product to a class or kind of imported merchandise which has been determined to be subject to the imposition of duties under section 701 or 731 of the Tariff Act of 1930, as amended,

(b) the amount allowable as a deduction under section 167 of Internal Revnue Code of 1986, with respect to eligible plant and equipment,

(c) if the transaction is not taken into account for purposes of subparagraph (A), the net proceeds from the sale or other disposition of any such eligible plant and equipment, or insurance or indemnity attributable to any such eligible plant and equipment, and

(d) the receipts from the investment or reinvestment of amounts held in such fund.

The subsection also limits the deposit in any taxable year following the 5th taxable-year period referred to in subparagraph (D) above.

Subsection (b), Requirements as to Investments, requires the segregation of amounts in the fund to be subject to certain requirements imposed by the Secretary. Investment of fund assets must be made in interest-bearing securities issued by the United States Government.

Subsection (c), Withdrawals, sets out the purposes for which a withdrawal may qualify as a "qualified withdrawal" and also provides that the Secretary may treat the entire fund or portion thereof as a nonqualified withdrawal upon determining that a substantial obligation under the agreement is not being fulfilled. A withdrawal is qualified if it is for the acquisition, construction, reconstruction, modernization or refurbishment of qualified plant and equipment or for the payment of the principal on indebtedness incurred in connection with the acquisition, etc. of qualified plant and equipment.

SECTION (4). TAXABILITY OF FUND

Explanation of provision

Subsection (a), Nontaxability for Deposits, provides for the nontaxability of deposits into the fund by subtracting the amount deposited from taxable income, not realizing gain on certain transactions if an amount equal to the net proceeds from the transaction is deposited, not considering the earnings from the investment of amounts in the fund, and not considering the amounts in the fund when determining the earnings and profits of the corporation for tax purposes.

Subsection (b), Establishment of Accounts, requires that three accounts be maintained within the fund including a capital account, a capital gain account and an ordinary income account. The capital account is to consist, for example, of an amount equal to the depreciation of eligible plants and equipment and amounts of gain realized on the sale of such eligible plants and equipment. The capital gain account consists of amounts representing long-term capital gains reduced by long-term capital losses. The ordinary income account shall consist of an amount of taxable income attributable to the production and sale of products of a like kind to imported merchandise subject to the payment of dumping duties (determined to be subject to duties under section 701 or 731 of the Tariff Act of 1930) short-term capital gain, and interest and other ordinary income received on assets held in the fund.

Subsection (c), Tax Treatment of Qualified Withdrawals establishes a priority rule requiring that qualified withdrawals be treated as first made out of the capital account, then out of the capital gains account, and lastly out of the ordinary income account. Additionally, it provides for the adjustment of basis of plant and equipment purchased with funds withdrawn from the capital gain or ordinary income account. The section provides that if any portion of a qualified withdrawal is used to pay principal on any indebtedness and is made from either the ordinary income or the capital gain account, then the money shall be applied to reduce the basis of plant and equipment owned by the person maintaining the fund.

The section also sets out the method in which any gains realized on property sold, the basis of which was reduced under the section, should be treated.

Subsection (d), Tax Treatment of Nonqualified Withdrawals. Nonqualified withdrawals do not receive the favorable tax treatment of qualified withdrawals. This subsection provides that nonqualified withdrawals are not to be treated as withdrawn first out of the ordinary income account, second out of the capital gain account, and third as out of the capital account and treated as withdrawn on a first-in-first-out basis, with certain exceptions. Nonqualified withdrawals are treated as ordinary income, or ordinary gain realized during the taxable year in which withdrawal was made, depending on which account was credited with the withdrawal. The subsection also details the various kinds of tax treatment these withdrawals receive.

A time limit for the maintenance of a fund is also established. Starting in the tenth year after the agreement, a percentage of the amount remaining in the fund is taxed as a nonqualified withdrawal. Twenty percent of the amount remaining in the fund after 10 years is treated as a nonqualified withdrawal, then 60 percent is taxed in the eleventh year, and finally, 100 percent of the amount left in the fund after 12 years is treated as a nonqualified withdrawal. However, if an amount has been committed through a binding contract as a qualified withdrawal, but is remaining in the fund at the end of the taxable year, that amount will be treated as withdrawn. Furthermore, any excess funds which the Secretary has determined exceed the amount appropriate to meet the fund's program objectives will be treated as a nonqualified withdrawal, unless appropriate program objectives are developed within 3 years to dissipate such excess.

Nonqualified withdrawals are to be taxed at the highest marginal rate. However, if any portion of a nonqualified withdrawal is attributable to deposits made by the taxpayer in any taxable year which did not reduce the taxpayer's liability for tax for any taxable year preceding the taxable year in which such withdrawal occurs, such portion will not be subject to taxation.

