fourteen years after our beef agreement with Japan, there is a 38.5-percent tariff on every pound of beef that still goes into Japan. Japan has a $60 billion to $70 billion trade surplus with us, and they are still hanging huge tariffs on every pound of American beef we ship to Japan. How about more T-bones in Tokyo?

I am describing a few of a litany of problems in international trade that our country refuses to address. Why? Because we have trade negotiators all suited up. They have their Armani shoes and their wonderfully cut suits, and they are ready to negotiate. They will lose in the first half hour at the table if history is any guidance.

I am saying we ought not grant fast-track authority until our negotiators demonstrate they can fix a few trade problems. I did not believe Bill Clinton should have fast-track authority when he was President, and I do not believe George Bush should have fast-track authority. Not until the Administration is willing to demonstrate that it is willing to solve a few of the trade problems I have described.

Fast track is going to be on the slow track in the Senate. There will be many amendments proposed. I, for one, will offer a good number of amendments dealing with the issues described. I will also offer an amendment that says that NAFTA tribunals should not operate in secret. We should not be a party to any deal that determines international trade outcomes behind closed doors. The public should be able to see what NAFTA tribunals are up to.

This country will have done a service to its citizens if we say no to fast track.

The ACTING PRESIDENT pro tempore. The Senator's time has expired.

Mr. DORGAN. I yield the floor.

The ACTING PRESIDENT pro tempore. The Senator from Arizona.

PRESIDENTIAL WITHDRAWAL FROM ABM TREATY

Mr. KYL. Mr. President, Secretary Powell at this very moment in the Middle East is striving mightily to effect a cease fire and develop more support for our war on terror, especially to the extent we may have to take military action against the country of Iraq.

It is in that context that I discuss today another way the administration has prepared to deal specifically with the threat from Iraq and other countries similarly situated in the Middle East.

On December 13, following a period of high-level negotiations, President Bush notified Russia of his intent to withdraw the United States from the 1972 Anti-Ballistic Missile Treaty. Since then, I have addressed the Senate on the military justification for the President's decision and the question of how much a national ballistic missile defense system will cost. Today, I would like to discuss the President's constitutional authority to unilaterally exercise the right of withdrawal without the consent of the Senate or Congress as a whole.

The President withdrew the United States from the treaty pursuant to Article XV, which allows either party to withdraw upon 6 months' notice if it determines that ''extraordinary events . . . have jeopardized its supreme interests.'' I believe his action is a proper exercise of the authority of the chief executive to terminate a formal treaty to which the Senate had given its consent pursuant to Article II, Section 2, of the Constitution.

The question of Presidential authority is illustrated by the following assertion in a New York Times editorial by Bruce Ackerman, a professor of constitutional law at Yale:

> Presidents don't have the power to enter into treaties unilaterally . . . and once a treaty enters into force, the Constitution makes it part of the ''supreme law of the land'' just like a statute. Presidents can't terminate statutes they don't like. They must persuade both houses of Congress to join in a repeal.

While the Constitution is silent with respect to treaty withdrawal, the preponderance of writings and opinions on this subject strongly suggests that the Framers intended for the authority to be vested in the President. Article II, Section 1 of the Constitution declares that the ''executive power shall be vested in the President.'' And Article II, Section 2 makes clear that the President ''shall be Commander-in-Chief,'' that he shall appoint, with the advice and consent of the Senate, and receive ambassadors, and that he ''shall have power, by and with the advice and consent of the Senate, to make treaties.''

The Constitution approaches differently the duties of Congress, giving the legislative branch—in Article I's Vesting Clause—only the powers ''herein granted.'' The difference in language indicates that Congress' legislative powers are limited to the list enumerated in Article I, Section 8, while the President's powers include inherent executive authorities that are unenumerated in the Constitution. Thus, any ambiguities in the allocation of a power that is executive in nature—particularly in foreign affairs—should be resolved in favor of the executive branch. As James Madison once wrote in a letter to a friend, ''the Executive power being in general terms vested in the President, all power of an Executive nature not particularly taken away must belong to that department . . .''

