example, it has never been used to mitigate against the rigorous requirements governing the grant of new trials in ordinary criminal prosecutions. That is, when one is convicted as a result of perjured testimony and moves for a new trial, he is still at the mercy of the trial judge's discretion.[38] This inconsistency is, perhaps, a recognition of lay opinion which is more tolerant of the situation which necessitates the use of a witness who is likely to perjure himself, such as a known criminal, than the situation in which a person is hired by the government for the specific purpose of spying upon others with the ultimate goal of entrapment. This attitude is implicit in the indignation found in much of the press over the "kept witness."[39]

The decisions in the *Mesarosh* and *Communist Party* cases, departing from generally accepted precedent, do not unduly obstruct the performance of the government's duty to discover and prosecute persons advocating its violent overthrow. No restraint is placed upon the use of informers as such. Rather, the decisions force the government to make a careful evaluation, prior to the trial, of the paid informer's expected testimony. Certainly there is evidence that greater care on the part of government attorneys could prevent events similar to those which occurred in the above two cases.[40] It is submitted that a requirement of meticulous care on the part of the government in selecting its witnesses does not impose too stringent a restriction on prosecutions of this type.[41]

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37. See cases cited note 36 *supra.*

38. See text supported by notes 5-11 *supra.*

39. See Harper's Magazine, May 1954, p. 25; Nation, Jan. 28, 1956, p. 63; New Republic, Mar. 7, 1955, p. 12; Newsweek, Feb. 14, 1955, pp. 20-21, Mar. 7, 1955, p. 26; The Reporter, Feb. 24, 1955, p. 4; The Saturday Review, Apr. 2, 1955, p. 26; Time, Feb. 14, 1955, pp. 21-22; 61 Commonweal 518, 620-21 (1955).

40. See, *e.g.*, United States v. Flynn, 130 F. Supp. 412, 417 (1955), in which the informer's story underwent six successive changes—from innocuous to incriminating. All but the last of these changes were known to government attorneys who were preparing trial briefs of the witness' expected testimony.

41. It should be remembered, however, that the basic reason for the strict rules governing the award of new trials is that too many trials would result if the rules were liberalized. See United States v. Troche, 213 F.2d 401 (2d Cir. 1954); Long v. United States, 139 F.2d 652 (10th Cir. 1943); Weiss v. United States, 122 F.2d 675 (5th Cir. 1941). If it is felt that the need for integrity in the administration of criminal administration *requires* a new trial whenever "tainted testimony" is present, it appears that the Court should logically be willing to re-examine the justification given for the rigid rules governing the grant of new trials in other situations where evidence of false testimony is presented.