

**IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

LARRY KLAYMAN, *et. al*

Plaintiffs,

v.

BARACK HUSSEIN OBAMA II, *et. al*

Defendants.

Civil Action Nos. 13-cv-851
&
13-cv-881

**MOTION TO SUPPLEMENT THE RECORD CONCERNING RECENT ANONYMOUS
NSA PUBLIC DISCLOSURES OVER METADATA COLLECTION**

Plaintiffs hereby advise the Court, and move to place on the record, recent calculated disclosures of misleading and false national security information by the National Security Agency (“NSA”) and other former and current intelligence officials designed to try to influence judicial and other authorities, as well as congressional oversight. Specifically, as set forth in the attached public disclosures by so-called anonymous sources of the Defendants in the Washington Post, New York Times and elsewhere (Exhibits 1), the NSA now conveniently claims that its metadata collection is very limited. This contradicts previous material disclosures and forced admissions of the agency and the other Defendants, as well as whistleblower Edward Snowden, and is a reason why this Court, to clear up these contradictory NSA disclosures concerning metadata collection and to uncover the truth, should respectfully not stay this case and order discovery to proceed forthwith, through suitable means to protect national security. Given their

disclosures, however, misleading and obviously false¹, it would appear that the Defendants feel free to make these calculated disclosures which compromise national security and which if made by ordinary citizens would constitute serious felonies, while persons like whistleblower Snowden are threatened with imminent prosecution.

Defendants oppose this motion.

Dated: February 10, 2014

Respectfully submitted,

/s/ Larry Klayman
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Attorney for Himself, Pro Se, and Plaintiffs

¹ As set forth in prior pleadings on this Court's record, Defendants have a long history and pattern of being reprimanded by courts and Congress for repeatedly making misleading, false and perjurious statements regarding their metadata collection.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of February, 2014, a true and correct copy of the foregoing Motion to Supplement the Record Concerning Recent Anonymous NSA Public Disclosures Over Metadata Collection (Civil Action Nos. 13-cv-851 and 12-cv-881) was submitted electronically to the District Court for the District of Columbia and served via CM/ECF upon the following:

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Exhibit 1

National Security

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Courage that echoes from NFL to Russia



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NSA is collecting less than 30 percent of U.S. call data, officials say



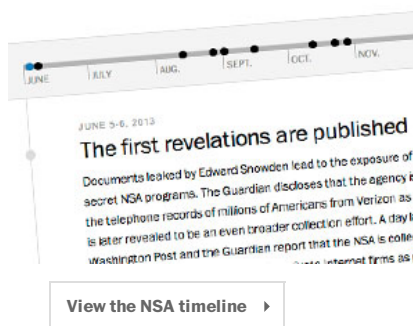
Patrick Semansky/AP - The NSA is preparing to seek court orders to compel wireless companies that currently do not hand over records to the government to do so, officials said.

By Ellen Nakashima, Published: February 7 [E-mail the writer](#)

The [National Security Agency](#) is collecting less than 30 percent of all Americans' call records because of an inability to keep pace with the explosion in cellphone use, according to current and former U.S. officials.

The disclosure contradicts popular perceptions that the government is sweeping up virtually all domestic phone data. It is also likely to raise questions about the efficacy of a program that is premised on its breadth and depth, on collecting as close to a complete universe of data as possible in order to make sure that clues aren't missed in counterterrorism investigations.

Revelations on the NSA



In 2006, a senior U.S. official said, the NSA was collecting "closer to 100" percent of Americans' phone records from a number of U.S. companies under a then-classified program, but as of last summer that share had plummeted to less than 30 percent.

The government is taking steps to restore the collection — which does not include the content of conversations — closer to previous levels. The NSA is preparing to seek court orders to compel wireless companies that currently do not hand over records to the government to do so, said the current and former officials, who spoke on the

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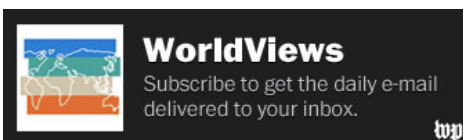
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Greg Miller 2:55 PM ET

The possible target is allegedly part of the al-Qaeda network overseas and involved in plots against Americans.

