

Intelligence Oversight

Ensuring accountable intelligence within a framework of democratic governance

About this series

The SSR Backgrounders provide concise introductions to topics and concepts in good security sector governance (SSG) and security sector reform (SSR). The series summarizes current debates, explains key terms and exposes central tensions based on a broad range of international experiences. The SSR Backgrounders do not promote specific models, policies or proposals for good governance or reform but do provide further resources that will allow readers to extend their knowledge on each topic. The SSR Backgrounders are a resource for security governance and reform stakeholders seeking to understand, but also to critically assess, current approaches to good SSG and SSR.

About this SSR Backgrounder

This SSR Backgrounder explains how the principles of democratic control and oversight can be applied to intelligence services. Oversight of intelligence matters, because intelligence services can pose a threat to democratic governance, the rule of law and human rights, even while acting in the public interest. Applying the principle of good security sector governance through a system of democratic control and oversight ensures intelligence services are both effective and accountable while providing security for the state and for its people.

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Why is democratic oversight of intelligence important?

When intelligence services are held accountable for fulfilling their legal mandate, both their legitimacy and their effectiveness are bolstered. Democratic oversight is crucial, to protect against abuse of power by ensuring respect for democratic governance, the rule of law and human rights, including gender equality. Democratic oversight also protects intelligence services from political abuse and can help create well-resourced, meritocratic and non-discriminatory workplaces for intelligence professionals. For these reasons, applying the principles of good governance to intelligence requires that every aspect of intelligence activity, including legal, operational, financial and administrative practices, be subject to democratic control and oversight.

How does democratic oversight of intelligence work?

Oversight of intelligence services assesses their performance, integrity and compliance with the law as well as the quality of both executive and internal control.

Key questions in intelligence oversight include:

- Are intelligence officials working within their mandate and the rule of law?
- Do they have sufficient legal powers, budget and personnel to fulfil their mandate?
- What problems have arisen from an intelligence activity or process?
- Have political leaders misused intelligence services?
- Do intelligence professionals provide impartial and objective analysis or is their analysis politicized?

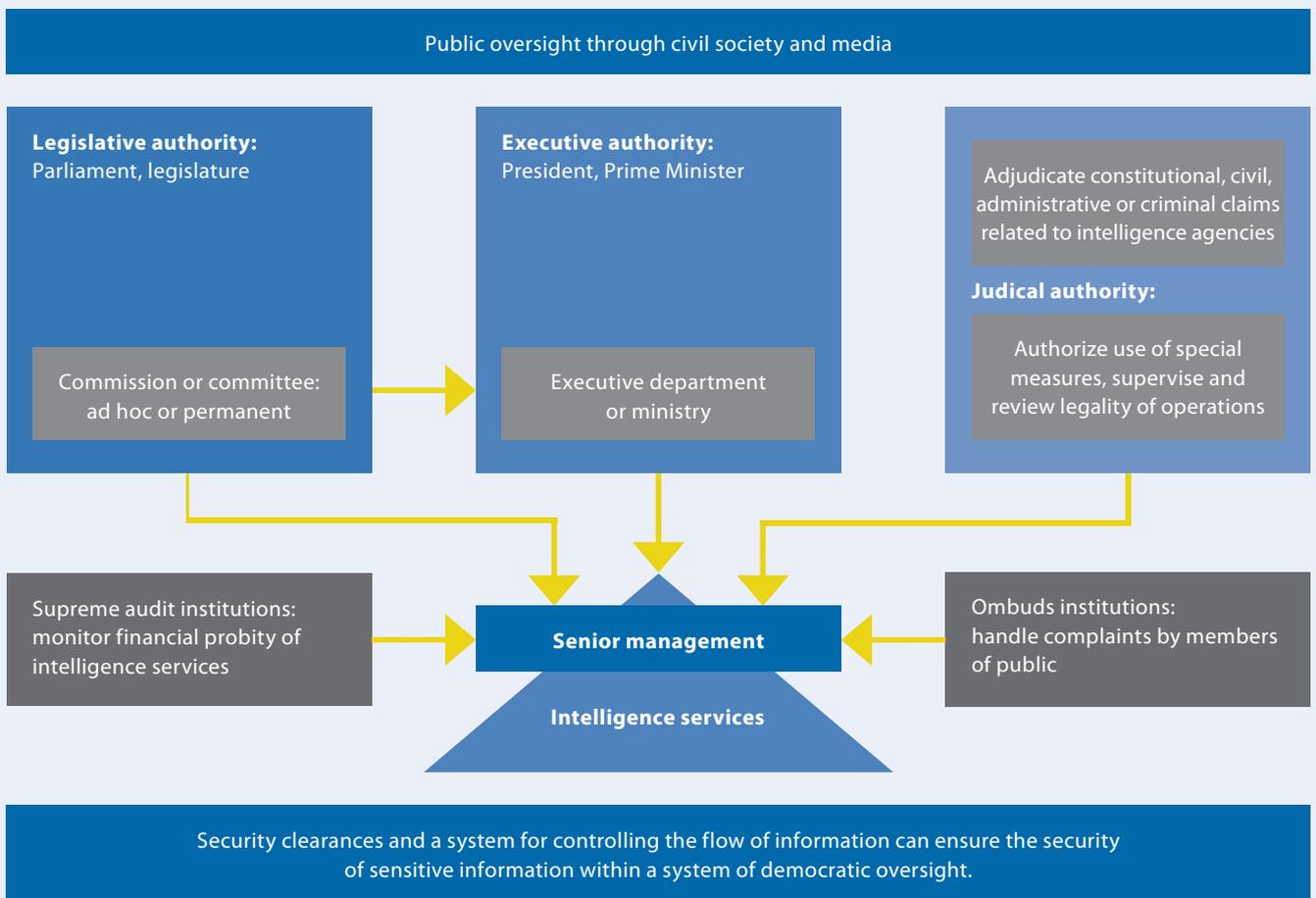
Figure 1 Oversight can happen before, during or after an intelligence operation