The treaty clause's location in Article II clearly implies that treaty power is an executive one. The Senate's role in making treaties is merely a check on the President's otherwise plenary power—hence the absence of any mention of treaty-making power in Article I, Section 8. Treaty withdrawal remains an unenumerated power—one that must logically fall within the President's general executive power.

A careful reading of the writings of the Framers strongly also confirms that they viewed treaties differently than domestic law, and that, while they desired to put more authority over domestic affairs in the hands of the elected legislative representatives, they believed that the conduct of foreign affairs lay primarily with the President. As Secretary of State Thomas Jefferson observed during the first Washington Administration, ''The constitution has divided the powers of government into three branches [and] has declared that 'the executive powers shall be vested in the president,' submitting only special articles of it to a negative by the Senate.'' Due to this structure, Jefferson continued, ''The transaction of business with foreign nations is executive altogether; it belongs, then, to the head of that department, except as to such portions of it as are specially submitted to the Senate. Exceptions are to be construed strictly.''

In the same vein is the history of Supreme Court rulings on the subject of presidential powers. The Court has concluded that the President has the leading constitutional role in managing the nation's foreign relations. As one commentator, David Scheffer, noted in the Harvard International Law Journal, ''Constitutional history confirms time and again that in testing [the limits of presidential plenary powers], the courts have deferred to the President's foreign relations powers when the constitution fails to enumerate specific powers to Congress.''

In Harlow v. Fitzgerald, the Supreme Court observed that responsibility for the conduct of foreign affairs and for protecting the national security are '''central' Presidential domains.'' Similarly, in the Department of Navy v. Egan, the Supreme Court '''recognized the generally accepted view that foreign policy [is] the province and responsibility of the Executive.'''

The case most frequently cited as confirming that the President is the supreme authority in the Nation's conduct of foreign affairs is the Supreme Court's 1936 decision in the United States v. Curtiss-Wright Corp. In that case, the Court reversed the decision of the district court, and affirmed the constitutionality of President Franklin Roosevelt's declaration of an arms embargo against both sides in the conflict between Peru and Bolivia over the Chaco region. As stated in the opinion issued by Justice Sutherland, the power to conduct foreign affairs is ''the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require for its exercise an act of Congress.''

Treaties represent a central tool for the successful conduct of foreign policy. Such international agreements typically reflect the circumstances of particular security or economic conditions which may, of course, change

over time. As such, in the course of protecting national security, recognizing foreign governments, or pursuing diplomatic objectives, a President may determine that it is necessary to terminate specific United States' treaty obligations.

That is precisely the subject we are facing with respect to the President's withdrawal from the 1972 ABM treaty.

As the D.C. Circuit stated in Goldwater v. Carter, ''The determination of the conduct of the United States in regard to treaties is an instance of what has broadly been called 'the foreign affairs power' of the President. . . . That status is not confined to the service of the President as a channel of communication . . . but embraces an active policy determination as to the conduct of the United States in regard to a treaty in response to numerous problems and circumstances as they arise.''

For these reasons, other unenumerated treaty powers have been understood to rest within the plenary presidential authority. For example, the President alone decides whether to negotiate an international agreement, and also controls the subject, course, and scope of negotiations. Additionally, the President has the sole discretion whether to sign a treaty and whether to submit a treaty to the Senate for advice and consent. The President may even choose not to ratify a treaty after the Senate has approved it. Vesting the power to terminate a treaty in the President is consistent with the accepted view that other such unenumerated powers are the responsibility of the President.

