There are two judicial doctrines potentially implicated by the government's motion to seal: the common law right of access to public records and the First Amendment's right of access to judicial proceedings. Moreover, the applicability of the doctrines potentially depends upon the inquiry at issue—*i.e.*, the sealing of documents versus the closing of the hearing(s) associated with the government's motion to disqualify. *See United States v. Salemme*, 985 F.Supp. 193, 194-95 (D.Mass. 1997) (noting Supreme Court has not definitively ruled whether First Amendment right of access encompasses right of access to documents as contrasted with trial proceedings); *Riker v. Federal Bureau of Prisons*, 2009 WL 595943 (10th Cir.2009) ("The Supreme Court has not yet ruled that there is a constitutional right to access court documents."); *In re Globe Newspaper Co*., 727 F.2d 47, 49 (1st Cir.1984) (finding a qualified First Amendment right of access to pretrial proceedings and, without discussion, to documents on which bail decisions are based); *Globe Newspaper Company v. Pokaski*, 868 F.2d 497, 502 (1st Cir.1989) (acknowledging that a First Amendment right of access to records submitted in connection with criminal proceedings exists in the First Circuit); *Id*. at 505 (concluding that "blanket prohibition on the disclosure of records of closed criminal cases of the types at issue here implicates the First Amendment"); *Associated Press v. United States District Court*, 705 F.2d 1143 (9th Cir.1983) (extending First Amendment right of access to documents filed in pretrial proceedings). In this case, continued sealing of the pleadings and the closing of the hearing(s) is warranted under both the common law and First Amendment. *See In re Globe Newspaper Co*., 727 F.2d at 52-53 ("In cases that arouse intense public interest . . . 'adverse publicity can endanger the ability of the defendant to receive a fair trial.'") (*quoting Gannett Co. v. DePasquale*, 443 U.S. 368, 378 (1979)).

As the Court has previously observed, while "[t]here is at common law 'a general right to inspect and copy public records and documents,'" such a right "is not absolute." *Salemme*, 985 F.Supp. at 194-95, *quoting Nixon v. Warner Communications,* 435 U.S. 589, 597, 98 S.Ct. 1306, 1312, 55 L.Ed.2d 570 (1978). Instead, "'judicial documents are presumptively available to the public, but may be sealed if the right to access is outweighed by the interests favoring nondisclosure.'" *Salemme*, 985 F.Supp. at 195, *quoting United States v. McVeigh,* 119 F.3d 806, 811 (10th Cir.1997). "Among the countervailing factors favoring nondisclosure are: (i) prejudicial pretrial publicity; (ii) the danger of impairing law enforcement or judicial efficiency; and (iii) the privacy interests of third parties." *Salemme*, 985 F.Supp. at 195, *citing United States v. Amodeo,* 71 F.3d 1044, 1050 (2d Cir.1995); *McVeigh,* 119 F.3d at 813-14; *In re Globe Newspaper Co.,* 729 F.2d at 59.

With regard to the First Amendment's right of access, in the decision styled *United States v. Salemme*, 985 F.Supp. 193, 195 (D.Mass.1997), the Court observed that the Supreme Court had not yet ruled definitively whether there was a First Amendment right of access to *court documents* and/or the scope of any such *arguendo* right:

> "There is not yet any definitive Supreme Court ruling on whether there is a [First Amendment] constitutional right [in addition to the common law right] of access to court documents and, if so, the scope of such right." *United States v. McVeigh,* 119 F.3d 806, 812 (10th Cir.1997). The Court of Appeals for the First Circuit has held that there is a qualified First Amendment right to access to pretrial proceedings in a criminal case and, without analysis, to related documents. *See In re Globe Newspaper Co.,* 729 F.2d 47, 59 (1st Cir.1984) (holding that public had a First Amendment right of access to bail proceedings and related documents in *United States v. Anguilo,* which was trumped by defendants' paramount interest in a fair trial where hearings and documents involved information derived from electronic surveillance that was subject to a motion to suppress); *Globe Newspaper Co. v. Pokaski,* 868 F.2d 497, 502 (1st Cir.1989) (holding that First Amendment is implicated in blanket restrictions on access to records

> of criminal cases not resulting in a conviction). In *McVeigh,* 119 F.3d at 811-12, the Court of Appeals for the Tenth Circuit recently surveyed the case law and expressed uncertainty whether it would apply First Amendment standards or the less stringent common law standards for justifying impoundment to determine the propriety of sealing documents involved in open judicial proceedings. Both the First Amendment and the common law standards require consideration of comparable factors in deciding the issue of impoundment. As this court finds that unsealing the documents now at issue is appropriate even under the less stringent common law standard for justifying impoundment, it is not necessary to engage in a First Amendment analysis as well.

Salemme, 985 F.Supp. at 195, n.4. When applicable, the First Amendment right of access precludes sealing of documents and/or the closure of courtroom proceedings "unless specific, on the record findings are made demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" *Press-Enterprise*, 478 U.S. at 13, *quoting Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) (Press-Enterprise I).

The intersection of pretrial publicity and an accused's right to fair trial is an element for consideration under both the common law right to access and the First Amendment. *See Salemme*, 985 F.Supp. at 195 (citing prejudicial pretrial publicity as "[a]mong the countervailing factors favoring nondisclosure"); *Press-Enterprise*, 478 U.S. at 14 (after finding a qualified First Amendment right attached to preliminary hearings in California, Court held that if right of accused to fair trial is asserted, preliminary hearing should be closed if "there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights"); *see also In re Globe Newspaper Co*., 727 F.2d at 49 (finding that privacy and fair trial

interests of the defendants outweighed public's interest in having access to bail proceedings).

"When the rights of the accused and those of the public come irreconcilably into conflict, the accused's Sixth Amendment right to a fair trial must, as a matter of logic, take precedence over the public's First Amendment right of access to pretrial proceedings." *In re Globe Newspaper Co*., 727 F.2d at 53. Moreover, like the "strict regulation" afforded conversations intercepted by wiretap and at issue in *In re Globe Newspaper Co*., *see In Re Globe Newspaper Co*., 727 F.2d at 53-54, the strict rules regarding the disclosure of grand jury materials contained in Rule 6 of the Federal Rules of Criminal Procedure reflect both privacy and trial fairness issues, particularly given the *ex parte* nature of grand jury proceedings.