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□

Adam Goldman 10:37 AM ET

A 13-year hunt for a man once thought to be close to Osama bin Laden ended in October when U.S. special forces nabbed him in a covert operation in Libya.

Finally, a shield for the 'hunted'

□

Sari Horwitz FEB 8

The law targets virtual immunity for non-Indians who rape or assault women on reservations.

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condition of anonymity to discuss internal deliberations.

That effort comes in the wake of President Obama's [decision last month](#) to find a way to move the data out of the government's hands to assuage concerns about intrusions on privacy. Obama has given the Justice Department and the intelligence community until March 28 to come up with a plan.

The actual percentage of records gathered is somewhere between 20 and 30 percent and reflects Americans' increasing turn away from the use of land lines to cellphones. Officials also have faced technical challenges in preparing the NSA database to handle large amounts of new records without taking in data such as cell tower locations that are not authorized for collection.

That low percentage still probably represents tens of billions of records going back five years, a cause of great concern to privacy and civil liberties advocates. "For innocent Americans, 20 or 30 percent is still a significant number and will chill legitimate lawful activities," said Christopher Soghoian, chief technologist for the American Civil Liberties Union.

In defending the program, administration officials have emphasized the need to gather all records. "If you're looking for the needle

in the haystack, you have to have the entire haystack to look through," Deputy Attorney General James Cole told Congress in July.

Edward Felten, a Princeton University computer scientist who has studied the program from a technological perspective, said the revelation "calls into question whether the rationale offered for the program is consistent with the way the program has been operating."

But collection of even a quarter of the records is valuable, officials say.

"It's better than zero," NSA Deputy Director Rick Ledgett said Thursday in an interview, without describing the program's exact scope. "If it's zero, there's no chance."

One former senior official acknowledged that 100 percent was the goal but asserted that as long as the collection "is fairly spread across the different vendors in the geographic area that you're covering," the collection provides value.

The NSA, for instance, is still able to obtain the call records of some customers whose phone companies are not covered by the program. When the customers of a non-covered carrier call customers of a covered carrier, the latter's records should reflect both ends of the call.

Some industry officials said that the 20 to 30 percent figure can only be explained if the NSA is also missing records from companies that provide Internet-based calls.

According to industry and government figures, the number of land lines in use fell from 141 million in 2008 to 96 million in 2012, a 32 percent drop. By contrast, the number of cellphones in use in the United States jumped from 255 million in 2007 to 326 million in 2012, a 28 percent rise. And Internet-based subscribers, according to the Federal Communications Commission, doubled from 21 million in 2008 to 42 million in 2012.

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The NSA collection program began without court or congressional approval after the Sept. 11, 2001, attacks but was placed under court supervision in 2006 when American phone companies balked at providing the data solely at the request of the executive branch.

Under the program, the NSA receives daily transfers of call “metadata” from several of the nation’s largest phone companies. Those records include numbers called and the calls’ time and duration but not the content of conversations, subscriber names or cell tower location data.

The bulk collection began largely as a land-line program, focusing on carriers such as AT&T and Verizon Business Network Services. At least two large wireless companies are not covered — Verizon Wireless and T-Mobile U.S., which was first reported by the Wall Street Journal.

Industry officials have speculated that partial foreign ownership has made the NSA reluctant to issue orders to those carriers. But U.S. officials said that was not a reason.

“They’re doing business in the United States; they’re required to comply with U.S. law,” said one senior U.S. official. “A court order is a court order.”

Rather, the official said, the drop in collection stems from several factors.

Apart from the decline in land-line use, the agency has struggled to prepare its database to handle vast amounts of cellphone data, current and former officials say. For instance, cellphone records may contain geolocation data, which the NSA is not permitted to receive.

“It’s not simply the ability to go to the court and order some vendor to give you more records, but you have to make sure that the [agency’s collection system] is prepared and ready to take the data and meet all the requirements of the court,” the former official said. “You don’t want to turn it on and get hundreds of millions of records, only to find out that you’ve got the moral equivalent of raw sewage spilling into the Chesapeake Bay.”

The process of preparing the system can take months, said the senior U.S. official, adding that mobile calls have different data elements than land-line calls. “That’s a really detailed set of activities where we get sample data in, and we march it through our systems,” the official said. “We do that again and again and again. We put in auditing procedures to make sure it works. So before we turn on that mobility data, we make sure it works. . . . It’s very complex.”

