

Ethics for an Outsourced Government

Kathleen Clark

John S. Lehmann Research Professor of Law
Washington University in St. Louis
kathleen_clark@mac.com

University of Baltimore

October 2012

Acknowledgment

(my own conflict of interest?)

Contract with the

Administrative Conference of the United States

(ACUS)

Methodology

90+ interviews with:

- Executive Branch officials:
 - » Ethics
 - » Procurement
- Government Investigators
 - » IGs
 - » GAO
- Contractors & their trade associations
 - » Professional Services Council (PSC)
 - » Defense Industry Initiative (DII)
- NGOs
 - » good government groups
 - » unions
- Hill staffers
- False Claims Act lawyers

An Illustration of the Problem

Dan Jester

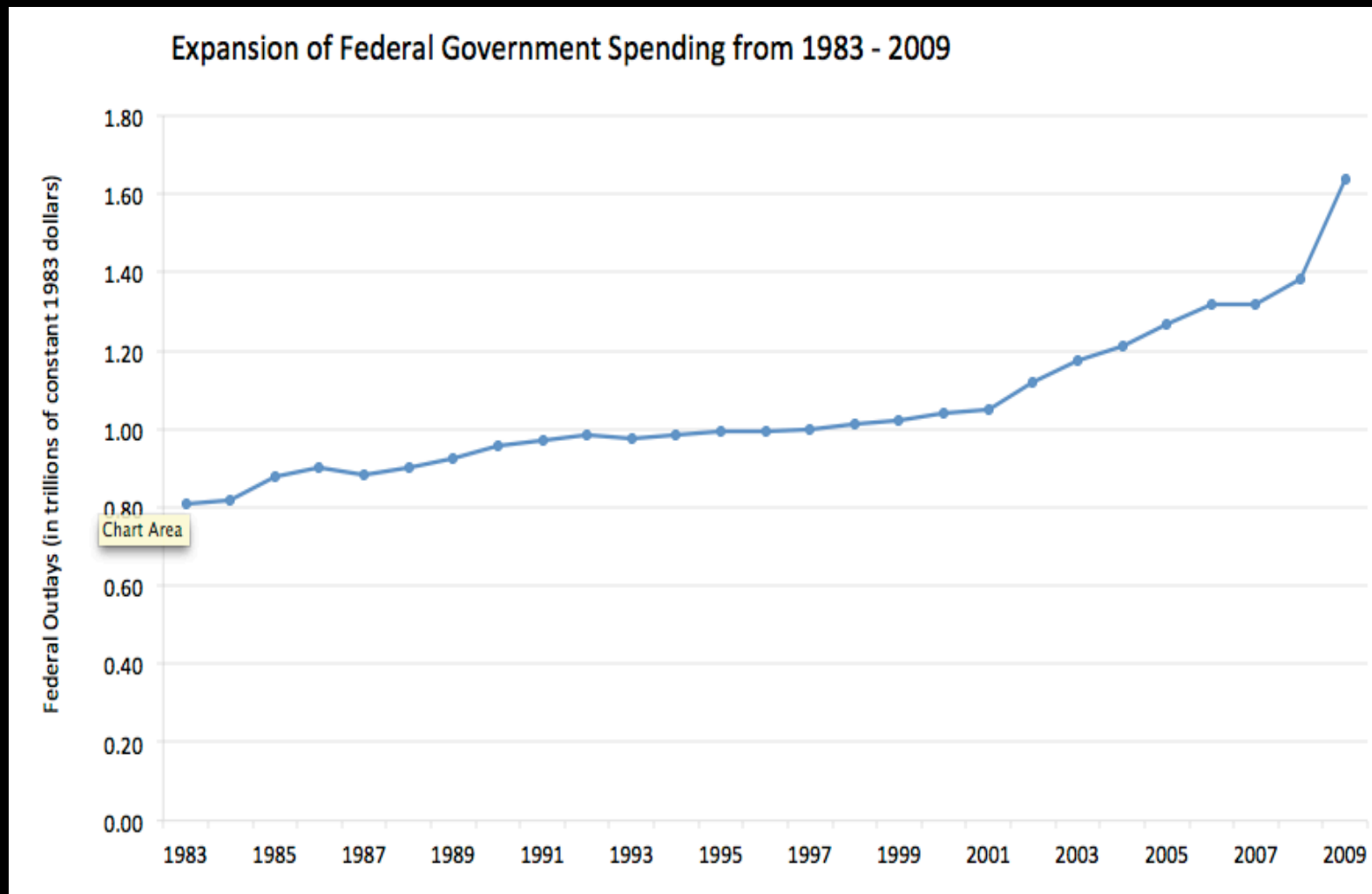
- Advised Treasury on AIG bailout
- Owned Goldman Sachs stock
- Handled AIG bailout in a way that benefited Goldman Sachs -- and himself