Different systems of government oversee intelligence in different ways. External oversight typically includes the executive, judicial and legislative branches of government – with corresponding parliamentary and expert oversight bodies – as well as senior management of the intelligence services, who provide internal control. Independent oversight may be conducted by ombuds institutions and supreme audit institutions, while civil society and the media generally guarantee public, or informal, oversight. Figure 2 provides a schematic structure for intelligence oversight.

► **Control and oversight: similar but different** Control implies the power to direct an organization’s policies and activities, for example by making rules, codes or policies that determine how an organization functions. Oversight means verifying whether rules and laws are obeyed and codes and policies are applied. Oversight can be undertaken by many different actors and institutions, while control is typically the responsibility of the executive branch. However, not all governments clearly distinguish between the two terms; thus, some oversight bodies may also possess certain control responsibilities, while control activities may also have an oversight function.

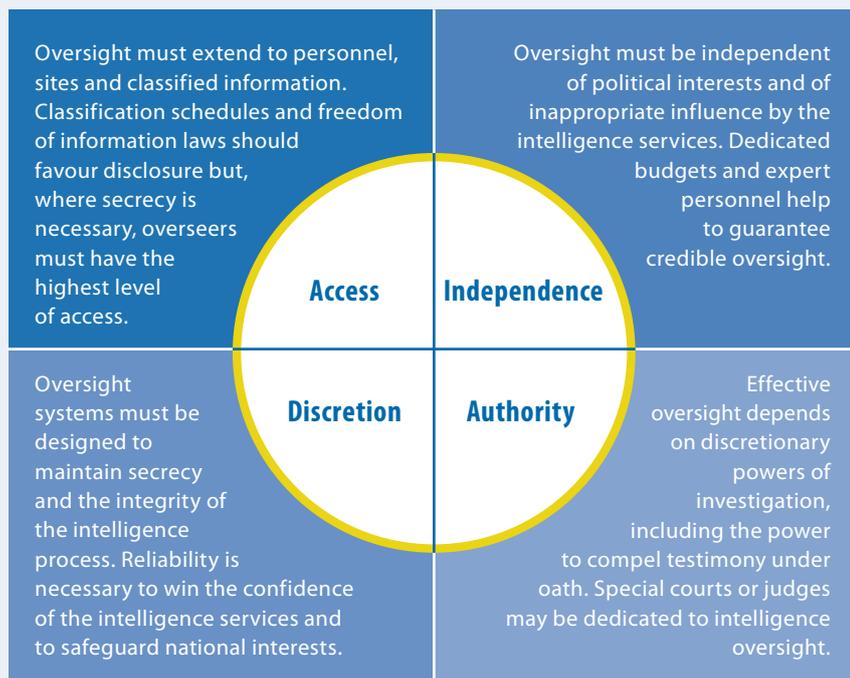
Figure 2 A broad range of state institutions have specialised roles to play in democratic control and oversight of intelligence



Oversight bodies must have the requisite powers and resources to fulfil their mandates effectively. Figure 3 describes the features of access, independence, discretion and authority that make intelligence oversight effective. Oversight bodies must have access to classified information, sufficient investigative powers and powers to authorize strategic intelligence programmes, budgets and/or top-level appointments. Effective oversight requires methods such as inspections, hearings, documentary analysis, interviews, witness statements and direct access to databases.