Compounding the challenge, the agency in 2009 struggled with compliance issues, including what a surveillance court found were “daily violations of the minimization procedures set forth in [court] orders” designed to protect Americans’ call records that “could not otherwise have been legally captured in bulk.”

As a result, the NSA’s director, Gen. Keith Alexander, ordered an “end-to-end” review of the program, during which additional compliance incidents were discovered and reported to the court. The process of uncovering problems and fixing them took months, and the same people working to address the compliance problems were the ones who would have to prepare the database to handle more records.

The NSA fell behind, the former official said.

In June, the program was revealed through a leak of a court order to Verizon by former NSA contractor Edward Snowden, setting off [an intense national debate](#) over the wisdom and efficacy of bulk collection.

The same NSA personnel were also tasked to answer inquiries from congressional overseers and others about how the program and its controls worked. “At a time when you’re behind, it’s hard to catch up,” the former official said.

Storage and implementing new features to comply with court requirements also cost money, and that has been difficult in an era of budget cutbacks, the former official said.

The agency did not go to the court to seek new orders, because it was not prepared, officials

said.

“Until you are sure that you have an architecture that has the right features and the right capacity, you wouldn’t go to the time and trouble of getting the court to authorize the collection and retention of the data,” the former official said. “Because the court would want to know that you’ve followed through on that and you had a material intent to get it and use it.”

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j.gordon wrote:

2/7/2014 8:22 AM PST

So, let's say you had a store, and local mobster was illegally shaking you down for protection. He came around with a bag and asked for all the money in your till at gunpoint, however he could only shove a third of it into the bag he had with him. He commented "I need a bigger bag" and wandered off. You called the police and they came to your store, and said "what are you upset about? He only took 30%"

I'm pretty sure that the mobster intends to buy a bigger bag for next time. Just sayin...



foozu responds:

2/7/2014 1:16 PM PST

This.

Would it be OK if the local cops only illegally beat you up 30% of the time? I mean, that's 7 in 10 times you DON'T get a free trip to the hospital because some cop felt like it. I should feel grateful, right?

Seriously, this article has to be one of the most ludicrous justifications I've ever read. Just because they're not doing it to **everyone** doesn't make it OK to do it to **anyone**. Especially since every indication that the only limit on the NSA's willingness to spy is opportunity - if they had the money, they'd spy on everyone.



Prof-Dr-G wrote:

2/7/2014 11:00 AM PST

The Constitution says that the target for collected calls is 0%

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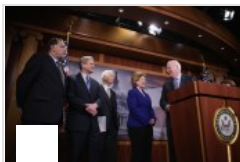
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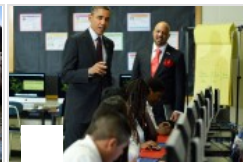
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POLITICS

N.S.A. Program Gathers Data on a Third of Nation's Calls, Officials Say

By CHARLIE SAVAGE FEB. 7, 2014

WASHINGTON — The National Security Agency's once-secret program that is collecting bulk records of Americans' domestic phone calls is taking in a relatively small portion of the total volume of such calls each day, officials familiar with the program said on Friday.

While the agency is collecting a large amount of landline phone data, it has struggled to take in cellphone data, which has undergone explosive growth in recent years and presents additional technological hurdles, the officials said.

The revelation came days after the nation's secretive Foreign Intelligence Surveillance Court approved President Obama's proposal to impose new restrictions on when and how analysts with the N.S.A. may gain access to the raw database containing the bulk phone records, according to the Office of the Director of National Intelligence.

The bulk call records program began under the Bush administration and was based on claimed wartime powers. In 2006, the program was brought under the surveillance court's authority. It came to light after leaks by the former N.S.A. contractor Edward J. Snowden.

On Friday, The Washington Post reported that the N.S.A. is currently taking in data on less than 30 percent of phone calls. The article also said the agency had been collecting nearly all records about Americans' phone

calls in 2006, and that the N.S.A. was now trying to restore comprehensive coverage.