Criminal Conflict of Interest Statute

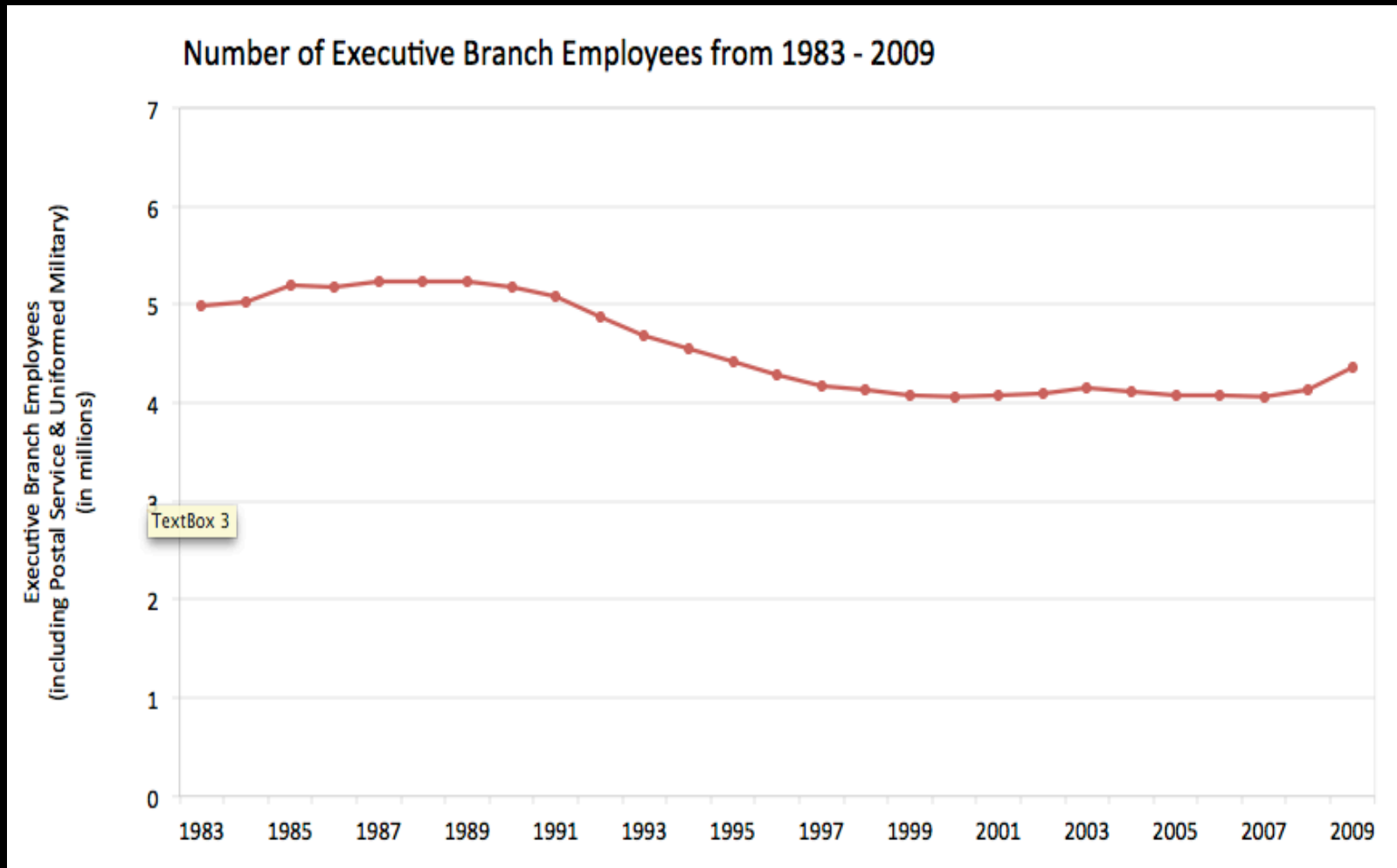
18 U.S.C. § 208(a) (excerpt)

“ officer or employee
of the **executive branch** . . .
participates personally and substantially . . .
through . . . the rendering of **advice**, . . .
in a . . . particular matter in which, . . .
he . . . has a financial interest”