Furthermore, the executive branch has long maintained that it has the power to terminate treaties unilaterally. The Justice Department has argued that, ''Just as the Senate or Congress cannot bind the United States to a treaty without the President's active participation and approval, they cannot continue a treaty commitment that the President has determined is contrary to the security or diplomatic interests of the United States and is terminable under international law.'' The State Department, in a 1978 memorandum advising that the President had the authority under the Constitution to terminate the Mutual Defense Treaty without Congressional or Senate action, opined that, ''The President's constitutional power to give notice of termination provided for by the terms of a treaty derives from the President's authority and responsibility as chief executive to conduct the nation's foreign affairs and execute the laws.''

One of the most well-known instances of treaty termination in recent history is former President Carter's decision to withdraw the United States from the Mutual Defense Treaty of 1954 between the U.S. and Taiwan in order to normalize relations with the People's Republic of China. That decision resulted in an extensive debate in the Senate and among scholars as to the President's constitutional authority to withdraw the United States from a treaty without the approval of the Senate or Congress. Several members of Congress, including former Arizona Senator Barry Goldwater, filed suit against President Carter, and the full Senate addressed treaty termination in a series of legislation that was debated by a number of my distinguished colleagues who remain in this body today.

Senator KENNEDY wrote a persuasive article for Policy Review in 1979 strongly supporting the notion that treaty termination is an executive power not requiring legislative consent. In that article, he argued:

> Article 10 of the treaty in question [the Mutual Defense Treaty] provided for its termination. In giving notice of an intent to terminate the treaty pursuant to that provision, the President was not violating the treaty but acting according to its terms—terms that were approved by the Senate when it consented to the treaty.
>
> As Charles C. Hyde, former Legal Advisor to the Department of State, put it in his leading treatise: ''The President is not believed . . . to lack authority to denounce, in pursuance of its terms, a treaty to which the United States is a party, without legislative approval. In taking such action, he is merely exercising in behalf of the nation a privilege already conferred upon it by the agreement'' . . .
>
> At the time that each treaty is made and submitted [for the advice and consent of the Senate, Senators] should seek to condition Senate approval upon acceptance of the Senate's participation in its termination. The Senate might have done so when it consented to the 1954 defense treaty with the Republic of China, but it did not. Any attempt, at this point, to invalidate the President's notice of intention to terminate that treaty is not only unwise . . . but also without legal foundation.

As with the 1954 treaty, the ABM Treaty contains a withdrawal clause—article XV(2)—for extraordinary events. That clause states:

> Each party shall, in exercising its national sovereignty, have the right to withdraw from this Treaty if it decides that extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests. It shall give notice of its decision to the other Party six months prior to withdrawal from the Treaty.

That, of course, is precisely what President Bush did.

The President was fully justified in using that withdrawal clause unilaterally. Just as the Senate did not condition its approval of the Mutual Defense Treaty with Taiwan upon its participation in termination of that treaty, the Senate also did not place such a condition upon its approval of the ABM Treaty.

Senator Goldwater's suit over the President's termination of the Mutual Defense Treaty with Taiwan led to conflicting decisions by the trial and appellate courts and an eventual non-decision by the Supreme Court. The D.C. Circuit had reversed the trial court's decision, and upheld President Carter's authority to terminate the Mutual Defense Treaty, rejecting the arguments that (1) the advice and consent role of the Senate in making treaties implies a similar role in termination, and (2) that, because a treaty is part of the law of the land, a minimum of a statute is required to terminate it.

The Circuit Court pointed out that the President is responsible for determining whether a treaty has been breached by another party, whether a treaty is no longer viable because of changed circumstances, and even whether to ratify a treaty after the Senate has given its advice and consent. The court said that, ''In contrast to the lawmaking power, the constitutional initiative in the treaty-making field is in the President, not Congress.'' Moreover, the court stated that, to require Senate or Congressional consent to terminate a treaty would lock the United States into ''all of its international obligations, even if the President and two-thirds of the Senate minus one firmly believed that the proper course for the United States was to terminate a treaty.'' It would, therefore, deny the President the authority and flexibility ''necessary to conduct our foreign policy in a rational and effective manner.''