► **Good security sector governance (SSG) and security sector reform (SSR)** The principles of good SSG are accountability, transparency, the rule of law, participation, responsiveness, effectiveness and efficiency. Good SSG is a normative standard for how the state security sector should work in a democracy. **Applying the principles of good SSG to security provision is the goal of SSR.** SSR is the political and technical process of improving state and human security by making security provision, management and oversight more effective and more accountable, within a framework of democratic civilian control, the rule of law and respect for human rights. SSR may focus on only one part of public security provision or the way the entire system functions, as long as the goal is always to improve both effectiveness and accountability.

Figure 3 Effective democratic oversight of intelligence requires that overseers have both the mandate and the power to credibly assess the performance of intelligence services



What are typical challenges for democratic oversight of intelligence?

1. **Secrecy** Management, control and oversight of a large governmental bureaucracy is more complicated when there is a need for secrecy. Independent but interlocking oversight institutions with clear mandates for access to information can help overcome this problem.
2. **Discretionary authority** Intelligence professionals commonly have discretionary authority to make independent decisions, and make many such decisions in the course of their work. Effective oversight of these is time consuming and difficult. To ensure that independent decision-making is as sound as possible, it is important that management instills a culture of professionalism based on respect for good governance and the rule of law, including gender equality, at every level of the intelligence services.
3. **Political will** Because of the level of secrecy involved in the intelligence services (see SSR Backgrounder, "Intelligence Services"), ensuring their accountability is not necessarily useful for winning votes. This means that elected representatives may lack incentives to invest their time in legislative or executive oversight of intelligence. Political decision makers may also prefer to protect themselves from the consequences of certain decisions by preserving 'plausible deniability'. Oversight mechanisms can help protect intelligence services from this type of political manipulation by making clear who holds political responsibility for decisions made.
4. **Exaggerated threat perceptions** Perceived threats to national security can be used to justify actions that may be disproportionate to the threat and damaging to the principles of democratic governance, human rights and the rule of law. A high level of professionalism, political independence and effective oversight are necessary to ensure that intelligence analysis does not over- or under-estimate the danger of a threat to national security.
5. **International scope** International cooperation in intelligence extends the powers and activities of national intelligence services beyond the reach of national systems of control and oversight. Where

► Challenges for oversight and control in transitional contexts

Intelligence services are usually a crucial element in preserving authoritarian or totalitarian regimes, which means they can pose special challenges when carried over to new democracies:

- Information collected under a former regime may be used for blackmail, extortion or political manipulation.
- Seeking justice for past abuses may create an incentive for powerful interests to stall political transition.
- Impunity for former abuses can undermine new political institutions.
- Government officials, elected representatives, civil society and the media in transition states may be ill equipped or unwilling to scrutinize intelligence.
- The lack of a legal framework for democratic oversight and control, fragmentation of services and broad mandates of intelligence services make oversight difficult.

For all these reasons, excluding intelligence services from SSR in transition contexts can jeopardize both state and human security.

adequate information on international cooperation is unavailable or oversight powers do not reach beyond national jurisdiction, problems can occur. Defining the scope and nature of international cooperation can prevent abuses and bolster the credibility of national intelligence services.

6. **Technological developments** The technology used in intelligence work can advance more quickly than the mandates and powers for their oversight and control, leading to gaps in accountability. Technical experts can provide oversight bodies with crucial information, while legislatures need to ensure legal frameworks keep abreast of such changes.

How does internal control of intelligence contribute to good governance?

Internal control provides **rules and processes within an intelligence service to ensure staff perform professionally and effectively within the limits of their authority, in compliance with the law and with respect for human rights, including gender equality** – key pillars of good governance.