Officials partly confirmed The Post's report, although they said it was difficult to put a precise number on the percentage. But they disputed that the agency had ever had near-universal access to phone data, saying cellphone records have always presented problems.

The Wall Street Journal reported in June that T-Mobile and Verizon Wireless were not part of the N.S.A.'s data collection, and a report on surveillance policy last month by a review group appointed by Mr. Obama said that while the program "acquires a very large amount" of phone data each day, that was still "only a small percentage of the total" calls.

One official said intelligence agencies have quietly chafed at assumptions that the N.S.A. was collecting all phone records. But they have been reluctant to correct the record because they did not want to draw attention to the gap and because it is, in fact, the agency's goal to overcome technical hurdles that stop them from ingesting them all.

The greater attention to the gap puts new light on claims about the effectiveness of the program. Critics say the gap may undermine the argument that the program, as it currently exists, can provide peace of mind about links to potential terrorists: a negative result might instead mean only that the data was missing.

Supporters, however, say the gap might undermine the argument that the program is ineffective because it has thwarted no attacks and uncovered only a minor case in which some men sent several thousand dollars to a Somali terrorist group.

"We should have a debate about how effective would it be if it were fully implemented," one official said.

In a speech last month, Mr. Obama announced that he intended to find a way to get the government out of the business of holding onto the bulk records, but he also said that its capabilities should be preserved.

Mr. Obama also announced that he wanted to immediately impose new limits on how the database is used, by requiring the N.S.A. to wait for

a judge on the surveillance court to sign off before querying records associated with a number that is suspected of links to terrorism — except in emergencies — and by limiting analysts to only pulling up records of people who are up to two levels removed from that number.

Previously, the surveillance court had allowed the N.S.A. to decide that a search was justified, and had let analysts go up to three levels out — meaning an exponentially larger number of people's calls would be scrutinized.

On Wednesday, according to a statement issued late Thursday in the name of James R. Clapper Jr., the director of national intelligence, the surveillance court issued an order amending the rules in line with Mr. Obama's proposed changes.

On Friday, a judicial clerk announced that Chief Justice John G. Roberts Jr. had made his first selection to the main Foreign Intelligence Surveillance Court since Mr. Snowden's revelations about spy programs that had been secretly approved by the court.

The leaks have focused greater attention on how Chief Justice Roberts has used his unilateral authority to select judges to serve seven-year terms on the court. Of the 11 judges currently serving — all appointed by Chief Justice Roberts — 10 had been appointed to judgeships on other federal courts by Republican presidents.

But in May, when the term expires for Judge Reggie B. Walton of the District of Columbia, Chief Justice Roberts has selected an Obama appointee, Judge James E. Boasberg, also of the District of Columbia, to fill the position until 2021. Judge Boasberg, a former federal prosecutor, was appointed to the Federal District Court by Mr. Obama in 2011. He has handled several cases involving national security and secrecy matters since joining the court.

In 2012, for example, he sided with the Central Intelligence Agency, and rejected a Freedom of Information Act lawsuit seeking public disclosure of photographs of the corpse and burial of Osama Bin Laden.

But last year, Judge Boasberg ruled against the Department of

Homeland Security, saying it had to release documents explaining a secret policy about the government's ability to shut down commercial and private wireless network services in certain circumstances. The Obama administration has appealed the ruling.

Chief Justice Roberts also selected Judge Richard C. Tallman, of the United States Court of Appeals for the Ninth Circuit, to fill a vacancy on the three-member review panel that hears rare appeals of the surveillance court's rulings.

While Judge Tallman was appointed by President Bill Clinton, his nomination was part of a political deal over judicial nominations in which his seat would go to a person acceptable to Senator Slade Gorton, Republican of Washington.

Several members of Congress have proposed changing the way judges are selected to serve on the court to achieve greater ideological diversity in light of its evolving role and growing power, and Mr. Obama's surveillance review group also recommended doing so.

A version of this article appears in print on February 8, 2014, on page A11 of the New York edition with the headline: N.S.A. Program Gathers Data on a Third of Nation's Calls, Officials Say.

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NSA phone data collection far more limited than had been disclosed

The National Security Agency collects phone data from less than a third of U.S. calls, officials say, which may undermine the assertion that the program is essential for fighting terrorism.