Finally, the court determined that ''of central significance'' was that the Mutual Defense Treaty—as my colleague Senator KENNEDY had also pointed out in his article—contains a termination clause that ''is without conditions,'' and spells out no role for either the Senate or Congress. As a consequence, the court concluded, the power to act under that clause ''devolves upon the President.'' The facts are the same with the 1972 ABM Treaty, and, therefore, the law must also be consistent.

I should note that President Carter did not stand alone in exercising his power to unilaterally terminate a treaty. According to David Gray Adler's The Constitution and the Termination of Treaties, unilateral executive termination has been practiced since the Lincoln Administration, and seems to be the most commonly used method of terminating treaties. And as the D.C. Circuit stated in Goldwater v. Carter,

> It is not without significance that out of all of the historical precedents brought to our attention, in no situation has a treaty been continued over the opposition of the President.

It is interesting to me members of the Senate have also raised the issue of the President's authority to withdraw from a particular treaty without legislative consent in the context of debating the resolution of ratification of a treaty. During the Senate's consideration of the Comprehensive Test Ban Treaty, CTBT, proponents of the CTBT argued that Safeguard F of that treaty meant that the President alone could exercise the right of withdrawal from the treaty. Safeguard F states:

> If the President of the United States is informed by the Secretary of Defense and the Secretary of Energy—advised by the Nuclear Weapons Council, the Directors of DOE's nuclear weapons laboratories and the Commander of the U.S. Strategic Command—

that a high level of confidence in the safety or reliability of a nuclear weapon type which the two Secretaries consider to be critical to our nuclear deterrent could no longer be certified, the President, in consultation with Congress, would be prepared to withdraw from the CTBT under the standard ''supreme national interests'' clause in order to conduct whatever testing might be required.

As Senator BIDEN stated on the Senate floor on October 12, 1999:

They have to assume, then, that the President, knowing that this stockpile is no longer reliable, would look at the U.S. Congress and say: I, President whomever, next President, certify that we can rely on our stockpile. They either have to assume that or they have to assume their concern about our stockpile is not a problem because the moment the President is told that, he has to call us and tell us and withdraw from the treaty . . .

Senator BOXER likewise argued that withdrawal from the treaty would be exclusively the responsibility of the President during her remarks on the Senate floor on October 13, 1999, stating,

If our stockpile is not safe and reliable, the President will withdraw from the treaty. There doesn't have to be a Senate vote. It's not going to get bogged down in the rules of the Senate. If there is a supreme national interest in withdrawing from the treaty, we will withdraw.

Indeed, even some Senators openly opposed to the President's decision to withdraw the United States from the ABM Treaty have recognized his constitutional authority to make the decision without the consent of the Senate or Congress. In December 2001, Inside Missile Defense quoted Senator DASCHLE on the subject:

It's my understanding that the President has the unilateral authority to make this decision. But we are researching just what specific legal options the Congress has, and we'll have to say more about that later . . . at this point, we're very limited in what options we have legislatively.

Similarly, according to a July 2001 article in the New York Times, Senator LEVIN stated,

The president alone has the right to withdraw from a treaty, but Congress has the heavy responsibility of determining whether or not to appropriate the funds for activities that conflict with a treaty.

My own view is that while it would be anomalous for Congress to withhold funding for a national missile defense system, Senator LEVIN is correct on both counts: withdrawal is the President's decision and any funding for anything must be through Congressional appropriation.

In conclusion, I believe history will judge President Bush's notice of withdrawal from the 1972 ABM Treaty as equal in importance to his historic decision to commit the United States to the war on terrorism. With the withdrawal decision, he has paved the way for the United States to work aggressively toward deployment of defenses to protect the American people against the growing threat of a ballistic missile attack.

In announcing his intent to withdraw the United States from the treaty, President Bush acted in accordance with changed international circumstances and our national interests—reestablishing the important doctrine of ''peace through strength'' as the basis for U.S. security policy. And he acted within the authority granted by the Constitution to the Chief Executive.