Subsection (e), Corporate Reorganizations, provides that a transfer of a fund from one person to another person as a result of a corporate reorganization, such transfer shall not constitute a nonqualified withdrawal. If the transaction results in the transfer of an eligible corporation, a majority of whose shares are held by non-U.S. persons, any and all withdrawals will be treated as having been nonqualified and the resultant tax liability must be paid at the time of the transaction.

SECTION (5). DEFINITIONS; RECORDS AND REPORTS

Explanation of provision

Subsection (a), Definitions, provides the definition of certain key terms used in the section. Most importantly, an "eligible corporation" must first be certified as a member of a domestic industry essential to the national security interests of the U.S. and have filed a petition under section 702 or 732 of the Tariff Act as an interested party described in section 771(9)(C) of the Tariff Act of 1930 which has resulted in the commencement of an investigation leading to the imposition of additional duties under 701 or 731 of the Tariff Act.

Subsection (b), Records; Report; Changes in Regulations, requires each person maintaining a fund to keep such records as the Secretary or the Secretary of the Treasury may require. The Secretary of Commerce and the Secretary of the Treasury are required to jointly prescribe rules and regulations appropriate to determine tax liability under the section. The section also provides that a person may terminate an agreement if a change is made in the joint regulations which could have a substantial effect on the rights or obligations of that person.

Subsection (c), Departmental Reports and Certification, requires the Secretary of Commerce to provide an annual report to the Secretary of the Treasury identifying each person who established a fund during the taxable year, maintained a fund at the end of the taxable year, terminated a fund during a taxable year, made withdrawals or deposits during the taxable year, or who has been determined to have failed to fulfill a substantial obligation under a fund agreement.●

By Mr. BIDEN (for himself, Mr. HATCH, Mr. KENNEDY, Mr. SPECTER, Mr. INOUYE, Mr. LIEBERMAN, Mr. METZENBAUM, and Mr. MOYNIHAN):

S. 3254. A bill to protect the free exercise of religion; to the Committee on the Judiciary.

RELIGIOUS FREEDOM RESTORATION ACT

Mr. BIDEN. Mr. President, the first amendment of our Constitution protects the free exercise of religion. Our country is committed to religious freedom.

A rule announced in a recent Supreme Court opinion, Employment Division versus Smith, could lead to unnecessary restrictions on religious freedom. Under this new rule, a State can enforce a general criminal law that restricts religious practices, without demonstrating a compelling State interest in enforcing that law.

Today I am introducing legislation to restore the previous rule of law, which required the Government to justify restrictions on religious freedom. The Religious Freedom Restoration Act of 1990 would allow Government to restrict religious freedom only if the restriction is a general law that does not intentionally discriminate against religion. The Government will also have to show a compelling State interest in enforcing the law and that it has chosen the least restrictive way to further its interest.

Mr. President, let me make one thing clear: Under this legislation, as I see it, Oregon could still keep native Americans from using peyote during religious ceremonies. In my view, Oregon has a significant interest in preventing the physical harm caused by using drugs like peyote. Oregon could show that it had a compelling State interest in regulating peyote use and that creating an exception for

native Americans would interfere too much with that interest.

Justice O'Connor, in an opinion concurring only in the judgment in Employment Division versus Smith, concluded that Oregon has a compelling interest in regulating peyote use and "that accommodating religiously motivated conduct will unduly interfere with fulfillment of the governmental interest."

I agree with Justice O'Connor. We can protect religious freedom and still prevent the use of peyote. This legislation is concerned with the former, and not the latter.

During Justice Souter's confirmation hearing, I asked him about the Employment Division versus Smith decision. Justice Souter endorsed Justice O'Connor's opinion and stated that he had no reason to question the requirement that Government show a compelling State interest in enforcing laws that restrict religious practice. I believe Justice Souter's comments reflect an emerging trend among legal scholars to embrace Justice O'Connor's opinion in the Employment Division versus Smith free exercise decision.

The Court has, in the past, concluded that the first amendment forbids the application of general prohibitions to religious practices. The Court has respected both the first amendment and the Government's interest in regulating conduct by requiring the Government to justify placing a substantial burden on religious practices by showing a compelling State interest.

Making a religious practice a crime is a substantial burden on religious freedom. It forces a person to choose between abandoning religious principles or facing prosecution. Before we permit such a burden on religious freedom to stand, the Court should engage in a case-by-case analysis of such restrictions to determine if the Government's prohibition is justified. The legislation I hope to introduce will require such a case-by-case analysis.

