not make a recommendation or express an opinion on a legitimate legal or policy matter. Instead, it was part of a larger campaign initiated by Attorney General Barr to undermine the Special Counsel's report and rehabilitate the President . . . .").

What the Court can say without revealing the content of the redacted material is that there were two sections to this memorandum. Section I offers strategic, as opposed to legal advice, about whether the Attorney General should take a particular course of action, and it made recommendations with respect to that determination, a subject that the agency omitted entirely from its description of the document or the justification for its withholding. This is a problem because Section I is what places Section II and the only topic the agency does identify – that is, whether the evidence gathered by the Special Counsel would amount to obstruction of justice – into its proper context. Moreover, the redacted portions of Section I reveal that both the authors and the recipient of the memorandum had a shared understanding concerning whether prosecuting the President was a matter to be considered at all. In other words, the review of the document reveals that the Attorney General was *not* then engaged in making a decision about whether the President should be charged with obstruction of justice; the fact that he would not be prosecuted was a given. The omission of any reference to Section I in the agency declarations, coupled with the agency's redaction of critical caveats from what it did disclose, served to obscure the true purpose of the memorandum. Thus, the Court's *in camera* review leads to the conclusion that the agency has fallen far short of meeting its burden to show that the memorandum was "prepared in order to assist an agency decisionmaker in arriving at his decision." *Formaldehyde Inst.*, 889 F.2d at 1122.

What follows is a discussion of the memorandum in its entirety.

[redacted]

[redacted]

11 [redacted] DOJ made a strategic decision to pretend as if the first portion of the memorandum was not there [redacted]

The Court is under no obligation to assess the applicability of a privilege on a ground the agency declined to assert; the D.C. Circuit has stated that while *in camera* review is permissible, it should be reserved for those cases when it truly necessary, and for that reason, "it 'is not a substitute' for the government's obligation to justify its withholding in publicly available and debatable documents." *Schiller*, 964 F.2d at 1209, quoting *Lykins v. U.S. Dep't of Just.*, 725 F.2d 1455, 1463 (D.C. Cir. 1984). "We expect agencies to ensure that their submissions in FOIA cases are absolutely accurate." *Id.*

[redacted]

All of this contradicts the declarant's *ipse dixit* that since the Special Counsel did not resolve the question of whether the evidence would support a prosecution, "[a]s such, any determination as to whether the President committed an obstruction-of-justice offense was left to the purview of the Attorney General." Brinkmann Decl. ¶ 11. It also calls into question the accuracy of Attorney General Barr's March 24 representation to Congress: "The Special Counsel's decision to describe the facts of his obstruction investigation without reaching any legal conclusions leaves it to the Attorney General to determine whether the conduct described in the report constitutes a crime." March 24 Letter at 3.[12]

12 It is true that the Special Counsel "determined not to make a traditional prosecutorial judgment." Report, Volume II, at 1. What the Attorney General neglected to say, though, was that while the Special Counsel accepted "for the purpose of exercising prosecutorial jurisdiction" the 2000 opinion of the Office of Legal Counsel that that the indictment or criminal prosecution of a sitting President would be unconstitutional, and apart from that, he also "recognized that a federal criminal accusation against a sitting President would place burdens on the President's capacity to govern and potentially preempt constitutional processes for addressing presidential misconduct," Report, Volume II, at 1, he did not leave the matter there. Instead, the Special Counsel specifically informed the Attorney General:

> [I]f we had confidence after a thorough investigation of the facts that the President clearly did not commit obstruction of justice, we would so state. Based on the facts and the applicable legal standards, however, we are unable to reach that judgment. The evidence we obtained about the President's actions and intent presents difficult issues that prevent us from conclusively determining that no criminal conduct occurred. Accordingly, while this report does not conclude that the President committed a crime, it also does not exonerate him.

Footnote continues on next page.

And the *in camera* review of the document, which DOJ strongly resisted, *see* Def.'s Opp. to Pl.'s Cross Mot. [Dkt. # 19] ("Def.'s Opp.") at 20–22 ("*In Camera* Review is Unwarranted and Unnecessary"), raises serious questions about how the Department of Justice could make this series of representations to a court in support of its 2020 motion for summary judgment:

> [T]he March 2019 Memorandum (Document no. 15), which was released in part to Plaintiff is a pre-decisional, deliberative memorandum to the Attorney General from OLC AAG Engel and PADAG Edward O'Callaghan . . . . The document contains their candid analysis and advice provided to the Attorney General prior to his final decision on the issue addressed in the memorandum – whether the facts recited in Volume II of the Special Counsel's Report would support initiating or declining the prosecution of the President . . . . It was provided to aid in the Attorney General's decision-making processes as it relates to the findings of the Special Counsel's investigation . . . . Moreover, because any determination as to whether the President committed an obstruction-of-justice offense was left to the purview of the Attorney General, the memorandum is clearly pre-decisional.

Def.'s Mem. in Supp. of Mot. [Dkt. # 15-2] ("Def.'s Mem.") at 14–15 (internal quotations, brackets, and citations omitted).[13] [redacted]

Id. at 2; *see also id.*, Conclusion, at 182 ("[I]f we had confidence after a thorough investigation of the facts that the President clearly did not commit obstruction of justice, we would so state. Based on the facts and the applicable legal standards, we are unable to reach that judgment."); *see also id.*, Section III (B)(2), at 168–69 (finding that the separation of powers concerns that might pose a constitutional impediment to a criminal prosecution did not apply to Congress: "Congress can validly regulate the President's exercise of official duties to prohibit actions motivated by a corrupt intent to obstruct justice."). This cannot be easily squared with the assurances the Attorney General transmitted to Congress in March of 2019 instead of the report itself. *See Elec. Priv. Info. Ctr. v. U.S. Dep't of Just. ("EPIC")*, 442 F. Supp. 3d 37, 49 (D.D.C. 2020) ("[A] review of the redacted version of the Mueller Report by the Court results in the Court's concurrence with Special Counsel Mueller's assessment that Attorney General Barr distorted the findings in the Mueller Report.").

13 The flourish added in the government's pleading that did not come from either declaration – "PADAG O'Callaghan had been directly involved in supervising the Special Counsel's investigation and related prosecutorial decisions; as a result, in that capacity, his candid prosecutorial recommendations to the Attorney General were especially valuable." *Id.* at 14 – seems especially unhelpful since there was no prosecutorial decision on the table.

[redacted][14]

In sum, while CREW had never laid eyes on the document, its summary was considerably more accurate than the one supplied by the Department's declarants.

As noted above, summary judgment may be granted on the basis of agency affidavits in FOIA cases, when "they are not called into question by contradictory evidence in the record or by evidence of agency bad faith." *Judicial Watch, Inc.*, 726 F.3d at 215, quoting *Consumer Fed'n*, 455 F.3d at 287.

But here, we have both. Another court in this district has expressed "grave concerns about the objectivity of the process that preceded the public release of the redacted version of the Mueller Report." *EPIC*, 442 F. Supp. 3d at 48. The district court in the *EPIC* case undertook a close

14 This effort was not without consequences. As the Special Counsel noted in his March 27 letter to the Attorney General, the "public confusion about critical aspects of the results of [his] investigation" that Attorney General Barr's March 24 letter had caused "threaten[ed] to undermine a central purpose for which" DOJ had appointed him: "to assure full public confidence in the outcome of the investigation." March 27 Letter at 1.