- 1 GUIDO CALABRESI, Circuit Judge, concurring:
- 2 I agree with the majority opinion, which I join in full. I write separately to
- 3 emphasize the risks posed by the crime of obstruction of justice, 18 U.S.C. § 1512(c),
- 4 as it has evolved, and as it has been applied in this case.
- 5 The case before us illustrates how dangerously far 18 U.S.C. § 1512(c) now extends.
- 6 Defendant's main crime was to attempt to join ISIS, in violation of 18 U.S.C. §
- 7 2339B(a)(1). This is a most serious crime, and it carries a serious penalty. But, at
- 8 the time Defendant committed his acts, his crime was subject to a statutory
- 9 maximum of 15 years' imprisonment. Understandably, the District Court
- sentenced Defendant to the full 15 years under that count. The District Court,
- 11 however, went further. It ultimately sentenced Defendant to more than twice that
- time because of acts that seem to have been much less grave: Defendant's apparent
- destruction of several USB drives and the deletion of the data on his iPod, in
- 14 violation of 18 U.S.C. § 1512(c).
- 15 It is ironical—more than ironical, potentially dangerous—that the government
- was able to take what is already a very serious crime—attempting to provide
- material support to a foreign terrorist organization—and, on the basis of some not
- overly strong facts, bring an obstruction charge that more than doubled the
- 19 maximum sentence otherwise available.
- 20 The majority is correct that, here, the evidence was enough to support the
- 21 prosecutor's obstruction of justice charge and the jury's verdict. On the basis of
- 22 the facts presented at trial, a jury was licensed to conclude beyond a reasonable
- doubt that the defendant corruptly altered, mutilated, or destroyed digital media
- 24 with the intent to impair their availability for use in a foreseeable official United
- 25 States proceeding, in violation of 18 U.S.C. § 1512(c)(1).
- But is it really justifiable, because of this conduct, to turn Defendant's 15-year
- sentence into a 35-year one? In this case, there was no evidence to suggest that the
- 28 destroyed USB drives or deleted iPod data contained information that was
- valuable or significant in itself or for ISIS. Indeed, the evidence at trial established
- that Defendant did not have a relationship with current ISIS members, did not
- 31 have an ISIS-affiliated handler supporting his recruitment, and did not succeed in
- 32 his attempt to join the organization. To cross into ISIS-controlled territory,

- 33 Defendant apparently planned to rely on a publicly-available map from a large-
- 34 circulation newspaper.
- 35 This is not to downplay the seriousness of Defendant's crime. For a skilled aircraft
- mechanic like Defendant to offer his services to a barbaric terrorist organization is
- a criminal act of the highest order. That is the gravamen of Defendant's criminal
- 38 conduct, and, accordingly, it should be the primary determinant of Defendant's
- 39 punishment, which Congress limited to 15 years maximum (now raised to 20
- 40 years, see USA FREEDOM Act of 2015, Pub. L. No. 114-23, 129 Stat. 268 § 704).
- But Defendant here was sentenced to 35 years. And the additional term of 20 years
- of imprisonment seems incongruous. Obstruction of justice can, of course, in some
- circumstances, be a very serious crime. But we have to look at the context. And
- 44 here, in this specific context, the record does not establish the seriousness of that
- crime. Indeed, it looks as though the court imposed the sentence it did based on
- 46 the heinousness of Defendant's attempted terrorism and simply used the
- obstruction conviction as a means to go beyond the statutory maximum of that
- 48 terrorism count.
- 49 The majority recognizes the problems with the District Court's decision and
- remands this case for greater explanation—a procedural ground. This is perfectly
- 51 proper. We have stated *en banc* that an appeals panel will not usually reach
- questions of substantive reasonableness where there are procedural errors to be
- 53 corrected. See United States v. Cavera, 550 F.3d 180, 189-90 (2d Cir. 2008) (en banc).
- But I believe that the demand for more explanation also, inevitably, implies that
- substantive problems may underly this sentence as well.
- My belief is reinforced by a concern with how broad obstruction of justice
- 57 prosecutions under 18 U.S.C. § 1512(c) have become. As construed by federal
- 58 courts, the crime has been applied expansively, as a tacked-on charge in
- everything from attempted robbery and murder cases to run-of-the-mill drug
- 60 busts. See, e.g., United States v. Johnson, 655 F.3d 594, 598, 603-05 (7th Cir. 2011)
- 61 (destruction of cocaine base actionable under 18 U.S.C. § 1512(c)(1)); United States
- 62 *v. Ortiz,* 367 F. Supp. 2d 536, 538, 540-44 (S.D.N.Y. 2005) (attempted disposal of an
- automobile used in connection with an attempted robbery actionable under 18
- 64 U.S.C. § 1512(c)(1)); United States v. Vasquez-Soto, No. 11 Cr. 986-02 (GBD), 2013 WL
- 65 1898174, at *1 (S.D.N.Y. May 2, 2013) (wiping fingerprints off an automobile used
- 66 in connection with an attempted murder-for-hire actionable under 18 U.S.C. §

- 67 1512(c)(1)); see also Sarah O'Rourke Schrup, Obstruction of Justice: Unwarranted
- 68 Expansion of 18 U.S.C. § 1512(c)(1), 102 J. Crim. L. & Criminology 25 (2012)
- 69 (collecting and discussing cases).
- 70 It is at least arguable that this law was never intended to be used so broadly. 18
- 71 U.S.C. § 1512(c) was enacted as part of the Sarbanes-Oxley Act of 2002, a major
- 72 white-collar reform bill, largely prompted by reports of corporate accounting
- fraud at Enron and other major blue-chip companies. See H. R. Rep. No. 107-414
- 74 at 18-19 (2002). But, as applied and interpreted, 18 U.S.C. § 1512(c) can now reach
- 75 everything from the smallest crime to the broadest political attack and creates
- 76 tremendous room for prosecutorial discretion.
- Accordingly, as judges, we should be careful, in examining obstruction of justice
- 78 cases, to make our review searching and contextual. A sentence for obstruction of
- 79 justice under 18 U.S.C. § 1512(c) should reflect the severity of the obstruction of
- 30 justice, in the context of a particular underlying crime, and not prosecutorial or
- 91 judicial dissatisfaction with the limits Congress placed on the gravity of that
- underlying crime. And this, ultimately, is what is called for in the case before us.