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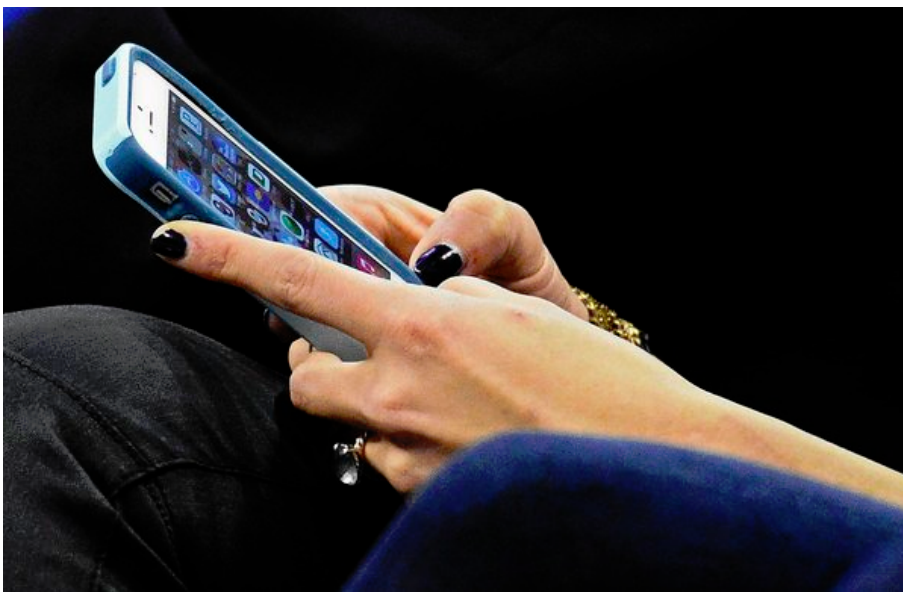
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The NSA phone data collection program is far less pervasive than it had appeared, because authorities cannot keep pace with cellphone use, officials said. (Larry W. Smith / European Pressphoto Agency / January 17, 2014)

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By Ken Dilanian

February 7, 2014 | 7:58 p.m.

WASHINGTON — Although U.S. intelligence officials have indicated since last summer that the National Security Agency was vacuuming up nearly every American telephone record for counter-terrorism investigations, officials acknowledged Friday that the spy agency collects data from less than a third of U.S. calls because it can't keep pace with cellphone usage.

In a speech last month, President Obama called the bulk collection of telephone records the most controversial part of the debate over security and privacy sparked by former NSA contractor Edward Snowden's leaks of classified material. Obama announced plans to impose greater judicial review on the program and to limit how it can be used.

But the NSA operation now seems far less pervasive than it appeared, raising questions about whether it is as essential a terrorist-fighting tool as the NSA and its supporters have argued.

Rather than sweeping in all U.S. call records, officials said, the NSA is gathering toll records from most domestic land line calls, but is incapable of collecting those from most cellphone or Internet calls. The details were first disclosed by the Washington Post.

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The officials, who spoke on condition of anonymity because much of the program remains classified, said they did not correct the public record because they did not want to tip off potential adversaries to obvious gaps in the coverage.

"We didn't want to tell the bad guys to go out and get a cellphone," one senior intelligence official said.

The NSA aims to build the technical capacity over the next few years to collect toll records from every domestic land line and cellphone call, assuming Congress extends authority for Section 215 of the USA Patriot Act after it expires in June 2015.

Once the capacity is available, the agency would seek court orders to require telecommunications companies that do not currently deliver their records to the NSA to do so. The records contain phone numbers, times and lengths of each call, but not the content or anyone's name.

Civil liberties activists said the new disclosure did not change their view that the NSA database of billions of domestic call records was unnecessary and could lead to government abuse.

"I don't find this revelation very reassuring," Jameel Jaffer, deputy legal director of the American Civil Liberties Union, said in an email. "To accept their legal reasoning is to accept that they will eventually collect everything, even if they're not doing so already. They're arguing that they have the right to collect it all."

The NSA declined to discuss the gap. "While we are not going to discuss specific intelligence collection methods, we are always evaluating our activities to ensure they are keeping pace with changes in technology," Vaneé M. Vines, a spokeswoman, said in a statement.

