Defective Patent Deference

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The Supreme Court's deference to the Office of the Solicitor General in patent cases (among other intellectual property cases) is well-documented: What the Solicitor General requests, the Solicitor General typically receives. But we know far less about how the Solicitor General arrives at these preferred policy positions, or why the Solicitor General comes to advocate for some outcomes over others. This is problematic. In practically every other corner of the administrative state, an agency engages in substantive rulemaking—and earns substantial deference to its views—only where robust procedural protections attend to the policymaking process, where the agency's outcome reflects its substantive expertise, and where the agency may, through presidential election, be held politically accountable for its policy choices.

Not so in intellectual property law. The Patent Office, for example, has never claimed to exercise any substantive rulemaking power. Meanwhile, the Solicitor General develops and advocates for preferred patent policy outcomes, but behind closed doors, without deep expertise, and under the time constraints of appellate litigation. These shortcomings suggest that we should re-examine the Court's de facto deference to the Solicitor General. And these deficiencies counsel in favor of several reforms—most importantly, to the policymaking power of the Patent Office.