Do Deepfakes Pose Risks to 2024 Election?

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As AI has become ever present in our daily lives, its role in the 2024 election has sparked an ongoing debate along with changes to legislation. Election Day looms large, and concerns of AI-generated content, commonly known as deepfakes are increasing. Deepfakes are AI-generated images, audio, or video depicting a candidate saying or doing things they never did. With the goal of damaging that candidate's reputation and deceiving voters.[1] Both the Republican and Democratic parties have expressed concerns over deepfakes being used in election communications. As they have the potential to shake voter confidence and undermine election integrity. [2] Perhaps what is most concerning is that there is no comprehensive federal legislation to address this issue, leaving states to deal with the consequences.

This election has had its share of deepfakes, dating back to the primary season. Days before the New Hampshire primary, several New Hampshire voters received a robocall from what sounded like President Joe Biden's voice. And "he" was advising them not to vote in the primary and to save their vote for the general election.[3] The call included a common Biden catchphrase, calling the election "a bunch of malarkey," and told voters that "it's important that you save your vote for the November election."[4] The message also stated that "voting this Tuesday only enables the Republicans in their quest to elect Donald Trump again." As well as "your vote makes a difference in November, not this Tuesday."[5] The calls seemed legitimate to some voters because their caller IDs listed former New Hampshire Democratic Party chairwoman Kathy Sullivan.[6] Sullivan also works for a PAC which encouraged voters to write in Biden's name on the primary ballot.[7] Sullivan contacted the state's attorney general after she learned that recipients of this call saw her name on the caller ID.[8]

New Hampshire Attorney General John Formella issued a statement that described this robocall deepfake as an "unlawful attempt to disrupt the New Hampshire Primary Election" and to "suppress voters."[9] Following the incident, Formella launched a criminal investigation into a Texas-based company that was allegedly responsible for thousands of AI-generated calls impersonating President Biden.[10] Formella's investigation highlights the seriousness of

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[1] *Tracker: State Legislation on Deepfakes in Elections*, Public Citizen (2024), https://www.citizen.org/article/tracker-legislation-on-deepfakes-in-elections/ (last visited Sep 8, 2024) https://perma.cc/J334-QPE7.
[2] *Id.*
[3] Meryl Kornfield, *Fake Biden Robocalls Urge Democrats Not to Vote in New Hampshire Primary*, WASH. POST (Jan. 22, 2024 1:50 PM), https://www.washingtonpost.com/politics/2024/01/22/biden-robocall-new-hampshire-primary/ (last visited Sep. 08, 2024).
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] Cat Zakrzewski & Pranshu Verma, *New Hampshire Opens Criminal Probe Into AI Calls Impersonating Biden*, WASH. POST (Feb. 06, 2024 1:51 PM), https://www.washingtonpost.com/technology/2024/02/06/nh-robocalls-ai-biden/ (last visited Sep. 8, 2024).

deepfakes in the political process and the need for a serious response to fight this issue.

New Hampshire has since responded to these concerns with legislation targeted at combatting the misuse of AI-generated content in the election process. In July New Hampshire passed HB-1432, which prohibits certain uses of deepfakes, creates a private right of action, and prohibits registration of lobbyists who have been found to have fraudulently used deepfakes in certain cases.[11] This bill gives individuals a right to sue if they have been harmed by fraudulent deepfakes. The following month, the state passed HB-1596, requiring any political advertising using AI-generated content to include a clear disclosure. [12]

Several other states have also taken steps to regulate AI-generated content in elections. To curb this issue, state legislatures across the country have passed legislation to regulate deepfakes in election communication. Surprisingly this has been met with bipartisan support.[13] Prior to 2024, there were only five states with legislation on their books that regulated deepfakes.[14] California enacted laws that prohibit the distribution of misleading images, audio or video within 60 days of an election if they are intended to harm a candidates' reputation.[15] Just this year, more than a dozen states have passed legislation to regulate deepfakes in elections. Wisconsin enacted a law that requires any campaign audio or video content that includes AI-generated media to include a clear disclaimer.[16]

The federal government is notorious for being late to the party. There is currently no comprehensive federal legislation that directly addresses the use of AI-generated content in elections. The Federal Election Commission (FEC) has been slow to update its rules to prohibit the use of AI-generated content to misrepresent a candidate or political party's position.[17] Even if the FEC updates their rules, it may not have the desired impact, as it would only apply to campaigns and political parties—outside actors would not be included.[18]

The main concerns of AI-generated content in elections are whether the spreading of deepfakes could constitute a violation of election laws. The development of AI poses a myriad of serious threats to our democracy, from supercharging disinformation to making it easier to manipulate voters. [19] Without regulation, deepfakes are likely to confuse voters and undermine confidence in elections.[20] The legal implications of deepfakes in elections are vast, considering this is a novel problem.

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[11] HB 1432, 2024 Leg. Sess. (N.H. 2024).
[12] HB 1596, 2024 Leg. Sess. (N.H. 2024).
[13] *Id.*
[14] *Id.*
[15] California Assembly Bill No. 730, 2019–2020 Reg. Sess. (Cal. 2019).
[16] Wis. Assembly Bill 664, 2023 Reg. Sess. (Wis. 2023).
[17] Jim Saksa, *Federal Election Laws Not Ready for Deepfakes, Experts Warn*, Roll Call (Mar. 14, 2024 5:00 AM), https://rollcall.com/2024/03/14/federal-election-laws-not-ready-for-deepfakes-experts-warn/ (last visited Sep 9, 2024) https://perma.cc/ZV5Q-EH7A.
[18] *Id.*
[19] *Supra* note 1.
[20] *Id.*

Deepfakes in this election presents a danger to election integrity, voter confidence, and democracy. Trustworthy elections are the foundation of democracy, and democracy is the backbone of this country. Elections should be rooted in facts, and only the facts. The Biden robocall case in New Hampshire demonstrates how easy it is for deepfakes to have an impact. While state legislatures have begun to address the issue, the lack of comprehensive federal regulation leaves significant legal gaps. Which could be exploited by bad actors. With election day less than 60 days out, we are basically out of time to pass legislation that will have a meaningful impact on protecting the integrity.