I commend the President for arriving at a very difficult decision. As we all know, the role of Congress has not ended with our withdrawal from the treaty—the annual budget process can be used to either undermine or support the President's decision, a matter I will address in a future presentation. But for now, an essential first step in moving forward to protect the United States against a serious threat has finally been taken, and the President should be commended for his action.

ENHANCED BORDER SECURITY AND VISA ENTRY REFORM

Mr. KYL. In the remaining time I have I would like to address a matter that will be before the Senate as the pending business as soon as we conclude morning business; that is, the Enhanced Border Security and Visa Entry Reform Act, H.R. 3525. The sponsors of this legislation all spoke to the reasons for this legislation on Friday when the matter was brought to the floor at 11:30 by unanimous consent request of the majority leader. I thank Majority Leader DASCHLE for bringing this matter to the Senate floor so we can dispose of it.

A little bit of history is in order. The sponsors of the legislation—Senators KENNEDY, BROWNBACK, FEINSTEIN, and myself—had worked hard to develop this legislation in the aftermath of September 11 because we held hearings in two different subcommittees of the Judiciary Committee that revealed loopholes in our immigration laws, loopholes through which some of the terrorists who came here and carried out their horrible attack on September 11 were able to gain entry into the United States. They came on legal visas, visas that in some cases should never have been granted. They were here under student visas, even though they no longer attended the classes they had signed up to attend. In the case of some of them, they were out of status by the time of September 11.

We set about to identify loopholes in our immigration and visa laws that we could close to make it much more difficult for terrorists to gain entry into the United States. That legislation was developed before the end of last year's congressional session and was actually adopted by the House of Representatives just before we adjourned for the year. We attempted to have it adopted by the Senate, but Senator BYRD objected on the grounds that it required Senate debate, and he didn't want to simply adopt it as a matter of unanimous consent.

At the beginning of this year, we sought to find ways to bring the bill to the Senate floor for that debate and amendment, if need be, and had not been successful until the end of last week when, as I said, the majority leader successfully propounded a unanimous consent request that the Senate take the bill up. There is no limitation on time nor on amendments, but there has been such a strong outpouring of support for the bill—indeed, I think there are some 61 cosponsors, and that probably reflects the fact we have not gotten around to all the Members of the Senate, that it is clear the bill can pass very quickly as soon as we are ready to call for the final vote. But out of deference to those who believed it did need debate, that opportunity has been made available.

The only people I am aware of who spoke on the legislation on Friday were the four cosponsors: Senators KENNEDY, BROWNBACK, FEINSTEIN, and myself. We all laid out the case, to one degree or another, for the legislation and urged our colleagues who may have something to say about it to come to the floor and express themselves. Indeed, if there were amendments, we would be happy to entertain those amendments.

We are obviously hopeful there will not be, so we can simply adopt the legislation approved by the House and we can send it to the President for his signature. Why is this our goal? Each week that goes by without this legislation being in place represents an opportunity for a terrorist to gain entry into the United States. We have to close the loopholes. Most of the actions the legislation calls for are going to take time to implement, so it is not as if we can slam the door shut the minute the President signs the bill. We have to put into place procedures, for example, whereby the FBI, CIA, international organizations, and others can all make available, to the people who grant visas, information that bears upon the qualifications of the people seeking entry to the United States, people who apply for the visas—information that might suggest, for example, that there is a connection with a terrorist group and therefore the visa ought to be denied.

That is going to take time to implement, as will other provisions of the legislation. So time is wasting. We know there is no—I was going to state it in the negative. I was going to say there is no evidence the terrorists have given up the ghost here. I think there is a lot of evidence that they will try to strike us when they believe they can, and when they see us as having a point of vulnerability. That is why we have to begin to close these windows of vulnerability as soon as possible.

The head of the INS has indicated he thinks some of the timeframes for achievement of results under this legislation may even be pretty difficult for INS to meet, which is to say it is all the more important to begin now to close these loopholes because it is going to take a while to get everything