This bill is needed because even neutral, general laws can unnecessarily restrict religious freedom. The new rule, announced by the Supreme Court in Employment Division versus Smith, will affect virtually every religion in this country. It will erode religious freedom.

For example, a few years ago, New Mexico prohibited the use of alcohol for minors; the law failed to provide an exemption for sacramental wine used for religious purposes. A court, following the old rule, overturned the prohibition. Under the Court's new rule, use of sacramental wine by minors in New Mexico might be illegal. Such a result must be prevented.

As chairman of the Judiciary Committee, which will consider this religious freedom bill, I will work with my colleagues to ensure prompt review of this important legislation. This bill is not perfect and I am not suggesting that it should be passed without change. I have discussed the bill with constitutional scholars. I will continue to consult with those scholars and my colleagues about this legislation. I intend to schedule Judiciary Committee hearings to review the legislation and look forward to full Senate action on the bill next year.

Mr. HATCH. Mr. President, I am pleased today to cosponsor the Religious Freedom Restoration Act [RFRA] of 1990. This legislation responds to the Supreme Court's April 17, 1990, decision in *Employment Division* v. *Smith* (110 S.Ct. 1595 (1990)). There, the Supreme Court indicated that "an individual's religious beliefs (do not) excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." (110 S.Ct. at 1600.) This is the lowest level of protection the Court could have afforded religious conduct.

In my view, this standard is insufficiently protective of a person's first amendment right to the free exercise of religion. Freedom of religious practice is the first freedom mentioned in the Bill of Rights. It deserves stronger protection than the Supreme Court has given it in Smith. I will mention just one example that illustrates the concern engendered by this decision. If a State raises its legal drinking age to 21, it would be illegal for a minor to use sacramental wine in taking communion in that State. I believe the free exercise of religion needs protection, even when legislative majorities are unresponsive to religious liberty concerns in a particular instance. I do not believe that a person's right to take communion should turn on the whim of legislative majorities.

A tough standard is necessary to protect religious liberty. This bill imposes a "compelling interest" test on State and Federal Government when a governmental rule or law infringes on someone's free exercise of religion.

I fully expect that the Judiciary Committee will conduct several comprehensive hearings on this bill next year. It may be that refinements in the bill will be necessary after this review. It is clear to me that a legislative response to the Smith decision is important for the preservation of the full range of religious freedom the first amendment guarantees to the American people, especially for those whose religious beliefs and practices differ from the majority in a State or in the country.

Some of the areas that I believe need to be explored when the bill is reviewed next year include:

First, the precise language of the compelling interest test;

Second, whether this legislation needs to address the burden of persuasion at all, and if so, how to do so; and

Third, whether the compelling interest test has been applied in all areas of American life prior to Smith. Some Supreme Court decisions suggest that a different standard may be applicable in some areas. For example:

A. MILITARY

The Supreme Court has said:

Our review of military regulations challenged on first amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society. *Goldman* v. *Weinberger*, 475 U.S. 503, 507 (1986).

B. PRISONS

To ensure that courts afford appropriate deference to prison officials, we have determined that prison regulations alleged to infringe constitutional rights are judged under a "reasonableness" test less restrictive than that ordinarily applied to alleged infringments of fundamental constitutional rights * * * "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." (citing *Turner* v. *Safley*, 107 S.Ct. 2254, 2261 (1989)). *O'Lone* v. *Shabazz*, 107 S.Ct. 2400, 2404 (1987).

C. INCIDENTAL IMPACT OF GOVERNMENT PROGRAMS

In one case, the Federal Government sought to permit timber harvesting in, and the construction of a road through, a portion of a national forest traditionally used for religious purposes by members of three Indian tribes. *Lyng* v. *Northwest Indian Cemetery Protective Association*, (485 U.S. 439, 450-451 (1988)). The Court ruled 5 to 3 for the Government and against the Indians:

It is true that this Court has repeatedly held that indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the first amendment. Thus, for example, ineligibility for unemployment benefits, based solely on a refusal to violate the Sabbath, has been analogized to a fine imposed on Sabbath worship, see *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963). This does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions. The crucial word in the Constitutional text is "prohibit": "For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government," citing *Sherbert* v. *Verner*, 374 U.S. 398, 412 (Douglas, J., concurring), 485 U.S. 439, 450-451.

Of course, even if the compelling interest test did not apply in particular areas prior to the Smith decision, I and others in Congress may still feel it is desirable to extend it to some or all such areas.

I mention these matters of interest to me as an indication of where I believe part of the committee's focus should be when it examines the bill next year.

I believe it is imperative for Congress to act expeditiously in response to the Smith decision, and I look forward to working with the distinguished chairman of the Judiciary Committee, Senator BIDEN, in achieving this result.