Two of the most vocal congressional critics of the NSA program, Sen. Ron Wyden (D-Ore.), who sits on the Senate Intelligence Committee, and Sen. Patrick J. Leahy (D-Vt.), who heads the Senate Judiciary Committee, had no comment Friday, according to their aides. Both of those committees were informed of the coverage gap, officials said.

Other senior officials apparently were not told, however, or did not understand the program's reach.

A federal judge in New York who ruled in December that the government's collection of customer records from telecommunications companies was legal, for example, indicated that he believed the NSA operation covered virtually every domestic call.

"The blunt tool only works because it collects everything," District Judge William H. Pauley wrote. He said the government had invoked legal authority to collect "virtually all call detail records."

And in written testimony to the House Judiciary Committee this week, David Medine, chairman of the Privacy and Civil Liberties Oversight Board, which received classified briefings on the NSA systems and issued a lengthy report to Obama last month, said the program involved "ongoing collection of virtually all telephone records of every American."

Medine did not respond to a request for comment Friday.

By contrast, a presidential task force that included former acting CIA Director Michael Morell and former White House counter-terrorism advisor Richard Clarke hinted at the collection gap in a line buried in its 303-page report on NSA surveillance operations.

"The total amount of data collected and retained in the hypothetical version of Section 215 is much greater than the total amount of data collected and retained in the actual version," it said, adding that the NSA collects "only a small percentage of the total telephony metadata held by service providers."

The task force concluded that the phone records program "has contributed to its efforts to prevent possible terrorist attacks" at home and abroad but "was not essential to preventing attacks."

"One of the things that convinced us that the program couldn't be all that useful was that they weren't doing much with it and they weren't spending much money on it," said a source familiar with the inquiry, who declined to be identified when discussing confidential briefings. "It never appeared to us as a program they had valued very highly."

When White House officials told board members that the phone records were useful in ruling out participation by Americans in international terrorism plots, the board members responded, "How could you possibly clear somebody based on a database that didn't include the majority of the phones in the country?" the source said.

The NSA program was begun without court or congressional approval after the Sept. 11, 2001, terrorist attacks. A former senior NSA official said the agency obtained nearly all domestic call records from late 2001 through at least 2006, when the program was brought under the supervision

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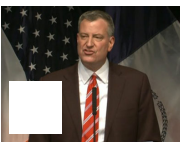
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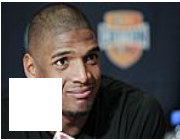
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of the Foreign Intelligence Surveillance Court.

But in recent years, the explosive growth of mobile devices outpaced the NSA's capacity to digest the data. And American use of land line phones has plummeted: Less than half of U.S. households have or use a land line, according to the Centers for Disease Control and Prevention.

In his Jan. 17 speech, Obama said the collection of phone records was "designed to map the communications of terrorists" operating in the United States.

Although he said no abuses had been found, Obama said he would order a transition to end the program as it currently exists to ease concerns of potential abuses. The changes already have begun.

As of Thursday, the NSA must get a judge's approval each time it queries the database, not just the approval of a senior NSA official, as in the past, unless an emergency is underway. In addition, NSA analysts can pursue only phone calls that are two steps removed from a terrorist organization instead of three.

But Obama has found it more difficult to move the database out of government hands, as he also called for.

Telephone companies don't want to hold the vast data cache for the government, and the use of government contractors raises privacy and security concerns. Obama has given the intelligence community and the Justice Department a March 28 deadline to come up with a plan.

ken.dilanian@latimes.com

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G. W. Bush, the Decider at 1:36 AM February 09, 2014

This article attempts to moderate just-in-case, ubiquitous spying when, in fact, any warrantless spying such as being done by the NSA is not limited enough. It should be zero. It does not matter that corporations may be spying on us at will because we give consent. We do not give big gub'mnt consent. That's the difference. There is no way to opt out from the NSA's big gub'mnt spying when there should be only an opt in.

Parasomnia at 12:44 AM February 09, 2014

NSA phone data collection far more limited than had been disclosed
Tell me another one grandma...what kind of horses\$% do they think we'll buy?

dfordla at 9:57 PM February 08, 2014

You believe that, I got a good deal on a Bridge in Brooklyn for you.

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