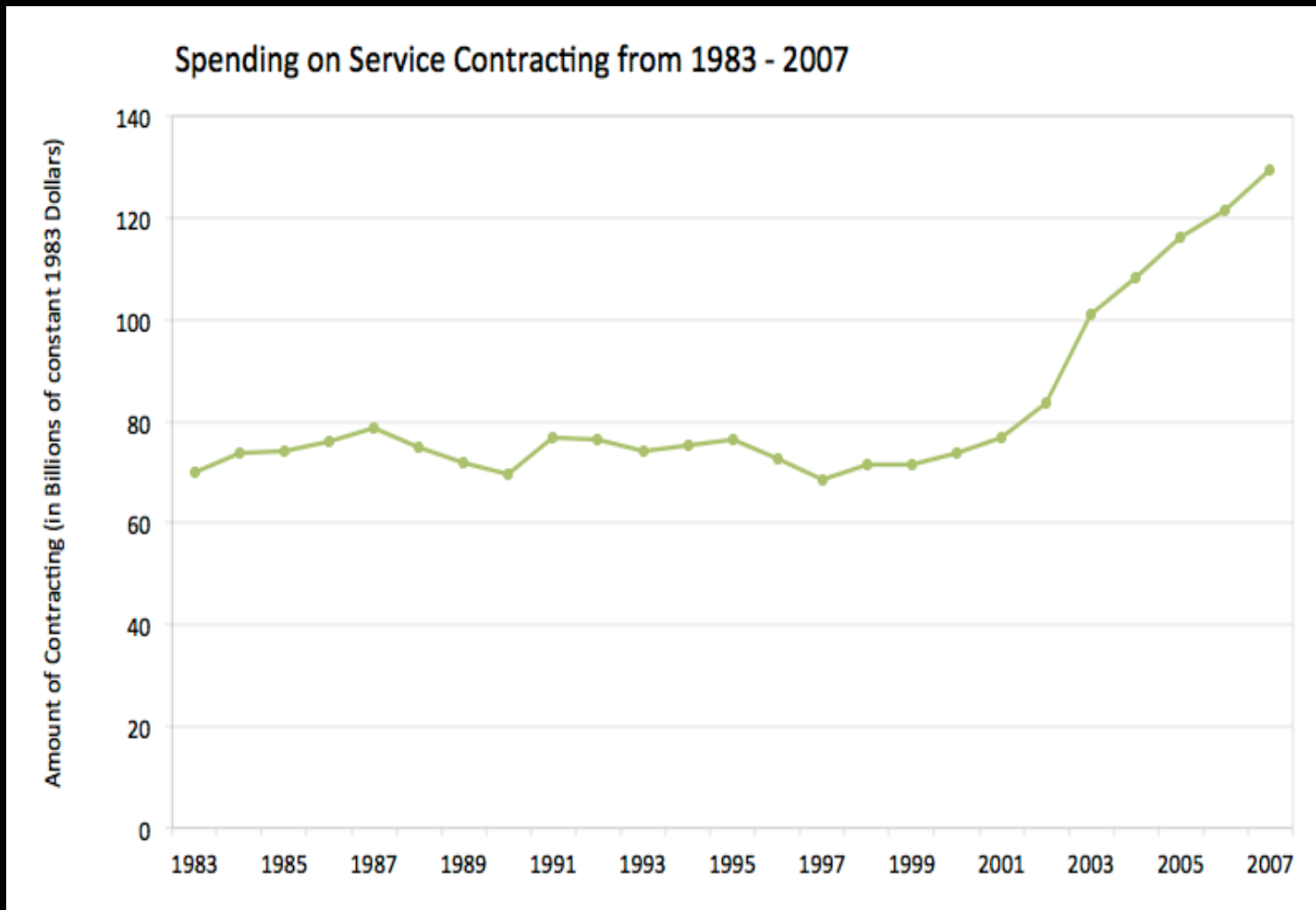
Federal Government Spending



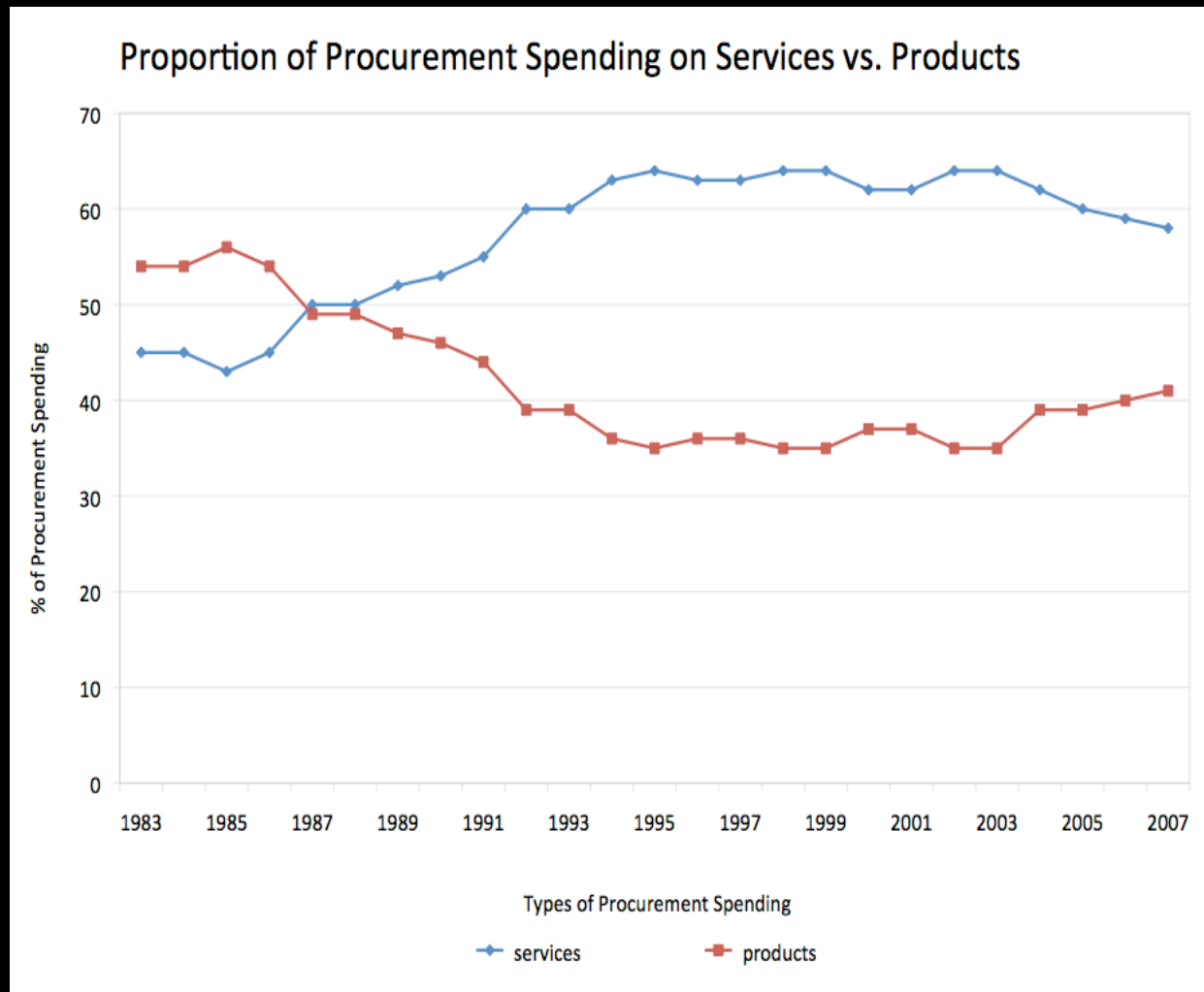
Number of Federal Employees



Spending on Service Contracting



Spending on Services v. Products



Ethics Restrictions on Government Employees

- financial influences
- use of government position
- outside activities
- post-government employment
- pre-government employment

One Size Does Not Fit All

- Stricter Ethics Rules for Employees in Sensitive Positions
 - High-Level Officials
 - Procurement Officials
 - Bank Examiners
- Looser Rules for Temporary Employees
 - “Special Government Employees” or SGEs

Principles Underlying Government Ethics Restrictions

- (1) **Fiduciary** nature of public office
- (2) **Public's confidence** in government
- (3) Congressional and executive
branch **control** of federal resources
- (4) Devote **adequate attention**

Few Ethics Restrictions on Government Contractor *Personnel*

- A few agencies have *narrow* regulations re: contractor employee Personal Conflicts of Interest (“PCI”)
- Government-Wide Regulations re: Contractors’ *Organizational* Conflicts of Interests (“OCI”)
- Contractors’ Internal Ethics Codes

Exception: FDIC

- Deems contractor personnel who are supervised by government managers to be government employees
- Comprehensive ethics regulations for its contractors' personnel
 - *Financial influences*
(including interests of close family members)
 - *Misuse of government resources*
(including information)
 - *Outside activities*
 - *Post-employment*

ACUS Recommended:

Optional FAR clauses for contracts with high risk of:

- personal conflicts of interest (COIs) or
- misuse of certain non-public information.

Contractors must:

- **train** employees to recognize their own COIs
- require employees to **report COIs internally**
- **screen** conflicted employees from contract work
- **disclose to government** employee misconduct (& resulting discipline)

Recent Development: **New FAR Clause on PCI**

Contractor personnel who perform

acquisition functions

closely associated with

inherently governmental functions

Articles

***Fiduciary Standards for Bailout Contractors:
What Treasury Got Right and Wrong in TARP,***

95 Minn. L. Rev. 1614 (2011)

***Financial Conflicts In and Out of Government:
Ethics, Employees and Contractors,***

62 Alab. L. Rev. 955 (2011)

What's next?

Suggestions?

Questions?