Internal control works through effective management to:

- Coordinate the process for assigning, reporting on and evaluating all intelligence activities as well as staff performance;
- Issue guidance for intelligence staff and ensure adherence to codes of conduct, regulations, legal standards and professional ethics;
- Identify and correct minor infractions, while ensuring major infractions are appropriately dealt with by the justice system or higher institutions of oversight, as appropriate.

A strong commitment to high standards of professional ethics is traditionally one of the most effective mechanisms for accountability in intelligence services.

How does executive control of intelligence contribute to good governance?

In a democracy the executive typically has two main control responsibilities over intelligence:

- An **operational responsibility** to establish overarching policies, priorities and budgets for intelligence services, authorize sensitive operations and initiate inquiries in cases of suspected misconduct. The executive also ensures that intelligence services are well equipped to contribute to national security within the larger framework of a national security policy;
- A **political responsibility** to parliament and the public to ensure the effective, accountable and legal conduct of intelligence services.

Both these responsibilities are key elements of good governance.

Executive control can be exercised directly or indirectly.

Intelligence functions situated within institutions such as the military or law enforcement agencies are usually supervised by sector-specific ministries or departments, such as defence, justice or the interior. Autonomously operating intelligence services often fall under the direct control of the executive, through the president or prime minister's office or a joint executive body such as a national security advisory board. (The SSR Backgrounder, "Intelligence Services" presents various institutional arrangements).

Finding a **balance between control and professional autonomy is key to both the effectiveness and accountability of intelligence services**. On the one hand, intelligence services should remain autonomous enough from executive control to be protected from undue political influence and be able to guarantee independent objective analysis. On the other hand, even relatively autonomous intelligence services must remain under the control of the government to ensure that they respect the rule of law and human rights and do not become a threat to the state or its population.

What role does parliament play in democratic oversight of intelligence?

Parliament sets the legal framework within which the intelligence services operate and monitors their compliance. Parliament may determine whether intelligence operations are legal and effective. It generally oversees administrative practices and financial management through control of the intelligence budget. In some countries, parliament must be informed of operational matters or might even have a role in authorizing and reviewing them. Such procedures can protect intelligence services from abuse by political authorities.

Parliament provides external oversight through expert bodies, which can have either a general or specific oversight mandate. Ideally, these bodies are permanent, but some countries use ad hoc bodies. Parliamentary oversight reviews both the activities of intelligence services and the quality of executive control. All of the features described in figure 3 are essential in making parliamentary oversight of intelligence effective.

Parliament is also responsible for ensuring that legal frameworks include commitments to gender equality. This includes appropriate recruitment and procedural requirements for intelligence services as well as oversight institutions, and the monitoring of their implementation. **The goal is to establish effective, inclusive and representative institutions that respect human rights in their operational and administrative responsibilities while addressing the different security needs of all men, women, boys and girls.**

► Elements of a legal framework for democratic oversight of intelligence

Democratic oversight and control depends on a legal framework that defines:

- Mandates for the intelligence services, including specific areas of responsibility and their limits;
- Permissible and non-permissible methods and activities and the restrictions imposed on their use, in particular any method and activity that may interfere with human rights;
- Organizational structures and modalities for cooperation between and among intelligence services both at home and abroad;
- Control and oversight mechanisms by which the services will be held accountable, including the executive, judicial and legislative branches of government as well as special independent bodies;
- Means for legal recourse in instances of complaint, abuse or violation of rights.

Establishing a sound legal framework for intelligence oversight is the responsibility of parliament; implementing that framework is the responsibility of the executive and the justice system.

How is the justice system involved in the control and oversight of intelligence?

Judicial control and oversight ensures intelligence services and political authorities adhere to the laws governing their behaviour and missions.

The justice system:

- **Authorizes and oversees the use of special powers** such as exceptional search, surveillance or detention. This typically involves ex ante authorization through warrants, for example, and/or ex post judicial review of special investigative measures (i.e. after their conclusion);
- **Adjudicates charges of misconduct, criminal activity or access to information** in intelligence-related matters. To ensure that secrecy does not lead to impunity, special judicial provisions can ensure that the law is applied even while protecting classified information. Courts also adjudicate access to sensitive information, through access to/freedom of information laws and classification schedules. Courts may also be required to settle cases involving accusations of unlawfully disclosed classified information, for example as the law applies to whistle-blowers;
- **Conducts judicial review**, which ensures all intelligence-related laws and policies created by the legislature or the executive are compatible with constitutional law;
- **Assists in parliamentary or executive oversight** by judicial officials (or retired members of the judiciary) contributing their expertise to parliamentary enquiries or oversight commissions or conducting investigations into past events at the request of the executive.

How can public oversight apply to intelligence?

Public interest journalism, academia and think tanks, as well as a wide range of civil society organizations focused on security sector and/or human rights issues, can provide public oversight of intelligence issues. The public can exercise direct political pressure on the government, while the media play a key role in increasing public awareness, directing government attention to important topics and exposing misconduct in intelligence. Scandal can lead to investigation and result in reform that improves the accountability and effectiveness of intelligence. **Through the media and civil society organizations, the public can demand more democratic accountability in intelligence. However, the effectiveness of public oversight depends on access to reliable information.**

Legal rules about the classification of information can reconcile accountability and transparency with reasonable secrecy, for example through:

- **Freedom of information laws** allowing public access to government-held data;
- **Classification schedules** that clearly define what, when and how long information may be kept secret, including a designated timeframe for its de-classification;
- **Whistle-blower protections** that allow intelligence personnel to reveal information that exposes misconduct – such as corruption, deception or mismanagement – to designated internal or external bodies without fear of punishment for violating their obligation to maintain confidentiality and obedience. At the same time, it is important they understand that such disclosures can compromise national security, even when serving a wider public interest.

Further resources

On the challenges of effective intelligence and its oversight in democracies:

- Born, Hans and Loch K. Johnson (2005)
Balancing Operational Efficiency and Democratic Legitimacy
In Hans Born, Loch K. Johnson and Ian Leigh (Eds.), *Who's Watching the Spies: Establishing Intelligence Service Accountability*. Dulles, VA: Potomac Books: 225-240.
- Born, Hans and Aidan Wills (Eds.). (2012)
Overseeing Intelligence Services: A Toolkit
Geneva: DCAF.
- Wills, Aidan (2015)
Democratic and Effective Oversight of National Security Services
Issue Paper. Strasbourg: Council of Europe.

On oversight and human rights challenges in intelligence oversight:

- United Nations (2010)
Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin: Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight
Human Rights Council Resolution A/HRC/14/46.
- Bastick, Megan (2014)
Integrating Gender into Oversight of the Security Sector by Ombuds Institutions & National Human Rights Institutions
Geneva: DCAF, OSCE, OSCE/ODIHR.

On the reform of intelligence services in transitional contexts:

- Bruneau, Thomas C. and Kenneth R. Dombrosky (2006)
Reforming Intelligence: The Challenge of Control in New Democracies
In Thomas C. Bruneau and Scott D. Tollefson (Eds.), *Who Guards the Guardians and How: Democratic Civil-Military Relations*. Austin: University of Texas Press: 145-177.

- Caparini, Martina and Hans Born (Eds.). (2013)
Democratic Control of Intelligence Services: Containing Rogue Elephants
Oxford: Routledge.
- Africa, Sandy and Johnny Kwadjo (Eds.). (2009)
Changing Intelligence Dynamics in Africa
Birmingham: University of Birmingham Global Facilitation Network for Security Sector Reform (GFN-SSR).

On the oversight of international intelligence cooperation:

- Born, Hans, Ian Leigh and Aidan Wills (2015)
Making International Intelligence Cooperation Accountable
Geneva: DCAF.
- Aldrich, Richard J. (2009)
Global intelligence co-operation versus accountability: New facets to an old problem
Intelligence and National Security, 24(1): 26-56.

More DCAF SSR resources

- DCAF publishes a wide variety of tools, handbooks and guidance on all aspects of SSR and good SSG, available free-for-download at www.dcaf.ch
Many resources are also available in languages other than English.
- The DCAF-ISSAT Community of Practice website makes available a range of online learning resources for SSR practitioners at <http://issat.dcaf.ch>

The **Geneva Centre for the Democratic Control of Armed Forces (DCAF)** is an international foundation whose mission is to assist the international community in pursuing good governance and reform of the security sector. DCAF develops and promotes norms and standards, conducts tailored policy research, identifies good practices and recommendations to promote democratic security sector governance and provides in-country advisory support and practical assistance programmes.

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Fairlie Chappuis

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Geneva Centre for the Democratic Control
of Armed Forces (DCAF)
P. O. Box 1360
CH-1211 Geneva 1
Switzerland

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